REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75576

AT AUCKLAND

Before:	E M Aitken (Chairperson) R J Towle (Member)
Counsel for the Appellant:	I Chorao
Appearing for the NZIS:	No Appearance
Dates of Hearing:	1 and 2 September 2005
Date of Decision:	21 December 2006

DECISION

---

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of Iran.

[2] This is the second time that the appellant has claimed refugee status in New Zealand. He claims that he is a homosexual and therefore at risk of persecution if returned to Iran. He acknowledges that he has always been a homosexual and that he did not raise this matter at any time during the determination of his first claim to refugee status. Through his counsel, he asserts that this Authority has jurisdiction to hear and determine his appeal on its merits.

[3] The defining issue in this appeal is whether the Authority has jurisdiction to determine the appellant's second claim to refugee status.

PROCEDURAL BACKGROUND

[4] The procedural history of this appeal is relevant to the Authority's determination and is therefore set out in brief.

[5] The appellant arrived in New Zealand on 4 April 2000 and lodged a claim to refugee status on arrival. He was interviewed by a refugee status officer on 8 August 2001 and his application declined in a decision dated 29 November 2001.

[6] On 4 December 2001, he lodged an appeal to this Authority (the first appeal). His evidence was taken on 26 November 2002 and the Authority (differently constituted) declined his appeal in a written decision published on 17 March 2003.

[7] Subsequent to that decision, his work permit was revoked and he lodged an appeal against removal to the Removal Review Authority (RRA) on 6 June 2003. That appeal was also declined, in a decision dated 22 January 2004. Judicial review proceedings were lodged but subsequently discontinued.

[8] On 13 July 2004, the appellant lodged his second application for refugee status. He was interviewed in respect of this claim on 25 November 2004. In its decision delivered on 14 April 2005, the RSB declined his second application. It is against that decision that he now appeals to this Authority.

JURISDICTION OF THE AUTHORITY TO HEAR THE SECOND CLAIM TO REFUGEE STATUS

[9] While the Immigration Act 1987 permits a second (or subsequent) application for refugee status to be made after the first one is declined, that application can only be considered in limited circumstances. Those circumstances are prescribed by s129J which provides:

> "**129J Limitation on subsequent claims for refugee status**
>
> (1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.
>
> (2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer

may rely on any such finding."

[10] The Authority's jurisdiction to hear and determine an appeal from the decisions of a refugee status officer is found in s129O(1) of the Act which provides:

> "**129O Appeals to Refugee Status Appeals Authority**
> (1) A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[11] In determining whether we have jurisdiction to consider a second claim to refugee status, counsel refers us to the Authority's decision in *Refugee Appeal No 75139* (18 November 2004), from which the following passage is relevant:

> "[54] In any appeal involving a subsequent claim under s 129O(1), the issues are not "at large". Rather, there are three distinct aspects to the appeal.
>
> [55] First, irrespective of the finding made by the refugee status officer at first instance, the claimant must satisfy the Authority that it has jurisdiction to hear the appeal. That is, the claimant must establish that, since the determination of the previous claim, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. As to this:
>
> (a) The change of circumstances must occur *in* the claimant's home country. It is not open to the claimant to circumvent the jurisdictional bar by submitting that at the hearing of the previous claim the refugee status officer or the Authority misunderstood the facts.
>
> (b) A "reinterpretation" of a claimant's case is neither a change of circumstances, nor is it a change of circumstances *in* the claimant's home country.
>
> (c) The claimant cannot invite the Authority to sit as if it were an appellate authority in relation to the decision of the first panel and to rehear the matter. The Authority has no jurisdiction to rehear an appeal after a full hearing and decision.
>
> (d) A second appeal cannot be used as a pretext to revisit adverse credibility findings made in the course of the prior appeal.
>
> (e) Jurisdiction under ss 129J(1) and 129O(1) is determined by comparing the previous claim to refugee status against the subsequent claim. This requires the refugee status officer and the Authority to compare the claims as asserted by the refugee claimant, not the facts subsequently found by that officer or the Authority.
>
> (f) Proper recognition must be given to the statutory language which requires not only that the grounds be different, but that they be *significantly different*.
>
> (g) The Authority does not possess what might be called a "miscarriage of justice" jurisdiction.

> [56] Second, in any appeal involving a subsequent claim, s 129P(9) expressly prohibits a claimant from challenging any finding of credibility or fact made by the Authority in relation to a previous claim. While the Authority has a discretion whether to rely on any such finding, that discretion only comes alive once the jurisdictional threshold for subsequent claims set by ss 129J(1) and 129O(1) has been successfully crossed.
>
> [57] Third, where jurisdiction to hear the appeal is established, the merits of the further claim to refugee status will be heard by the Authority. That hearing may be restricted by the findings of credibility or of fact made by the Authority in relation to the previous claim, or "at large", depending on the manner in which the discretion under s129P(9) is exercised by the Authority."

[12] Specifically counsel refers us to [55](e) and submits that jurisdiction to hear a second refugee claim is established by comparing the claims "as asserted by the refugee claimant, not the facts subsequently found by [the refugee status officer] or Authority".

[13] In other words, if the refugee claimant *asserts* facts which establish that the requisite threshold is met, jurisdiction is, as a matter of law, established *irrespective of whether those claimed facts are subsequently found to be true.*

[14] We do not agree with this approach. It is contrary to both the express statutory language, and the intention of Parliament. Because of the unusual circumstances of this appeal, we consider it helpful to briefly articulate our reasons for this finding, notwithstanding our conclusion that, on the facts, the Authority has jurisdiction to hear this appeal.

[15] The unusual features of this appeal are twofold: that the appellant was a homosexual at the date of the Authority's first decision and would therefore have been granted refugee status then, had he told the truth and been believed. Secondly, the change in circumstances relied on by the appellant in bringing his second claim - the discovery of an offensive videotape - is untrue. If country conditions had not changed recently, then the Authority, for the reasons which follow, would <u>not</u> have had jurisdiction to determine the merits of this claim.

SECOND AND SUBSEQUENT CLAIMS UNDER 1999 IMMIGRATION AMENDMENT ACT

[16] The Immigration Amendment Act 1999 took effect from 1 October that year. It included the following relevant provisions:

> "**129B Definitions**
> (1) In this Part, unless the context otherwise requires:

claim means a claim in New Zealand to be recognised as a refugee in New Zealand:

subsequent claim means a claim in New Zealand to be recognised as a refugee in New Zealand by a person who has previously made such a claim in New Zealand that has been finally determined.

129F Functions of officers considering claims

(1) On receipt of a claim that is not a subsequent claim, it is the function of a refugee status officer to, as appropriate, -

(a) Determine whether the claimant is a refugee within the meaning of the Refugee Convention:

(b) Determine whether the claimant should be excluded form the protection of the Convention because of the application of any of Articles 1D, 1 E, and 1F of the Convention.

(2) On receipt of a subsequent claim, it is the function of an officer to –

(a) Determine whether, since the most recent claim by the person, circumstances in the claimant's home country have changed to such an extent that the subsequent claim is based on significantly different grounds to the previous claim; and

(b) Only if the officer is satisfied that circumstances have so changed, determine any matter specified in subsection (1).

129J Limitation on subsequent claims for refugee status

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

(2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding.

129O Appeals to Refugee Status Appeals Authority

(1) A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision.

129P Procedure on appeal

(9) In any appeal involving a subsequent claim, the claimant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim, and the Authority may rely on any such finding."

[17] Because the Authority's jurisdiction requires it to determine appeals from a decision of a refugee status officer, it is necessary to consider first the function and jurisdictional limitations of the refugee status officer in determining second or subsequent claims.

[18] The refugee status officer's functions are set out in ss129F(1) and (2). Where an application for refugee status is lodged, the officer is required "to determine" whether the applicant is a refugee within the meaning of the Refugee Convention and "to determine" whether the Convention's exclusion provisions apply. It is without doubt that "to determine" in this context means to decide on the facts and law, and not simply to rely on the assertions of the applicant. Put another way, the refugee status officer must hear the evidence, make findings of fact and determine whether, on those facts, the applicant meets the refugee definition.

[19] On lodgement, a second or subsequent claim is also to be considered by a refugee status officer whose function in these circumstances is to "determine" whether the requisite change of circumstances exists: s129F(2)(a). Section 129F(2)(b) continues: "only if the officer is satisfied that circumstances have so changed" can she or he then "determine" whether the applicant is, at the date of the second or subsequent decision, a refugee within the meaning of the Refugee Convention.

[20] Clearly s129F(2)(a) requires the refugee status officer "to determine" whether there has been a change of circumstances. In our view, "determine" means to decide on the facts whether the circumstances have changed. This is the ordinary meaning of the word and in the context of s129F no other interpretation is possible.

[21] Section 129J expressly limits the refugee status officer's jurisdiction to consider second and subsequent claims to circumstances where he or she "is satisfied that" there has been the requisite change in circumstances.

[22] Again, in our view the statutory language is clear - s129J(1) requires the officer to be "satisfied" that circumstances have changed. It does not provide the officer with jurisdiction "if the claimant asserts that" circumstances have changed, which is the interpretation that could be placed on these words if one adopts the Authority's approach in *Refugee Appeal No 75139*.

[23] Read together, we are of the view that, when considering a second or subsequent claim to refugee status, ss129F and 129J require the refugee status officer to make a determination - in other words, to be satisfied - that circumstances in the home country have changed to the requisite extent. If the

refugee status officer so determines then, and only then, can the second claim be assessed and a decision reached as to whether refugee status should be conferred.

[24] *Refugee Appeal No 75139* does not refer to s129F. While it cites s129J(1), it does not engage in any discussion as to what is meant by the requirement that the refugee status officer be "satisfied" as to the change in circumstances. By inference, however, it appears to have concluded that this means no more than being satisfied that what the appellant is asserting meets the jurisdictional requirements.

[25] The only reasons given by the Authority in *Refugee Appeal No 75139* for reaching this conclusion were the definitions given to "claim" and "subsequent claim" in s129B. But we do not find them persuasive in the face of the clear statutory language of s129F and s129J.

[26] However, even if it can be said that the language of ss129F and 129J is capable of more than one meaning, then the meaning to be placed on these words is "their most natural meaning in their context and taking into account their purpose", provided the words are capable of bearing that meaning (J F Burrows *Statute Law in New Zealand* 3rd edition, p131). Also relevant is s5 of the Interpretation Act 1999:

> "**5. Ascertaining meaning of legislation**
>
> (i) The meaning of an enactment must be ascertained from its text and in the light of its purpose."

[27] The purpose of this part of the legislation is to permit a second or subsequent claim to refugee status in limited circumstances. The decision in *Refugee Appeal No 75139* includes a discussion (see [14]-[27]) of both the rationale for permitting second and subsequent claims, and the historical background to the enactment of the 1999 Immigration Amendment Act which prescribed a statutory basis for the refugee status determination process, including the permitting of second or subsequent claims. In summary, while recognising that the Refugee Convention requires the New Zealand authorities to recognise claims to refugee status arising from events which occur after someone has left their home country, and that such events can occur after a first claim to refugee status has been determined and declined, it is also necessary to prevent or at least minimise the potential for abuse of the second claim procedures.

[28] In giving effect to its obligation under the Refugee Convention, but recognising the potential for abuse, Parliament adopted the jurisdictional threshold test for all second (and subsequent) refugee claimants. Clearly described as a "limitation on subsequent claims" (s129J), the Act requires the refugee status officer and the Authority to be "satisfied" that the limited qualifying grounds are met.

[29] If this limit is read as requiring merely that the applicant or appellant assert that there has been a requisite change of circumstances, then it is open to each and every failed claimant to bring a second claim asserting false circumstances which, on their face, meet the jurisdictional threshold. It would matter not that the claims were false - instead it would be enough that the claims or assertions were made. The refugee status officer and the Authority would find jurisdiction without any enquiry into the veracity of the claim.

[30] We are of view that Parliament cannot have intended such an interpretation. Indeed, on this point we concur with the Authority in *Refugee Appeal No 75139* where, at [21], the following point is made:

> "It must be presumed that at the time the Immigration Amendment Act 1999 was enacted Parliament was aware of the chronic level of abuse to which the refugee determination system was being subjected and in particular, the crippling number of cases in which disappointed claimants sought to reopen their cases by lodging second (or subsequent) refugee claims. … Because experience had shown that second refugee claims had led to wide scale abuse, the provisions inserted in 1999 narrowed the aperture for the submission of second (or subsequent) claims. From 1 October 1999 the only category of persons who had failed in an earlier attempt to secure refugee status and who could submit a further claim were those who could <u>demonstrate</u> that since the first determination, circumstances in the home country had changed to such an extent that the further claim was based on significantly different grounds to the previous claim." (emphasis added)

[31] As to any express Parliamentary intention, some assistance can be derived from the Explanatory Note to the Immigration Amendment Bill. In discussing the new Part 6A to be inserted (which establishes the statutory framework for refugee determinations and appeals), the note records:

> "[t]he statutory regime is based on the existing non-statutory one and the jurisprudence generated under it."

[32] The Authority's jurisprudence at the relevant time was that articulated in *Refugee Appeal No 2245* (28 October 1994) in which the Authority concluded:

> "Whether there is jurisdiction in the particular case to entertain a second refugee application is a question of mixed fact and law. In most cases, the second application will have to be heard in its entirety before a determination under [the

> relevant provision of the Terms of Reference] can be made. Once the facts of the second claim are explored, and findings of credibility and fact made, it is anticipated that little difficulty will arise in practice in the interpretation and application of [the relevant second-time jurisdictional provision]."

[33] In summary, we are satisfied that s129F(2)(a) and s129J(1) require the refugee status officer to be satisfied, as a matter of fact and law, that the circumstances have changed. Then and only then can he or she go on and determine whether, on the facts that exist now, the applicant meets the refugee definition.

[34] It follows that, on appeal, the Authority must determine first whether there has been the requisite change of circumstances: s1290(1) of the Act. As the appeal is *de novo*, this is required irrespective of whether the refugee status officer found jurisdiction. If, and only if, the Authority is satisfied that, as a matter of fact and law, the jurisdictional threshold is met, can it determine whether the appellant is, at the date of the second or subsequent decision, a refugee.

[35] Clearly, to establish jurisdiction a comparison of the first and second claims to refugee status must be made. In this regard we agree with *Refugee Appeal No 75139* that, in light of the definitions prescribed in s129B of the Act, the first step is to make a comparison between the claim as asserted at the time of final determination (here the claim before the Authority at the time it determined the first appeal in March 2003), and the claim being asserted in the second or subsequent application or appeal.

[36] However, the purpose of this comparison is to identify the claimed change of circumstances. Having done so, the refugee status officer and the Authority must then determine whether, as a matter or fact and law, circumstances in the claimant's home country have changed to such an extent that the second claim is now based on significantly different grounds from the first.

THE NATURE OF THE ENQUIRY INTO JURISDICTION

[37] Before the Authority can embark on a determination of whether, on the new facts being advanced the appellant meets the refugee definition, the Authority and the refugee status officer must first determine whether both jurisdictional limbs of s129J have been met. As already noted, this determination is a mixed question of fact and law.

[38] The enquiry into jurisdiction is therefore an enquiry into the facts as alleged

in the second (or subsequent) application. That enquiry may well traverse both the evidence adduced as to jurisdiction and as to the new refugee claim. Thus it may serve both to determine jurisdiction and, where jurisdiction is found to exist, whether the applicant now meets the refugee definition. However, this does not militate against our interpretation of the relevant statutory provisions. On the contrary, and as noted in *Refugee Appeal No 2245* (28 October 1994) :

> "Once the facts of the second claim are explored, and findings of credibility and fact made, it is anticipated that little difficulty will arise in practice in the interpretation and application of [the second time jurisdictional test]."

[39] Further, there are those claims which, on their face, do not disclose a change in circumstances. The Authority has previously dismissed these appeals for want of jurisdiction on the basis that the second claim, when compared to the first, revealed no significant change in circumstances; see for example, *Refugee Appeal Nos 75448* (26 April 2005), *75386* (27 June 2005) and *75199* (8 February 2005). We are not suggesting this approach be changed as, in effect, the Authority has assumed the claim advanced is credible before determining it has no jurisdiction to hear and determine the second claim to refugee status. This approach is entirely consistent with the Authority's expedited approach generally to manifestly unfounded and/or clearly abusive claims.

[40] In respect of the hearing on the second or subsequent appeal, s129P(9) is relevant. It provides:

> "**129P Procedure on appeal**
>
> (9) In any appeal involving a subsequent claim, the claimant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim, and the Authority may rely on any such finding."

[41] The Authority, in *Refugee Appeal No 75139*, concluded:

> "**[56]** Second, in any appeal involving a subsequent claim, s 129P(9) expressly prohibits a claimant from challenging any finding of credibility or fact made by the Authority in relation to a previous claim. While the Authority has a discretion whether to rely on any such finding, that discretion only comes alive once the jurisdictional threshold for subsequent claims set by ss 129J(1) and 129O(1) has been successfully crossed.
>
> **[57]** Third, where jurisdiction to hear the appeal is established, the merits of the further claim to refugee status will be heard by the Authority. That hearing may be restricted by the findings of credibility or of fact made by the Authority in relation to the previous claim, or "at large", depending on the manner in which the discretion under s 129P(9) is exercised by the Authority."

[42] While we concur with [57], we do not agree with the manner in which the Authority's discretion has been limited in [56].

[43] Section 129P(9) is not expressly limited in the manner described, nor is there any rationale advanced in the decision that we can discern for fettering what is, on its face, an unfettered discretion. In other words, in our view the Authority can rely on previous findings of credibility and fact whether determining the issue of jurisdiction or the merits of the subsequent claim once jurisdiction is found to exist. The manner in which this discretion is exercised will result in either a limited or an "at large" assessment of the facts asserted.

[44] In the particular circumstances of this appeal, no issue arises in this regard as the appellant concurs with the Authority's previous findings of fact.

CONCLUSION ON ASSESSMENT OF JURISDICTION

[45] Where a second (or subsequent) application is made, or an appeal lodged against a decision in respect of a second (or subsequent) claim to refugee status:

A. The decision-maker must compare the claim asserted at the time the first claim was finally determined with the claim being asserted at the time the second time claim is being determined.

B. If the claims when compared do not meet the jurisdictional threshold, then jurisdiction to determine the second claim cannot be established and the appeal must fail.

C. If the claims when compared disclose assertions of fact which, if true, meet the jurisdictional threshold, then the decision-maker must determine whether, as a matter of fact and law, that threshold is met.

D. If so, s/he must then determine whether, on the facts as found, the appellant meets the definition of a refugee as defined in Article 1A(2) of the Refugee Convention.

E. At no time during either the determination of jurisdiction or the merits of the claim may the appellant challenge the findings of credibility or fact made during the previous determination. The Authority retains a discretion in this regard.

[46] We turn now to consider the case of this appellant.

A. COMPARISON OF CLAIMS

CLAIM ADVANCED ON FIRST APPEAL

[47] The following is a summary of the claim made to the Authority (differently constituted) at the time of the first appeal.

[48] The appellant was in his late 30s and unmarried. His early childhood years were unremarkable. Following his military service, he established a garment business and later he became a partner in an electrical business and a motor vehicle repair garage. In the mid-1980s when he was at school, he formed a close friendship with A who was to be an important influence in his life in Iran.

[49] Through this friendship, the appellant learned that A was involved with an anti-government political group. He was not aware what activities the group carried out nor A's specific role in it other than that A was involved in producing political pamphlets and had been arrested from time to time by the authorities. On one occasion, the appellant lent money to A to cover the cost of printing political pamphlets.

[50] The appellant and A used to go into the mountains for long recreational hikes during which they discussed many issues including politics. However, the appellant did not show any real interest in politics at this time.

[51] The appellant's own difficulties arose during the student demonstrations in Tehran on 8 July 1999. On that day both he and A participated in the demonstrations and chanted slogans. The crowd dispersed peacefully and the appellant returned home. Early the next morning, A telephoned him and asked him to bring his car urgently to a place where students had been injured. The appellant duly did so and found A being assaulted by police. He intervened and was himself accosted by the police. In the ensuing melee, both A and the appellant were able to escape in his car. They abandoned the vehicle on their way home and continued the journey by taxi. Later they went to retrieve the vehicle and found the vehicle missing, including some political pamphlets which had been hidden in the glove box.

[52] The appellant was scared of being linked through his vehicle to the political pamphlets and decided to escape. He went into hiding from where he heard that security forces had visited his home looking for him and had arrested his parents.

[53] In fear for his safety, he left Iran illegally in July 1999 and travelled overland to Turkey. From there he made his way to Australia and then, after contacting a sister who was already resident in New Zealand, continued to this country.

[54] Since his arrival he had heard that security officers had been to his family home in Iran looking for him. He worried that if he returned to Iran, he would be severely mistreated by the Iran authorities. He would be accused of attacking Iranian officials and distributing anti-regime materials and, thereby, would be imputed to hold political opinions that are against the regime.

[55] The appellant's refugee appeal was declined by the Authority. For the reasons given (see [21]-[22] of *Refugee Appeal No 73334* (17 March 2003)), the Authority concluded that the appellant was not a credible witness and did not accept any aspect of his account.

CLAIM ADVANCED ON SECOND APPEAL

[56] The following is a summary of the appellant's second refugee claim presented at the outset of the appeal.

[57] The appellant first became attracted to members of his own sex when he was still at school. In his second year at high school, he began a clandestine intimate relationship with A that continued until 1997 when the couple grew apart.

[58] In 1997/1998, the appellant formed an intimate relationship with another man, M. They managed to sustain their relationship in secret until 1999 when they were discovered by the authorities on two separate occasions. The appellant and M were fortunate to avoid more serious consequences because of the timely intervention of the appellant's brother-in-law.

[59] In mid-1999, the appellant, M and some friends were having a party. The appellant and M were dressed up to impersonate two prominent Iranian figures and were making a parody of their sexual orientation. Another member of the party recorded their antics on his video recorder.

[60] By mid-1999, the appellant felt that life as a homosexual in Iran was difficult and he made plans to leave the country.

[61] Since he has come to New Zealand, he has been able to explore and express his sexual orientation more openly.

[62] In early 2004, he heard from his brother-in-law in Iran that the authorities had found a copy of the incriminating videotape. He does not know how they came by the tape as he had assumed at the time that all copies had been destroyed.

[63] He is now worried that both his parents and the authorities are aware of his homosexuality and that he would face serious consequences if he were to return to Iran.

B. CONCLUSION ON COMPARISON OF CLAIMS

[64] The appellant asserts that since the final determination on 7 March 2003 of his first claim to refugee status, circumstances have changed in the following ways:

a. the Iranian authorities have discovered a videotape which is further evidence of his homosexual orientation, and is anti-regime;

b. his family is now aware of his sexual orientation: this is relevant because his father in particular is likely to inform the authorities of the appellant's homosexuality if he returns;

c. the Iranian authorities have now become aware of his sexual orientation and will seek to persecute him if he returns; and

d. that the treatment of homosexuals in general in Iran has deteriorated since the determination of the first appeal.

[65] For the reasons which follow, we are satisfied that circumstances in Iran have changed to the degree required to confer jurisdiction on us to determine the merits of this appeal.

[66] This is not because we believe the appellant's claim that an incriminating video was discovered. We do not. During the course of the hearing, the appellant

admitted he had made up this part of his account in an effort to meet the jurisdictional threshold. Further, we do not believe that his family have only become aware of his sexual orientation since his first appeal was declined. On the evidence before us, we are satisfied that they were all aware of this fact before his first appeal was determined.

[67] However, there are two factors which persuade us that the jurisdictional threshold is met:

(i) a significant change in country conditions for homosexuals in Iran since the determination of the first appeal;

(ii) a significant change in the appellant's personal identity and profile as a homosexual.

(i) Country conditions

[68] As a matter of Iranian law, punishment for homosexuality is execution, the mode of execution being at the discretion of the judge. Punishment also includes imprisonment, the infliction of lashings, and fines.

[69] The Authority, in a comprehensive review of country conditions in its decision in *Refugee Appeal No 74665* (7 July 2004) concluded that:

> "Information on whether the death penalty has been carried out for homosexual behaviour is inconclusive."

[70] At that time, Amnesty International commented that reports of gay men being stoned or beheaded were "extremely difficult to substantiate". The European Country of Origin Information Seminar, Berlin, 11-12 June 2001 (as cited in the UK Home Office 2006 Iran Report) notes that penalties of death have rarely been used since 1996, with lashings being the more usual punishment.

[71] However, in its recent report, the UK Home Office includes more reliable information on the number of executions and punishments of gay men (United Kingdom Home Office *Country Report: Iran* (27 October 2006) paras 14.01-14.07, 21.01-21.18). Specifically:

i. June 2004: a 21 year-old man, Amir, was detained after he was discovered meeting men through Internet chat rooms. He was sentenced to 175

lashes for homosexuality, 100 of which were administered immediately. He was threatened with death but was able to escape the country before the penalty was imposed (see also *Amnesty International 2006* "Iran: New government fails to address dire human rights situation" *(*16 February 2006)).

ii. March 2005: two men were sentenced to death in Tehran following the discovery of a videotape showing them engaged in homosexual acts (*HRW* "Iran: Two more executions for homosexual conduct" (22 November 2005)).

iii. 19 July 2005: two young men aged 16 and 18 were hanged in Marshad after being convicted of homosexuality. This case attracted considerable international coverage and the event was marked this year in anniversary rallies in a number of cities and by the International Lesbian and Gay Association (ILGA) (*Activists marks anniversary of gay executions with a call for human rights*, 20 July 2006 www.ilga.org (accessed 11 December 2006).)

iv. 8 May 2005: a homosexual was executed in Alak and two more were recorded as awaiting execution on similar charges (see also "Iran: is there an anti-homosexual campaign?" *Radio Free Europe/Radio Liberty* (1 September 2005)).

v. 28 November 2005: two men were hanged in a public square in Gorgan for homosexual activities (see also "Iran: reports of gays being executed raise concern" *Radio Free Europe/Radio Liberty* (28 November 2005)).

[72] Since the publication of the UK Home Office report, there is evidence that a gay man was hanged in Kermanshah on 14 November 2006 on the grounds of having committed sodomy ("Iran hangs gay man in public", *2006 Iran Focus*, 14 November).

[73] Further, in a letter to the Dutch Immigration Minister of 5 October 2006, the Human Rights Watch (HRW) director of the Lesbian Gay Bisexual and Transgender Rights Programme, Scott Long, notes:

> "The general rate of executions - which diminished early in the presidency of Mohammed Khatami, but began to rise even before his second term ended, as conservative forces regained effective control over the judiciary - has significantly

> increased under the Ahmedinejad administration. Old sentences which were not carried out have been revived; new sentences have been imposed. Recent months have shown increasing rigour in prosecutions and sentencing for moral offences." (Netherlands: No Deportations of LGBT Iranians to Torture Letter to Immigration Minister Verdonk, October 5, 2006 (http://hrw.org/english/docs accessed 23 October 2006).)

[74] This letter also refers to the semi-official and vigilante organisations which "regularly proliferate in Iran" and are aimed at enforcing public morality norms. The most recent one referred to, set up in late 2004, is the Social Protection Division, a "new group to police moral crimes" established under the national judiciary. Such developments, according to HRW, "suggest a degree of social and legal control over 'deviants' considered necessary by the Iranian government".

[75] The Charter of the Social Protection Division (also referred to as the Social Protection Headquarters) sets out the aim of the body as being

> "to protect society from all sorts of pollution, offences, crime and gatherings detrimental to society's security and well-being, and to revive the tradition of encouraging virtues and discouraging vice, … and reduce and remove vices in society …."
> ("Iran paper reports charter of Iranian judiciary's new vice control body", *Asia Africa Intelligence Wire*, 22 December 2004; www.web1infotrap.galegroup.com accessed 1 December 2006).

[76] According to an Iranian judiciary official, it is made up of "5,000 people from different walks of life, including MPs, Friday prayers leaders and university teachers" (*Iran Daily* "Social task force banned from political activities", 12 June 2005).

Conclusion on Country Conditions

[77] We are satisfied that the situation for gay men in Iran has changed since March 2003 when the appellant's first appeal was determined. While he was at risk of persecution on the basis of his homosexuality at that time, country material demonstrates an increase in the risk both of detection and the severity of punishment.

[78] The Authority has always recognised that the dramatic intensification of pre-existing factors since departure from one's home country can create the basis of a *sur place* claim to refugee status; see further James C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp33-39. However, the relevant date in this appeal is not the date of the appellant's departure but the date of determination of his first appeal.

[79] As noted, the Authority is satisfied that since that date there has been an intensification of risk factors for Iranian homosexuals, both as to detection and as to the severity of punishments.

(ii) Change in appellant's personal identity and profile

[80] This increased risk for all homosexuals, disclosed by the country conditions assessed above, must be seen together with the significant changes that have occurred in the appellant in the nearly four years since his first refugee appeal was delcined.

[81] At that time, the appellant was too embarrassed to disclose the homosexuality that had caused him such difficulties in Iran. He kept his sexual orientation to himself and to those in his family he could trust (namely his New Zealand-based sister).

[82] By the time of his hearing before this Authority in 2005, the appellant had evolved into a confident – even flamboyant – man who was able to express his sexual orientation openly and without inhibitions. Without the fear of persecution and societal approbation under which he had lived in Iran, the appellant has been able to openly embrace a gay life-style in New Zealand.

[83] From both his actions and appearance, the appellant leaves people, such as his employer, in no doubt as to his sexual orientation. It permeates his life and his choices. He is unable, and not required, to act discreetly in order to avoid being identified as a homosexual. His current lifestyle is in stark contrast to the atmosphere of intimidation created in Iran, including through public executions of gays.

[84] We conclude that the appellant's newly-found sense of identity and expression as a homosexual have occurred since the final determination of his first claim. Coupled with the changed circumstances in Iran, they are of such significance that the jurisdictional threshold is met.

THE ISSUES

[85] Having found jurisdiction to determine this second appeal, we must determine whether the appellant meets the refugee definition.

[86] In this regard, Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

[87] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

2. If the answer is yes, is there a Convention reason for that persecution?

(a) THE APPELLANT'S CASE

[88] The appellant's second claim to refugee status is based entirely on his sexual orientation and his fear that the authorities in Iran will persecute him if he were to return.

Emergence of sexual orientation

[89] While he was still at school, at about 16 or 17 years of age, the appellant formed a close friendship with A. This was the same person who featured in his first claim to refugee status. This friendship quickly grew into an intimate relationship involving sexual activity and continued for the next 13 years.

[90] The appellant and A used to spend a lot of time together, including attending parties and taking hiking trips in the mountains. They were able to have a physical and emotional relationship with each other throughout this period that was not detected by the authorities or his family and he did not suffer any significant difficulties during this period.

[91] In 1997 the appellant and A reached a mutual parting of their ways and he has not heard from A since then.

[92] In late 1997 or early 1998, he met M who owned a film and video business. After M accepted the appellant's tentative advances, they began a relationship which continued until the appellant's departure in 1999.

[93] The appellant and M used to meet regularly in parks, go to cafés and spend

time at M's apartment on a regular basis where they had sexual relations. Their relationship developed for the next 18 months or so, without any significant problems.

The first arrest – mid-1999

[94] One afternoon in mid-1999, the appellant was at M's apartment watching a pornographic video. The appellant assumes that inquisitive neighbours may have reported them to the police because suddenly *Komiteh* officers burst into the apartment. They seized the video materials, arrested the appellant and M, and escorted them to a vehicle.

[95] They were taken to a nearby base and held for a brief period in a cell. After some time the appellant was taken out and questioned by the authorities. He was asked how he came by the pornographic video, and why he was naked. His explanation was that the video belonged to M and that he was naked because he was about to take a shower. He was not physically beaten but was verbally abused and threatened by the officer in charge.

[96] The appellant believes he was fortunate not to have been more seriously ill-treated which he attributes to the normal duty officer, holding a more senior rank, not being on the premises at the time.

[97] After his interrogation, the appellant was returned to his cell at which point M was removed and taken to the same room for questioning.

[98] At the end of the interrogation, the appellant asked and was permitted to telephone his brother-in-law. His brother-in-law is an influential man who had served with some distinction in the Iraq war. The appellant does not know what his brother-in-law did to assist him but he detected a softening in the attitude of his interrogators after he had asked his brother-in-law to intercede. This may have been one reason why he and M were not so badly treated during this detention period and did not suffer more serious repercussions, such as lashings or criminal prosecution.

[99] The appellant and M were forced to sign a statement that they would not repeat such behaviour and were threatened with very severe repercussions if they did so. They were then released without being harmed and without being

charged.

[100] After this experience, the appellant and M decided to be more circumspect in their relationship and did not contact each other over the next one or two weeks. In the meantime, the appellant became aware that his brother-in-law had been angry to learn from the arresting officers the true circumstances in which the appellant had been arrested, and in particular that those officers thought the appellant was homosexual.

The second arrest

[101] About one or two weeks later, the appellant and M arranged to meet in a public park which homosexuals were known to frequent. They met two other gay friends there. While they were socialising, several officials approached them and ordered them into a nearby car. They were accused of immoral practices and driven in the direction of the officers' base. During the journey, M and his two gay friends offered a bribe to the officials in the car. As a result the vehicles stopped and all four of them were allowed to go. The appellant counts himself as lucky to have been able to escape on this occasion because he had no money with which to bribe the officers.

[102] After his release, the appellant had little contact with M other than when he, M, brought his car to the appellant's workshop. He kept a very low profile and did not attract the further attention of the authorities.

[103] He was concerned that if he maintained this way of life in Iran he would be caught again and that he would face far more serious punishment. He felt that his chosen lifestyle could not be respected in Iran and he decided to leave the country.

[104] M was aware of the appellant's plans to leave the country but was not prepared to accompany him as he had responsibilities to his ageing mother.

[105] In mid-1999, the appellant left Tehran's international airport using his own passport. He did not have any difficulties leaving. He made his way to Turkey where he stayed in a transit house for several months while arrangements were made for his onward travel to Australia and then to New Zealand.

Events in New Zealand

[106] Since his arrival in New Zealand, the appellant has lived with his sister and brother-in-law. He was in contact with M for a brief period but has not heard from him since 2000.

[107] During the first months, the appellant was very lonely and began looking for people with whom to socialise. In late 2001 or early 2002, he passed by the Auckland Gay Pride Centre. On making enquiries, he discovered that the centre offered a range of social activities and social support for the gay community in Auckland. Since then he has been a frequent visitor to the centre and a participant in its activities.

[108] After the appellant received his first refusal letter from the RSB, he went to the Auckland Gay Pride Centre and met with the programme co-ordinator. He explained the difficult situation for homosexuals in Iran and has since received support and guidance both from the co-ordinator and others at the centre. However, the appellant chose not to tell his lawyer or the RSB or the Authority that he was gay - in part because he was not then comfortable with making his sexual orientation public, and in part because he thought he would he penalised for changing the basis of his refugee claim.

[109] Since he has been in New Zealand, the appellant has experienced his sexuality in a much more open and profound way. After his early period of loneliness, he has been involved in a number of homosexual relationships.

[110] The appellant described in some detail how he met an Iranian man, witness X, in a bar in Auckland in March 2004. They got on well together and exchanged contact details. A week or so later, he invited X to his sister's place one afternoon where they drank a lot of alcohol. This led to a sexual relationship between them. It was not a lasting relationship and the appellant has met X only occasionally since then.

[111] The appellant is an active participant in the gay community in Auckland. He has had other fleeting relationships with men but has not formed any emotional or durable relationships with any of them. He goes to gay bars, nightclubs and parties and from time to time has attended functions at the Auckland Gay Pride Centre.

[112] If he were to return to Iran, the appellant fears persecution from the government and serious pressure from his family and society. Before he left he was under a lot of pressure from his parents for cultural and religious reasons to conform to their expectations of an arranged marriage. As the oldest son of the family, his parents had high expectations of this.

[113] He knows his parents have become aware that he is a homosexual. They are sorry that he has chosen this lifestyle for himself and his father is very angry. As a conservative man he has a different view of "manhood" and what the appellant has done would be unforgivable in his eyes. The appellant says that if he went back to Iran he would not be able to control himself or modify his lifestyle and that this would bring him into an even greater conflict with his father. The appellant believes that his father "would prefer me dead" than let him into the house and "for his own defence, he will tell the authorities about me". He also fears that his homosexuality would come to the attention of the Iranian authorities and that he would be persecuted, even killed, as a consequence.

Evidence of witnesses in the second appeal

Witness X

[114] Witness X, an Iranian national, who has permanent residence in New Zealand, gave evidence of a brief sexual encounter he had with the appellant in early 2004. He described the physical appearance of the appellant in having eyebrows plucked and his hair being dramatically dyed. He described how he and the appellant met at a bar in March 2004 and how, about two weeks later, they arranged a rendezvous at the appellant's house. There, the couple got drunk together and a sexual liaison followed. Since that time, he has had very little contact with the appellant.

Co-ordinator of the Auckland Gay Pride Centre

[115] The programme co-ordinator of the Auckland Gay Pride Centre gave evidence. In late 2001 or early 2002, he met the appellant when he dropped into the Centre. He recalls, clearly, a foreign Iranian man coming in and looking for people to associate with. He was interested in the work of the Centre and offered to help. After that, the appellant used the library from time to time and attended meetings.

[116] In mid-2003, the appellant came to see him to discuss his difficult situation as a homosexual in Iran and his fears concerning his parlous immigration status in New Zealand. Because of his concerns for the situation of homosexuals in Iran, the witness wrote a letter to the RAA on 5 July 2003.

[117] During the period he has known the appellant, the witness has no reason to believe that he is not homosexual. From his contact and observations during this period, he believes the appellant to be a well-adjusted and openly practising homosexual in the Auckland homosexual community. He confirmed that he had seen him at parties and other venues and that he had participated in social and more formal activities of the Centre when it was still open.

Appellant's employer

[118] The appellant's current employer also gave evidence. He said that the appellant had worked for him for the past 14 months, during which time he had seen him go through a number of changes, including his hair colour which altered "like the four seasons". The witness has friends and a relative who are homosexual and from these experiences he has formed the view, from the appellant's mannerisms and overt behaviour, that he too is homosexual.

Appellant's sister

[119] The appellant's sister gave evidence. She came to New Zealand in the 1990s and is married to an Iranian who obtained refugee status at an earlier time. She recalls that the appellant, as a child, was more inclined to play with girls than boys. She cannot recall precisely when the appellant told her that he was homosexual but it was probably within the first year of his arrival.

[120] After she found out this news, she conveyed it to her mother in Iran in a telephone conversation but cannot recall precisely when this took place. However, as best she can recall, both her parents were already aware of the appellant's sexual orientation by the time she visited them in November 2002. Her father was very angry because he is a very religious and old-fashioned man and would be incapable of accepting this about his son. The witness believes that her father is sufficiently angry to be capable of harming the appellant if he were to return.

<u>Documents produced</u>

[121] In support of his second appeal, the appellant produced a number of photographs. Counsel has made both oral and written submissions on the question of the jurisdictional threshold, and the substantive elements of this second refugee claim. These submissions, made from 19 July 2005 to 30 May 2006, have been carefully considered by the Authority in determining the critical issue of jurisdiction.

ASSESSMENT OF THE APPELLANT'S CASE

[122] The appellant gave evidence over the course of three days. The Authority also had the benefit of hearing from witnesses, all of whom gave testimony supporting the appellant's claim to be homosexual.

[123] At the outset, the appellant openly admitted that his first claim to refugee status was false. He said he made up the story about participating in a student demonstration in Tehran on the advice of his agent in Turkey. He was not initially aware that homosexuality could found a claim to refugee status. Having embarked on a false story, the appellant felt he could not resile from it without jeopardising his claim to refugee status.

[124] After his first appeal was dismissed (March 2003), he lodged an appeal to the Removal Review Authority seeking to remain in New Zealand on exceptional humanitarian grounds. In so doing, he sought the assistance of the Co-ordinator of the Auckland Gay Pride Centre who, along with his sister, encouraged him to tell the truth about his sexual orientation. As noted earlier, that appeal was dismissed on the basis that the proper procedure for testing his claim to be at risk of serious harm if returned to Iran was the refugee determination process.

[125] Discerning for himself that it may not be enough to assert simply the truth, the appellant invented the claim that the Iranian authorities had recently discovered an incriminating video of him and a former associate. It was, in essence, the discovery of this video that was advanced as one of the changes in circumstance. However, as soon as the Authority reached this part of the evidence, the appellant openly acknowledged that this, too, was a fabrication. No such video was ever made.

[126] Notwithstanding the appellant's acknowledgement that he has in the past

given false evidence, both during his first refugee claim and during the course of his second one, and notwithstanding the difficulties of proof faced by an appellant claiming to be homosexual, the Authority accepts his evidence and is satisfied that this appellant is homosexual. We tested his evidence over three days and heard testimony from witnesses. Of particular assistance was the evidence from the Auckland Gay Pride Centre Co-ordinator.

[127] We accept the appellant's evidence that he is homosexual and had two long-term relationships in Iran. While the evidence of the appellant's witness X regarding their brief liaison in New Zealand seemed somewhat contrived, our concerns are not such to cause us to reject his claim to be homosexual. Further, the appellant is entitled to any benefit of the doubt we may have in respect of this one aspect of his evidence.

SUMMARY

[128] We are satisfied that the appellant is a homosexual man whose sexual orientation is rejected and abhorred by significant members of his family in Iran.

[129] In light of the country material set out above (see [68] to [74]), we are satisfied that if he returns to Iran, there is a real chance he will be persecuted. In this regard, we also rely on and adopt the reasoning in *Refugee Appeal No 74465* (7 July 2004). Such persecution would be because of the appellant's membership of a particular social group: homosexuals.

[130] Issues 1 and 2, as posed in [87], are answered in the affirmative.

CONCLUSION

[131] The Authority is satisfied that it has jurisdiction to determine this appeal and that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. This appeal is allowed. Refugee status is granted.

....

E M Aitken
Chairperson