

AT AUCKLAND

Appellant:	AB (Brazil)
Before:	A N Molloy (Member)
Representative for the appellant:	The appellants represented themselves
Counsel for the respondent:	No Appearance
Date of hearing:	28 June 2011
Date of decision:	1 August 2011

DECISION

INTRODUCTION

[1] The appellants are a family of Brazilian nationals who will be referred to individually as “the father”, “the mother” and “the child”. They claim that they are at risk in Brazil because of a vendetta against the father by a prominent national politician. The problem arose in 2006 when the father called for the politician to be investigated for corruption. The appeals turn upon whether the appellants’ claim is credible.

[2] They appeal under section 195 of the Immigration Act 2009 (the Act) against the decisions of a refugee and protection officer of the Department of Labour, declining to grant them either refugee status or protected person status.

[3] Their appeals were heard jointly and the evidence of each appellant is considered in respect of their own appeal and the appeals of the other appellants. Because the child is a minor, the father acted as the responsible adult at the hearing for the purposes set out in section 375 of the Act.

[4] In order to address the statutory issues common to all appeals of this type, the Tribunal will first outline the accounts presented by the appellants on appeal. The core account of the mother and the father revolve around the same events and a composite summary of their evidence is set out below. The Tribunal will then assess the appellants' credibility before making the findings of fact upon which the appeals are determined. The Tribunal will then outline the legislation governing such appeals before assessing the appellants' claims for refugee status and protected person status.

THE APPELLANTS' ACCOUNT

[5] The father was born and raised in City A. He was educated to tertiary level and gradually acquired a portfolio of income streams that derived from teaching and from his proficiency in languages. The mother was born and raised in City B. She moved to City A to study during the late 1990s. After qualifying she obtained employment appropriate to her qualifications and experience. The father and mother have been together from 2003.

[6] The father's predicament arose while he was completing a post-graduate qualification at university in City A in early 2006. It is best understood in the context of events dating back to 2002, when Brazilian authorities raided a farm in Maranhao State owned by a prominent Brazilian politician, Inocencio Oliveira. The authorities discovered that several dozen people were being held and forced to work on the farm in degrading conditions.

[7] Oliveira was charged and brought before the Brazilian courts in 2003, when a judge entered convictions against him and ordered him to pay a significant sum in compensation to the workers in question. That matter was considered by the Supreme Court on appeal in early 2006.

[8] The original investigation was part of a government initiative to combat unsatisfactory practices throughout Brazil by which workers were effectively entrapped in conditions from which they could not extract themselves. Typically they were forced to work for low wages in order to cover ever-mounting debts that arose because their employers charged exorbitant amounts for food and accommodation as conditions of their employment.

[9] The father was oblivious to the existence of such a problem in Brazil until his friend, ZY, recounted a recent experience he had at the end of the university vacation in March 2006.

[10] ZY told the father that when he was driving back to City A he stopped for a break at a town near the border of State C, approximately 700 kilometres from City A. He was approached by an unkempt and emaciated man who had noticed the City A plates on ZY's motor vehicle and asked for a ride. ZY took pity on the man. During the ensuing nine-hour car journey, the man disclosed that he had escaped from the slave-like conditions of a farm in the Maranhao district. He said it was owned by Oliveira.

[11] The father felt outraged that such practices could still persist in Brazil in the 21st century. After hearing ZY's account he prepared a pamphlet denouncing slavery and specifically naming Oliveira. His statement appeared on a single A4 sized sheet of paper, alongside a graphic of a shackled fist. Copies were distributed around the appellant's University. It created quite a stir and spread to other universities in City A.

[12] Shortly after, the father received a letter containing an oblique threat to his life. He did not take it seriously. He and ZY circulated a petition calling upon the Brazilian government to investigate the corruption of its politicians and, in particular, Oliveira. The petition was distributed throughout the campus and around other nearby university campuses. Within a short period it had attracted some 20,000 signatories. ZY gathered together the various copies of the petition and sent them to the Ministry of Justice, hoping to inspire some action.

[13] The father then began to receive threatening, anonymous telephone calls, telling him to stop what he was doing. Unlike the letter, this scared the father. He purchased a bullet-proof vest and firearm. It was not long before he needed both. One evening, as he drove home from university, a motor vehicle drew alongside the father and a man in the back of the vehicle opened fire upon him. The father returned fire and managed to escape at high speed.

[14] The father reported the incident to the local police. In the course of routine questioning the police asked whether he had problems with anyone. When the father mentioned Oliveira's name he was told that there was little they could do. The father is convinced that Oliveira was behind his difficulties.

[15] The father survived another two similar attempts on his life before his would-be assailants turned their attention to the mother. Early one evening she was abducted from outside her work place. The mother was driven to a remote rural area and subjected to a brutal sexual assault. She was found the following day by a farm worker. The father collected the mother and sought medical assistance from a family friend. They did not report the matter to the police. The mother did not believe she could identify her assailants and did not wish to endure the trauma of recounting what had happened to her.

[16] At that point the mother and father decided that they could no longer remain in City A. The husband found work in Town C, a remote town in the northern state of State J, and they managed to live there in comparative tranquillity for several months. This came to an end when the father renewed the registration of the family motor vehicle, giving his local address. Within days the mother received a telephone call from a man purporting to be from the State Transport Department. When the mother confirmed her identity, the caller said something to the effect of “we’ve found you”.

[17] This frightened the mother, who had by then learned she was pregnant. The couple decided to cross the Brazilian border to Country X for a long weekend, to escape the constant pressure of their predicament and to evaluate their options.

[18] On returning to Town C the mother and father found that their home had been vandalised, their family pet slaughtered and the father’s computer had been stolen. They decided to return to City A to make arrangements to leave Brazil. Before they could do so, the father survived a further attempt on his life. He was in a taxi when two men opened fire upon him from the back of a passing motor vehicle. The taxi driver was injured and the appellant was hit in the abdomen, however he was not hurt because he was wearing his bullet-proof vest. As one of the armed men left his vehicle and moved toward the taxi, the father opened fire, hitting the man three times. The man fell to the road and his driver fled.

[19] The police arrived within five or ten minutes and the injured man was removed by ambulance. The father was invited to attend the police station the following day to make a statement. By the time he did so, the identity and fate of the injured man had become a mystery.

[20] The mother and father returned to City A, renewed their passports and left Brazil at the end of 2006. They travelled to Europe and lived in the United Kingdom (unlawfully for much of the time) from early 2007. The child was born

there. While the appellants were away from Brazil a member of the mother's family was involved in a serious motor accident. The mother's desire to see her relative was a strong factor in the family's decision to return to Brazil in mid-2009, but they also felt that it would probably be safe to do so, given the length of time that had passed. Unfortunately, they were to be proved wrong.

[21] When the family returned to Brazil the father found work with a company owned by one of his cousins in Town D. Shortly before Christmas 2009, the mother and child left to spend time with her family. It was intended that the father would join them a short time later so they could travel together to spend Christmas with his family in City A.

[22] One evening before he joined the family, the father was at a bar. The attention of one of his friends was drawn to the sight of two men approaching on a motorcycle. Their appearance was incongruous as they were wearing helmets, which was almost unheard of within the town precinct. The father had his back to the road. As he turned to look, one of the men unleashed a firearm. The father took cover immediately and two off-duty police officers returned fire from the bar. They hit the passenger, but the driver rode away. The injured man was collected by ambulance and, like the man in Town C three years earlier, his fate subsequently became something of a mystery.

[23] That incident prompted the family to move again. The father obtained work at a school in Town E. The fact that he had once again taken to carrying a firearm at all times acquired some importance when he was collecting the child from kindergarten one afternoon. As other parents were milling outside with their children, a man grabbed the child by the arm. The father drew his firearm and fired one shot in the air. In the ensuing panic, the stranger let go. The father bundled the child into a nearby motor vehicle and implored the driver to drive them away. He did.

[24] The family again decided that they could no longer remain in Brazil. The father made arrangements to travel to New Zealand. It was intended that he would travel here in advance and that the mother and child would follow once he had established himself. The father arrived in New Zealand in July 2010 and applied for refugee status the following month.

[25] In the meantime, the mother arranged accommodation for herself and the child at a relative's remote weekend property in Village F. Even there she was not safe. One evening she heard gun fire. The local man who was acting as her

security guard went to investigate but the mother did not wait to find out what was happening. She gathered the child and left the house. They spent the night and part of the next day walking through jungle. They finally came upon an elderly woman who helped them to make their way back to City A, where the mother made arrangements to travel to New Zealand.

[26] The mother and child arrived in New Zealand in mid-November 2010 and lodged applications for refugee status a few days later.

[27] After interviewing the mother and father in December 2010, a refugee and protection officer of the Refugee Status Branch of the Department of Labour issued decisions dated 1 April 2011, declining their claims for refugee and protected person status. It is from those decisions that the appellants now appeal.

[28] The appellants believe that their difficulties are attributable to the politician, Inocencio Oliveira. They consider that their lives will continually be in danger if they return to Brazil. They believe that the politician is so powerful that he can locate them anywhere in Brazil and can harm them with impunity.

Material Received

[29] The Tribunal was provided with Immigration New Zealand files relating to each appellant. The files contain statements prepared by the mother and the father in December 2010, prior to their interviews with the refugee and protection officer. The only additional material provided by the appellants was a brief statement the father handed the Tribunal during the hearing.

ASSESSMENT OF THE APPELLANTS' ACCOUNT

Whether the Appellants' Claims are Credible

[30] Before turning to address the issues identified, it is necessary to determine whether the appellants' account is credible. For reasons set out below, the Tribunal finds that it is not.

[31] The father claimed that he was astonished to learn of the plight of a man encountered by his friend. Hearing that slavery existed as a practice in Brazil in the 21st century motivated him to publish his pamphlet and to circulate his

subsequent petition. When placed in context, the father's claim does not stand scrutiny.

[32] First, the father's evidence about the pamphlet and the petition was vague and lacking in substance. In one context the father effectively portrayed his university campus as a hub of information and debate, peopled by students eager to embrace and disseminate new ideas. However, in substance the father's evidence failed to reflect any such ideals. He gave the appearance of having rote-learned a bare outline that was lacking in plausible detail.

[33] Asked to explain what he hoped to achieve by circulating the pamphlet, the father replied that he wanted "an investigation". He did not have any inkling of who the investigation would be conducted by, or how it would be brought about. He had given no thought to any follow-up to his pamphlet and there was no suggestion that he was himself coordinating any initiative or pressure.

[34] Second, it is implausible that the father lacked any knowledge about Oliveira's connection with slavery. Even if he had no knowledge of this at the time ZY spoke of his encounter with the man in March 2006, it would certainly have come to his attention by the time he supposedly initiated a petition against Oliveira a month or so later.

[35] In this connection it is important to understand that around the time in question, Inocencio Oliveira was the subject of an ongoing investigation into the practices on his farms in Maranhao state. This is referred to at page 6 of a 2006 report "*Contemporary Forms of Slavery in Brazil*", Anti-Slavery International:

Furthermore, a senior member of the Brazilian Congress, Inocencio Oliveira, was ordered by a court on 8 February 2006 to pay more than US\$100,000 to 53 forced labourers kept on his ranch in northern Maranhao state. He was ordered to pay US\$60 for every day they worked at his ranch.

[36] Oliveira's involvement dated back some years but it is clear from the Anti-Slavery International report that the state of Maranhao continued to be a focus of attention for the Brazilian authorities. That report continues, at page 6:

In April 2006, 318 workers were freed from forced labour in Maranhao state. An eight day search on just three ranches found 121 workers.

[37] These investigations took place in the context of a broader initiative to combat slavery in Brazil. It is clear that even in 2006 this was by no means a recent focus of attention. The preface to a report of the International Labour Office *Fighting Forced Labour: the Example of Brazil* (2009), states:

For some fifteen years, since a new inter-ministerial body was created in 1995 to coordinate action against forced labour, Brazil has been addressing the problem with vigour and determination. It has done so in many ways, involving different government agencies, employers and workers organisations, civil society, the media, academic organisations and others. Many of the measures taken are creative and unique, reflecting the need for extraordinary steps to deal with a severe human rights problem that can be difficult to identify, and even more difficult to punish through effective law enforcement in remote areas.

[38] The father's evidence is to be examined in this light. He claims that his initiatives effectively caught the imagination of the campus. Many students who agreed with the content of his pamphlet, he says, drew it to the attention of others across four or five universities. Visiting students supposedly obtained copies and took it back to their own campuses. A similar dynamic is said to have led to the significant display of support for the petition, resulting in the gathering of 20,000 signatures.

[39] If that was true, it is inevitable that some of the students so affected would have known of the government's actions against slavery. It is also inevitable that the resulting discourse would have embraced discussion of the contemporaneous legal action against Oliveira in respect of his own farms in Maranhao. It is inconceivable that none of this came to the father's attention.

[40] Yet according to the father he did not find out about these matters at that time. When asked to explain this, the father claimed that no one at universities in Brazil knows of such things and that these initiatives are simply window dressing for the international community. The Tribunal rejects that answer. It is apparent from articles put to the appellants by the refugee and protection officer that Brazil has a vigorous press, quick to publicise issues of public interest. It is inconceivable that, of all the students and university staff whose sympathies might be engaged by the content of the pamphlet and the petition supposedly created by the father, none were aware of government initiatives against slavery.

[41] Other elements of the father's claim are also implausible. For example the scale of the politician's vendetta is disproportionate. At a time when Oliveira was facing the resources of the Brazilian State before the Supreme Court, the father claims to have published one pamphlet and contributed to one petition. In response, attempts were supposedly made on his life on at least five occasions, his wife was assaulted and an attempt was made to abduct his child. These incidents are said to have occurred in locations hundreds (if not thousands) of kilometres apart, some remote, over a period of four years.

[42] Further, despite displaying an unerring ability to find the father and his family, Oliveira's men displayed an equally extraordinary inability to actually harm him. The father escaped injury despite being fired upon on three occasions prior to relocating in 2006. He was again shot at, from close range, in a taxi in Town C and at a bar in Town D in 2009. On four of those occasions the gunmen failed to hit the father despite having the advantage of surprise. On the fifth occasion, the father was saved from injury by the bullet-proof vest he was wearing. Even then, miraculously, the gunmen did not hit him in any area of his body that was unprotected by that vest. The father, for his part, managed to seriously injure and incapacitate one of his assailants. Later, another was similarly injured by an off-duty police officer who happened to be drinking at a bar when the appellant was attacked. The degree of good fortune inherent in these repeated, unsuccessful attacks, and the ability of the appellant to repel or escape from them, is so remarkable as to be implausible.

[43] The appellants' account is further undermined by their failure to provide any corroborative material. They have provided no police reports, no information from the man whose tale is said to have inspired the father to target Oliveira, and none from the father's friend ZY. Nor have they provided any supporting evidence from family members.

[44] Both the mother and the father claim that they have not provided their families with details about their predicament because they did not wish to worry their families. They claim that their families know of the difficulties only in broad outline.

[45] That explanation is rejected. The clear impression imparted by both the mother and the father was that they had constructive and healthy relationships with their respective families. They spent Christmas together and the decision to return home to Brazil in 2009 revolved around the mother's family member. When they did return, the father was able to support the family by working for a company owned by a relative. If the mother and father were genuinely forced to flee from Brazil on two occasions, for the reasons given, it is inevitable that their extended families would be well aware of the nature of their difficulties.

[46] The cumulative effect of all of these matters leaves the Tribunal in no doubt that the appellants' claim is contrived and false.

Summary of Factual Findings

[47] In summary, the Tribunal finds that the appellants have fabricated their core claim. The Tribunal does not accept that the appellants have been targeted by a Brazilian politician (or by anyone). There is no credible evidence that they are at risk of being seriously harmed in Brazil.

[48] The Tribunal must assess the appellants' claims on the basis of facts as found rather than on the basis of evidence that has been rejected. In that context the Tribunal finds that the appellants are nationals of Brazil. They departed from Brazil lawfully, using their own valid passports and they would be able to return to Brazil lawfully on the same basis.

[49] The father says he is competent in several languages, including English, and he and the mother are both educated to tertiary level. Neither appears to have had any real difficulty obtaining employment appropriate to their qualifications in Brazil. They have never experienced any undue difficulty obtaining accommodation in Brazil, or in travelling around Brazil. They each have access to extended families with whom they appear to have good relationships and from whom they can expect some degree of support while they re-establish themselves in Brazil.

[50] It is upon this basis that the appeals will be assessed.

THE LEGISLATION

[51] Under section 198 of the Act the Tribunal must determine whether to recognise each or any of the appellants as:

- (a) a refugee under the Refugee Convention (section 129); and/or
- (b) a protected person under the Convention Against Torture (section 130); and/or
- (c) a protected person under the International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[52] The Tribunal must first deal with the claim for recognition under the Refugee Convention.

THE REFUGEE CONVENTION – THE ISSUES

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

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

[54] The Tribunal adopts the analysis of the Refugee Status Appeals Authority, the body previously established to consider refugee appeals in New Zealand. In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim under the Refugee Convention

[55] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of basic or core human rights, demonstrative of the failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996). Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection.

[56] In determining what it means that a fear be “well-founded” as referred to in Article 1A(2) of the Refugee Convention, the Tribunal adopts the approach set out in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. The High Court of Australia held that a well-founded fear of being persecuted is established when there is a real, as opposed to a remote or speculative chance of such persecution occurring. The standard is entirely objective.

[57] The Tribunal turns to consider the first of the principal issues identified at para [54].

Whether objectively, on the facts as found, there is a real chance of the appellants being persecuted if returned to Brazil

[58] Neither the mother nor the father claimed that they were unable to return to Brazil for any reason other than the core claim advanced. The father agreed that, but for the claim that has been rejected by the Tribunal, there is no other barrier to the family returning to Brazil safely.

[59] The mother expressed concern that the child will be disadvantaged, having been away from the Brazilian education system. She said that the child will have fallen behind its contemporaries, who will by now be learning to read and write. That claim can be shortly disposed of. The child is currently under five years old. The fact of its short absence will not have any significant impact upon its future education in Brazil.

[60] The Tribunal has carefully considered each aspect of the appellants' claims, both separately and cumulatively, and has taken into account all of their individual characteristics. Having done so, the Tribunal finds that objectively, on the facts as found, there is no real chance of any of the appellants being persecuted for a Convention reason if they were to return to Brazil now.

Conclusion on the Refugee Claim

[61] The first principal issue identified at para [54] is answered in the negative in respect of each appellant. On that basis, the second principal issue does not need to be addressed in respect of any of them. None of the appellants has a well-founded fear of being persecuted in Brazil for a Convention reason.

[62] The Tribunal now turns to consider whether any of the appellants is a protected person under the Act.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[63] Section 130(1) of the Act provides that:

A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.

Assessment of the claim under the Convention Against Torture

[64] For the purposes of their claims for protected person status under section 130, the appellants have not advanced any evidence other than the evidence relied upon in connection with their refugee claims. For the reasons already given and having taken into account all of the appellants' circumstances, both as individuals and collectively, the Tribunal finds that there are no substantial grounds for believing that any of them would be in danger of being subjected to torture if deported from New Zealand.

[65] Accordingly, none of the appellants is a protected person under section 130(1) of the Act and the Tribunal therefore turns to their claims for protected person status under section 131 of the Act.

THE ICCPR – THE ISSUES

[66] Section 131(1) of the Act provides that:

A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

Assessment of the claim under the ICCPR

[67] For the purposes of their claims for protected person status under section 131, the appellants have not advanced any evidence other than the evidence relied upon in connection with their refugee claims. For the reasons already given and having taken into account all of the appellants' circumstances, both as individuals and collectively, the Tribunal finds that there are no substantial grounds for believing that any of them would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

[68] Accordingly, none of the appellants is a protected person under section 131 of the Act.

CONCLUSION

[69] For the foregoing reasons, the Tribunal finds, with respect to each of the appellants, that they:

- (a) are not a refugee within the meaning of the Refugee Convention;
- (b) are not a protected person within the meaning of the Convention Against Torture; and
- (c) are not a protected person within the meaning of the ICCPR.

[70] The appeal of each appellant is dismissed.

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