[2017] NZSSAA 051

Reference No. SSA 160/16 & 161/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** and **XXXX** of XXXX against a decision of a Benefits Review Committee

NO IDENTIFYING INFORMATION TO BE PUBLISHED PURSUANT TO SECTION 151 OF THE IMMIGRATION ACT 2009

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr C Joe - Member

Hearing at **Wellington** on 6 April 2017

Appearances

For Chief Executive of the Ministry of Social Development: Mr R Signal

The Appellants in person

DECISION

Background

[1] The appellants are a mother ("the first appellant") and her son ("the second appellant"). They, together with the man who is the respective appellants' husband and father, intended to migrate permanently to New

Zealand. They had all been living in South Africa. Only the mother and son have lodged these appeals. The husband/father has developed a serious degenerative disease which affects his cognitive state.

[2] It is not necessary to traverse the appellants' whole immigration history in detail. At this point, it is sufficient to record that they have failed to obtain visas to allow them to remain permanently in New Zealand. After their last temporary visa expired, they sought refugee status in New Zealand under the *United Nations Convention Relating to the Status of Refugees* ("the Convention") and the *Protocol Relating to the Status of Refugees* ("the Protocol").[1]

[3] At the outset, we recognise that in New Zealand it has been an all too common to find that persons lodge ill-founded refugee status claims when they have failed to obtain a residence visa, or extend a temporary visa. In some cases, these applications are apparently are simply intended to delay enforcement action.

[4] The appellants' evidence, which the Ministry does not challenge, indicates that their circumstances are quite different from persons who have sought to abuse the refugee and protection status jurisdiction. It is important to record that this Authority does not and cannot make refugee status determinations, or make any other determinations relating to immigration status.

[5] The function of this appeal is to determine whether or not the appellants are entitled to seek an emergency benefit under s 61 of the Social Security Act 1964 ("the Act"). Section 61 is subject to a Ministerial Direction given under s 5 of the Act. Section 74A of the Act governs the categories of persons who may claim a benefit in New Zealand. It excludes persons who are unlawfully resident or present in New Zealand.

[6] There are, accordingly, two issues before the Authority:

(i) Whether the appellants are excluded from being entitled to receive a benefit pursuant to s 74A of the Act; and

(ii) If not, whether they are entitled to a benefit in their situation.

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[1] Incorporated in Schedule 1 of the Immigration Act 2009.

[7] The first question is a technical legal issue as to the effect of the Act. The second question (which only arises if the appellants succeed on the first issue) relates to the exercise of the relevant power to ascertain the appellants' circumstances, and then to determine whether or not emergency benefits are payable, and, if so, at what rate. The Ministry has taken the view that section 74A prohibits the payment of emergency benefits; accordingly, it has not undertaken the evaluation beyond that point.

Discussion

The Facts

[8] We make some observations regarding the appellants' circumstances. For reasons discussed below, our decision cannot turn on these circumstances; however, they do give context to the issues raised when interpreting section 74A of the Act in relation to refugees and refugee claimants.

[9] The appellants do not wish to be in a position where they require benefits; they would prefer to be given work visas because they can work, are willing to work, and work is available. This Authority has no power in relation to whether or not work visas are issued. It must simply deal with the fact that Immigration New Zealand has not granted work visas. The appellants are in a situation where they have no income, and no ability to provide for their most basic human needs. They have been fortunate to receive some charitable support.

[10] In some cases, it is necessary to consider whether a person is a genuine refugee claimant. The Immigration Act 2009 contains some powers to reject ill-founded applications for refugee status. Nonetheless, it is a matter where great caution is required; if a person does have *de facto* refugee status, they cannot be removed lawfully as a result of defective administrative or judicial processes.

[11] In this case, it is sufficient to note two matters. The first is that, as far as the evidence extends, Immigration New Zealand has accepted the appellants' applications for refugee status. The applications have been with Immigration New Zealand for a significant period of time, and it would appear the merits are sufficient to have required several months

of processing, and it has not yet been possible to determine the applications.

[12] The second matter we identify is that the appellants provided evidence to this Authority regarding their refugee status. It is no part of this Authority's function to make a determination as to refugee status. However, the evidence did make it clear that this is not a case where a bogus refugee claim has been lodged simply to delay immigration processes. The first appellant identified a potentially credible, well founded fear of persecution in Zimbabwe for a Convention reason. She left Zimbabwe and resided for a long period of time in South Africa. The second appellant is a national of South Africa. The first appellant gave convincing evidence that she was never able to obtain South African citizenship, and travelled to New Zealand using South African travel documents, rather than a passport.

[13] When the first appellant initially came to New Zealand, she could have likely returned to her former habitual residence in South Africa. As far as the evidence before us went, there is good reason to think that it is likely that she now cannot return to South Africa. She is potentially either *de jure* or *de facto* stateless, alternatively, refoulement would be to Zimbabwe.[2]

[14] The claim by the second appellant may be a less compelling one, but his humanitarian circumstances may be triggered by his mother's refugee status claim.

The position of the parties

[15] Of necessity, the appellants presented their case in person. The Ministry did not address the legal issues that arise beyond contending that a definition from section 9 the Immigration Act 2009 should be applied for the purposes of the Social Security Act 1964. In these circumstances, we

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[2] *Refugee Appeal No 72635* (6 September 2002) deals with the general principles relating to statelessness and refugee status. However, in her case, "returnability as a matter of fact" is a potential factor, and that is further explored in *Refugee Appeals No 73861 and 73862* (30 June 2005), and the subsequent differing treatment of the test: see, for example, *Refugee Appeal No 73701* (6 October 2006) at [52] and *Refugee Appeal No 75694* (24 May 2006) at [45]. See also the comments of the panel in *Refugee Appeal No 74880* (29 September 2005) at [55] to [65] and [68] to [72].

emphasise that while we are required to, and do make a decision relating to granting an emergency benefit, any and all of our observations relating to refugee status and immigration matters are simply for that purpose alone; there may be other and quite different evidence before decision makers who are required to deal with immigration issues.

The legislation relating to entitlement to receive a benefit

[16] The Ministry's submissions regarding entitlement to a benefit are uncomplicated.

[17] The Ministry refers to s 74A; the material provisions being:

> **74A Persons unlawfully resident or present in New Zealand**
>
> (1) A person is not entitled to receive a benefit who is—
>
> (a) unlawfully resident or present In New Zealand;
>
> …
>
> (1A) Despite subsection (1), the chief executive may take either or both of the actions specified in subsection (1B) if the chief executive is satisfied that the person is—
>
> (a) a person lawfully present in New Zealand who is awaiting the outcome of his or her claim for recognition as a refugee or a protected person; or
>
> …
>
> (1B) The actions referred to in subsection (1A) are—
>
> (a) grant the person an emergency benefit under section 61:
>
> (b) grant the person temporary additional support under section 61G or, as the case requires, continue, under section 23 of the Social Security (Working for Families) Amendment Act 2004, a special benefit already granted to the person.

[18] It can be seen that there are two critical provisions. First, the prohibition in section 74A(1) excluding persons who are "unlawfully resident or present in New Zealand". The second is the permission in section 74A(1A), which turns on a person being "lawfully present in New Zealand".

[19] The Ministry says that those questions are answered by referring to s 9 of the Immigration Act 2009. That section provides that:

> **9 Meaning of unlawfully in New Zealand (in relation to a person who is not a New Zealand citizen)**
>
> (1) In this Act, a person who is not a New Zealand citizen is **unlawfully in New Zealand** if the person is in New Zealand but —
>
> (a) is not the holder of a visa granted under this Act; or
>
> (b) has not been granted entry permission under this Act.

[20] There is no dispute regarding the fact that the appellants do not currently hold any visa granted under the Immigration Act 2009.

Using section 9 of the Immigration Act 2009 to apply section 74A of the Act

[21] It is not usual for a provision in a different Act to govern the meaning of words in the Social Security Act 1964, unless there are special circumstances. While the Ministry did not rely on any authority to support its position, the issue has been considered by the High Court and Court of Appeal.

[22] The first of the decisions is *Rajabian v Chief Executive of the Department of Work and Income New Zealand* HC Auckland CIV-2004-485-671 12 October 2004. The case is an appeal from this Authority. At that time, the Immigration Act 1987 applied; section 74A has been amended since that time. However, it is not obvious that the new provisions in the Immigration Act 2009 and amendments to section 74A of the Social Security Act 1964 change the reasoning in the *Rajabian* case. Material conclusions of Potter J, listed at [30] of her judgment, were:

> - Eligibility for a benefit is denied to persons unlawfully in New Zealand (s 74(1)(a)) and to persons lawfully in New Zealand by virtue of any one of the temporary permits referred to in s 74A(1)(b), but a refugee may be granted an emergency or special benefit if he is "lawfully present in New Zealand".
>
> …
>
> - "Lawfully present" is not defined in the Social Security Act but s 4 of the Immigration Act is available to provide the relevant definition. Section 74A links in its terms directly and indirectly with the

> Immigration Act, relevantly by reference to para (1)(b) to permits granted under the Immigration Act as a criteria for consideration for an emergency or special benefit.
>
> …
>
> - A permit granted under s 4 of the Immigration Act is the gateway to obtaining lawful presence in New Zealand and hence eligibility for consideration for an emergency benefit by a refugee claimant who is required by s 74A(1)(c) to be lawfully present in New Zealand.

[23] The judgment went on to comment on section 74A(1)(d) which has since been repealed. The essential point stated by Potter J is that because section 74A(1)(d) provided that persons who had had their refugee status in New Zealand confirmed could receive a benefit, it implied that refugee status or claiming that status did not in itself prevent a person being in New Zealand unlawfully. Accordingly, the existence of the provision implied that lawfulness turned entirely on whether a person had a permit (now a visa under the Immigration Act 2009).

[24] The *Rajabian* case supports the view advocated by the Ministry, that in section 74A of the Social Security Act 1964, the meaning of "unlawfully resident or present", and "lawfully present in New Zealand" turn on the meaning of the phrase in the context of the Immigration Act.

[25] The Court of Appeal in *Aziz v Chief Executive of the Ministry of Social Development* [2011] NZCA 364 considered whether a person was in New Zealand unlawfully when they could not be removed from New Zealand while the Removal Review Authority (now part of the jurisdiction of the Immigration and Protection Tribunal) was considering their appeal. The Court considered section 74A. The court took the same approach as the *Rajabian* case, stating, at [20]:

> … the expressions "unlawfully resident or present in New Zealand" and "lawfully resident or present in New Zealand" in s 74A of the Social Security Act are to be interpreted by looking at the Immigration Act. Mr McKenzie's point that the two Acts have different objects reinforces rather than detracts from this point. The Immigration Act is the statute which governs whether a person is lawfully or unlawfully in New Zealand. Assistance in determining the lawfulness of a person's status in New Zealand is not to be found in the Social Security Act, because that is concerned with eligibility for benefits.

[26] The Court reinforced its view with a number of other references. It also referred to the *Rajabian* case, and said that the Court's view of what was meant by the lawfulness of presence in New Zealand was consistent with the *Rajabian* case. However, the Court did expressly observe that it was not considering a person claiming refugee status, and observed, at [24], that:

> It is therefore unnecessary to say anything more about *Rajabian*, and we leave open whether *Rajabian* was correctly decided.

[27] The Court did not elaborate on why it raised a doubt as to whether the *Rajabian* decision was correctly decided. It appears that, potentially, the Court was mindful of the terms of the Convention, and the Protocol, which are incorporated into the Immigration Act 2009 (as they were under the Immigration Act 1987). The terms of the Refugee Convention are, applied as part of New Zealand domestic law[3]. The Refugee Convention has provisions relating to the lawfulness of a refugee's presence in the country of refuge.

[28] Accordingly, it seems the Court of Appeal was likely mindful that the provision relating to being in New Zealand lawfully, formerly in section 4 of the Immigration Act 1987, and now in section 9 of the Immigration Act 2009, is not the only provision that may be relevant to whether a person having, or claiming, refugee status is in New Zealand unlawfully.

Section 74A and the lawfulness of presence or residence in New Zealand

[29] To evaluate the Ministry's position we note that s 74A uses two different phrases, one based on a person being "unlawfully resident or present" in New Zealand and the other on the person being "lawfully present" in New Zealand. The Ministry's approach was that the two terms comprehensively embrace the potential status of a person's presence in New Zealand, at least for the purpose of section 74A; the terms are entirely complementary in the sense that a person is either:

a. unlawfully in New Zealand; or

b. lawfully in New Zealand.

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[3] Sections 124, 127(3) and 165.

[30] However, the status of persons in New Zealand is not necessarily as simple as that binary categorisation. The following provisions affect a person's right to be present or resident in New Zealand:

a. A New Zealand citizen may enter New Zealand at any time (s 13 of the Immigration Act 2009) and Part 6 of that Act provides no ability to deport a New Zealand citizen.

b. Generally, any person who is not a New Zealand citizen is required to hold a visa to enter and remain in New Zealand (Part 3 of the Immigration Act 2009). If a person does not hold a visa they are usually liable to deportation (Part 6 of the Immigration Act 2009—the effect is not necessarily immediate).

c. The provisions that apply generally to persons who are not New Zealand citizens are different when a person claims recognition as a refugee in New Zealand under the Convention; they must have that claim determined in accordance with the Immigration Act 2009 (s 125). Part 5 of the Immigration Act 2009 sets out a statutory basis for the system by which New Zealand determines its obligations under the Convention and the Protocol (s 124).

[31] The Immigration Act 2009 sets out the text of the Convention in Schedule 1. The central concept in the Convention is that asylum is granted to persons who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The well-founded fear, for the stated reasons, must concern what would happen if they are not granted asylum.

Non-refoulement of refugees and refugee claimants

[32] A core principle of the Convention is contained in Article 33(1); it is the primary provision giving effect to what is known as the "non-refoulement" obligation under the Convention. Article 33(1). It provides that:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[33] The Protocol, in Article 1(1), also has a non-refoulement obligation.

[34] No reservations to the non-refoulement obligation are permitted. Unlike various other provisions in the Convention, the non-refoulement obligation is absolute and does not depend on the person being lawfully in the territory of the contracting State.

[35] Some of the other material provisions of the Convention are restricted to persons who are lawfully in the territory of the contracting state. Article 23 provides:

> The Contracting States shall accord to refugees lawfully staying in their territory **the same treatment with respect to public relief and assistance as is accorded to their nationals**. (emphasis added)

[36] Article 24 is similarly confined to "refugees lawfully staying" in the Contracting State's territory, and it requires the same treatment to be accorded to such persons as is given to nationals in relation to social security, which is defined as:

> … legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme.

[37] The appellants have not been recognised as refugees in New Zealand at this point in time; though, if they come within the terms of the Convention, they are refugees regardless of recognition.[4] Section 134 of the Immigration Act 2009 gives certain discretions relating to whether a claim for refugee status will be accepted. The evidence before the Authority is that in July 2016, Immigration New Zealand received a claim for refugee and protection status from the appellants. There is no evidence suggesting that this claim has either been declined or determined. Accordingly, the evidence before us is that the appellants are in a situation where their refugee status is still under consideration. Section 164 of the Immigration Act 2009 recognises that the non-refoulement obligation applies to both persons recognised as refugees and those claiming recognition. Section 164(1) of that Act states:

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[4] Article 1 of the Convention Relating to the Status of Refugees 1951, as modified by Article 1 of the Protocol Relating to the Status of Refugees 1967, and *MA v Attorney-General* [2009] NZCA 490 at [2].

> No person who is recognised as a refugee or a protected person in New Zealand, or who is a claimant, may be deported under this Act.

[38] The exceptions to that provision have no application to this case on the evidence before us.

The potential views of what "unlawfully", or "lawfully" present or resident in New Zealand mean in section 74A of the Social Security Act 1964

[39] Given the provisions of the Immigration Act 2009, including the incorporation of the Convention and Protocol, and statutory provisions relating to it, potentially:

a. the terms *lawful* and *unlawful* are not determined only by adopting a statutory definition of *unlawfully in New Zealand* from s 9 of the Immigration Act 2009. The legal status of persons subject to the special treatment of refugees and refugee claimants could be relevant to the application of section 74A in the Social Security Act 1964.

b. In the *Aziz* case, the Court of Appeal applied the principle that in the context of s 74A all persons who are not citizens of New Zealand require a visa to be either lawfully resident or present in New Zealand.[5]

c. The Court in the *Aziz* case, however, said that the High Court in *Rajabian*, when it applied the same principle to refugees, was not necessarily correct; the Court said it is "open whether *Rajabian* was correctly decided". For the reasons discussed, refugees and persons claiming refugee status may not be in the same position as other persons who are not citizens of New Zealand.

[40] In terms of deportation, refugees and refugee claimants are in the same position as New Zealand citizens. They may not be deported other than where relevant exceptions apply; section 164 of the Immigration Act 2009 would be relevant to the deportation of a refugee or a refugee claimant.

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[5] In this context it is unnecessary to consider irrelevant exceptions, such as persons transiting New Zealand.

[41] Potentially, the Court of Appeal's reservations in the *Aziz* case relating to refugees could impact upon the positive mandate that refugee claimants cannot be deported from New Zealand. Potentially depriving a refugee claimant or refugee of the necessaries of life by preventing them working, and refusing welfare assistance could breach the non-refoulment obligation.

[42] Another potential element the Court of Appeal may have had in mind was Articles 23 and 24 of the Convention, which use the phrase "refugees lawfully staying". It is similar but not identical to the phrase "lawfully present", which is used in s 74A of the Social Security Act 1964. Accordingly, given that the Convention is applied as part of the domestic law of New Zealand (section 124, 127, and 165 of the Immigration Act 2009), that wording may also need to be considered. The Refugee Convention, aside from being applied under the Immigration Act 2009 is an international treaty New Zealand ratified. It must not be treated as "window-dressing", to use the terminology of *Tavita v Minister of Immigration* [1994] 2 NZLR 257 AT P 266.

[43] In the context of refugee jurisprudence, the meaning of "refugees lawfully staying" in the Refugee Convention has been considered by various commentators. The authoritative text *The Rights of Refugees under International Law* says the term is characterised as:[6]

> … officially sanctioned, ongoing presence in a state party, whether or not there has been a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile there.

[44] E Lester noted that the meaning of "lawfully staying" must be ascertained by a broad and expansive interpretation beyond mere reference to domestic law. A refugee may be considered to be "lawfully staying" in a territory despite not having regularised his or her status yet.[7]

[45] The United Nations High Commissioner for Refugees' publication *Lawfully Staying – A Note on Interpretation* (3 May 1988) says that A judgment as to lawfulness should take into account all relevant

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6 J C Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) at pp 186-189.

7 E Lester's "Work, the Right to Work, and Durable Solutions: A Study on Sierra Leonean Refugees in The Gambia" (2005) 17 *International Journal of Refugee Law* 331 at pp 352-354.

circumstances, including whether the stay in question is known and not prohibited. Depending on the circumstances, an unauthorised stay might constitute a 'lawful' stay (See [17] and [23]).

[46] In New Zealand, the Immigration and Protection Tribunal considered the meaning of lawfully staying under the Refugee Convention in *AI (Refugee and Protection)* [2015] NZIPT 202110. It concluded that the appellant could be characterised as 'lawfully staying' in New Zealand in terms of the Convention (See [44]-[45]). His presence in New Zealand was ongoing in practical terms, regardless of whether he held a visa (though, in that case, the appellant held a work visa).

[47] In contrast, *B (Eritrea) v Secretary of State for Work and Pensions* [2015] EWCA Civ 141 observed, at [41]:

> If it was intended that all welfare benefits should be backdated for genuine refugees, article 23 [of the Convention] would have referred to "refugees", not "refugees lawfully staying in their territory". A refugee is only "lawfully staying in" the UK once it is established that he/she is indeed a refugee. During the earlier period, although he/she is a refugee, no-one knows that this is the case. His/her presence is tolerated, because the UK cannot take the risk of expelling someone who may turn out to be a genuine refugee. His/her presence only becomes "lawful" under UK law when the proper authority (either the Secretary of State or on appeal a tribunal) has determined that the person is a refugee.

[48] However, in New Zealand, in contrast with the *B (Eritrea)* case, the Court of Appeal in *MA v Attorney-General* [2009] NZCA 490 observed, at [2], that the determination finding a person is a refugee under the then Immigration Act 1987 is purely declaratory of that person's position, it is the Refugee Convention that gives them the status of a refugee. The Court said refugee status is conferred not by New Zealand law but by the Refugee Convention and the 1967 Protocol.[8]

The position of this Authority in relation to interpreting section 74A

[49] This Authority is in the unenviable position where the High Court's decision in *Rajabian* is the closest authority determining the issues in question in this appeal, and the Court of Appeal in the *Aziz* case has

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8 *Refugee Appeal No 75574* (29 April 2009) at paragraph [58] is to similar effect.

expressly noted that "we leave open whether *Rajabian* was correctly decided". Unless and until the Court of Appeal overrules *Rajabian*, or another High Court case does not follow it, this Authority must apply the *Rajabian* case.

[50] It is, of course, necessary to consider that section 74A has been amended since the *Rajabian* case, and the Immigration Act 1987 has been replaced. Accordingly, there is potential to conclude the *Rajabian* case does not to apply to the current legislation. However, we do not consider that is a sound approach. The legislative changes are ones of detail; the principles in the *Rajabian* case apply in a substantially similar way to the current legislation. Accordingly, this Authority cannot justify departing from the principles in the *Rajabian* case that the meaning of "unlawfully" and "lawfully" resident or present in New Zealand are interpreted by referring to the definition of "unlawfully in New Zealand", which now appears in section 9 of the Immigration Act 2009, to the exclusion of wider provisions of that Act. We are bound by the approach in the *Rajabian* case.

[51] Section 74A(1A) of the Act appears to create two categories of refugee, but does not expressly say how the categories are defined. How the categories might be defined appears potentially closely related to New Zealand's non-refoulment obligations, and lawful presence under the Refugee Convention. The *Rajabian* case itself recognised the reality that utter destitution could be caused by not providing refugees support in New Zealand. It would appear that these are matters that properly lie:

a. With Immigration New Zealand, which has the power to grant visas that does address the concerns; or

b. The Courts which, could potentially consider that the principles in the *Rajabian* fcase should be reconsidered.

[52] This Authority however, cannot reconsider the *Rajabian* case, so must dismiss the appeal.

Conclusion

[53] Given that this Authority is bound by the *Rajabian* decision, the fact that neither appellant has a visa permitting them to be present in New

Zealand inevitably means that section 74A excludes them from any entitlement to a benefit.

[54] Section 74A(1)(a) excludes them, and section 74(1)(b) cannot be an exception in their case. They are unlawfully in New Zealand, and not lawfully in New Zealand for the purposes of that section.

[55] Section 74A(1A) cannot apply to them as they are not lawfully present, and have not been recognised as refugees.

Decision

[56] The Authority dismisses the appeals.

Dated at **Wellington** this 6th day of September 2017

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G Pearson
Chairperson

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K Williams
Member

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C Joe JP
Member