IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2011] NZIPT 800232**

AT AUCKLAND

Appellant:	**AZ (Fiji)**
Before:	S A Aitchison (Member)
Representative for the Appellant:	The appellant represented himself
Counsel for the Respondent:	No Appearance
Date of Decision:	1 December 3011

DECISION

INTRODUCTION

[1] This is an appeal, pursuant to sections 195(1)(a) and 195(2) of the Immigration Act 2009 (the Act), against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), refusing to consider a subsequent claim by the appellant to be recognised as a refugee, and refusing to recognise the appellant as a protected person.

[2] The appellant claims that, as a Fijian national of Indian ethnicity, he will be subject to discrimination and endemic violence by indigenous Fijians in Fiji. He believes that the situation for Fijian Indians is deteriorating in Fiji, and the state does not afford them protection.

[3] This is the second time that the appellant has appealed against the decline of a claim to refugee and protected person status in New Zealand. His first appeal for refugee and protection status was declined by the Tribunal on 4 March 2011. Because of this, he must establish, in accordance with section 200(1) of the Act, that there has been a significant change in circumstances material to his claim

since the previous claim was determined. If he does not meet this jurisdictional threshold, his refugee claim must be dismissed.

[4] Before addressing those issues, however, it is necessary to record that the Tribunal determines not to offer the appellant an oral hearing because it finds that the appeal *prima facie* repeats a previous claim. Jurisdiction to dispense with an oral hearing is derived from section 233(2) of the Immigration Act 2009, which provides that, where an appellant was interviewed by the RSB (as was the case here), the Tribunal may determine an appeal without offering the appellant an interview if it considers that the appeal is *prima facie* manifestly unfounded or clearly abusive or that it repeats a previous claim.

[5] Before reaching that view, the Tribunal invited the appellant to comment on its preliminary view. By letter dated 8 November 2011, the Tribunal wrote to the appellant, advising:

> "In view of the following matters, the Tribunal considers that your appeal may be, *prima facie*, manifestly unfounded or clearly abusive. It also considers that, *prima facie*, it may repeat a previous claim. If so, your appeal could be determined without giving you an interview.
>
> In reaching this preliminary view, the Tribunal takes into account:
>
> 1. In your first refugee claim, lodged on 18 August 2010, you claimed that as a Fijian national of Indian ethnicity, you had been robbed, and discriminated against, by indigenous Fijians in Fiji, and that no state protection was available to you.
>
> 2. In your second refugee claim, lodged on 18 March 2011, you claimed the same circumstances as in your first claim, adding that discrimination against Fijian nationals of Indian ethnicity had worsened in Fiji since your first refugee claim. You submitted that the fact that a High Chief, Rada Tevita Mana, had to leave Fiji recently demonstrated that no one was safe in the country.
>
> 3. It appears that your second refugee claim simply repeats your first claim. Pursuant to section 140 of the Immigration Act 2009 (the Act), a second or subsequent claim for refugee or protection status may only be considered if, since the determination of the preceding claim, there has been a significant change in circumstances material to the claim. A broad assertion that discrimination against Fijian nationals of Indian ethnicity has worsened since the first claim, without any supporting country material, and the brief mention that an Indigenous Fijian (formerly holding the rank of Lieutenant Colonel in the military in Fiji) has left the country, does not constitute a significant change in circumstances material to the claim. The Tribunal is aware of no country information that supports your claim that the situation for ethnic Indians in Fiji has deteriorated or changed since determination of your first claim.
>
> 4. In assessing whether the claim is based on significantly different grounds to the previous one, the Tribunal may rely on findings of fact and credibility

> made in the previous appeal. The jurisdiction to bring the second or subsequent refugee claim cannot be used as a means of rehearing the preceding appeal: *Refugee Appeal No 70027/96* (19 September 1996) and *Refugee Appeal No 75139* (18 November 2004). In determining your first appeal, the Tribunal found that the political environment since the December 2006 coup had not led to a deterioration in the security of the Indo-Fijian community beyond the level of occasional discrimination. Further, the Tribunal relied upon a well-established principle of refugee law that nations are presumed capable of protecting their citizens, in the absence of any clear or convincing evidence to the contrary."

[6] The appellant was invited to forward, by 22 November 2011, submissions responding to these matters. He was also reminded that it was his responsibility to establish the claim and to ensure that all information, evidence and submissions which he wished to have considered were provided to the Tribunal before it made its decision (see section 226(1) of the Act).

[7] On 21 November 2011, the appellant responded to the Tribunal stating that his appeal was founded on a genuine fear of "the subversive and repressive regime" in Fiji. He submitted that if a High Chief in Fiji, Ratu Tevita Mara, was not safe from the Fijian military, Fijian Indians, loathed by the military, would not be safe. He stated that Fijian Indians cannot be assured of protection in Fiji and that in all political crises, the military has been "at the forefront of violence" against citizens. He stated that he did not wish to return to Fiji because of the endemic violence and discrimination against Fijian Indians there.

[8] The Tribunal finds, for reasons that are detailed more fully in paragraphs [23] and [24] below, that the appellant's second claim simply repeats the first claim. Reinforcing this view is the appellant's admission to the RSB that he knowingly submitted a claim in the knowledge that there had been no change in circumstances since his first claim, and on the basis of the same facts as the first claim. For that reason, and in accordance with section 233, the Tribunal determines not to offer the appellant an oral hearing and proceeds to determine the appeal on the papers.

[9] The RSB declined the appellant's second claim for refugee and protected person status on 3 October 2011. The RSB determined, according to section 140(1)(a) of the Act, that there was no jurisdiction to consider the subsequent claim to refugee status. It then considered the appellant's protected person claim on the merits and dismissed it. The appellant appeals against these findings in accordance with sections 195(1)(a) and 195(2), respectively. The Tribunal will address each in turn.

JURISDICTION TO CONSIDER A SUBSEQUENT REFUGEE CLAIM

[10] Where a refugee and protection officer has refused to consider a subsequent claim under section 140(1)(a), a person may appeal to the Tribunal pursuant to section 195(1)(a) of the Act. Where an appeal is brought under this section, the Tribunal, in accordance with section 200(1) must first consider:

> (a) Whether there has been a significant change in circumstances material to the appellant's claim since the previous claim was determined; and
>
> (b) If so, whether the change in 1 or more of the circumstances was brought about by the appellant –
>
> (i) acting otherwise than in good faith; and
>
> (ii) for a purpose of creating grounds for recognition under section 129.

[11] In order to assess whether or not there has been a significant change in circumstances material to the appellant's claim since the previous claim was determined, the Tribunal will compare the appellant's first claim against the second claim.

COMPARISION OF FIRST AND SECOND REFUGEE CLAIM

The First Claim

[12] In the appellant's first claim, he stated in his claim form that he feared discrimination by indigenous Fijians in Fiji because he was a Fijian Indian. He claimed that indigenous Fijians had always threatened Fijian Indians and threatened to kill them. He stated that indigenous Fijians consider Fijian Indians to be "outsiders" and that they have no role in Fiji. He added that Fijian Indians have experienced sustained physical and verbal abuse and that their rights have always been challenged.

[13] On 25 October 2010, the RSB received a letter from the appellant stating that he feared violence from indigenous Fijians as a consequence of "recent problems where Mahendra Chaudhry was arrested". He stated that indigenous Fijians hated Fijian Indians and he was not sure that the army or police would protect him.

[14] At the RSB interview, he stated that he had been robbed in 2006 by indigenous Fijians and that after reporting the matter to the police he did not hear from them again.

[15] Before the Tribunal, the appellant maintained his claim as abovementioned. The Tribunal also interviewed the appellant's father who explained his own personal problems, namely, that he had been robbed a number of times while employed as a taxi driver and that his taxi had been damaged on occasions. He did not think that the appellant would be at risk of serious harm on return to Fiji, however the risk he faced "could be anything". The father was primarily concerned that there was no-one in Fiji to look after his son.

[16] In its decision, *AB (Fiji)* [2011] NZIPT 800045, the Tribunal accepted that the appellant had suffered "some possible minor discrimination" in the past in Fiji, and had been robbed by indigenous Fijians on one occasion. While the Tribunal found that the appellant might experience episodic, low level instances of racial discrimination if he returned to Fiji, it found there was no more than a remote and speculative risk that he would experience any serious breach of his core human rights. The Tribunal found that the political environment since the December 2006 coup in Fiji had not led to a deterioration in the security of the Indo-Fijian community beyond the level of occasional discrimination. Further, the Tribunal relied upon a well-established principle of refugee law that nations are presumed capable of protecting their citizens, in the absence of any clear or convincing evidence to the contrary. His appeal was declined.

The Second Claim

[17] The appellant repeated the grounds of his first claim. In his claim form submitted on 18 March 2011, he stated that he feared he would be killed by indigenous Fijians in Fiji because of his ethnicity. He stated that indigenous Fijians perceive Fijian Indians to be "outsiders" and that they have no place in Fiji. He stated that Fijian Indians had been subject to violence and systemic abuse in Fiji.

[18] On 18 March 2011, the RSB wrote to that appellant inviting submissions on whether there had been a significant change in circumstances material to his refugee or protection claim since the previous claim was determined, in accordance with section 140(1) of the Act. The RSB advised that a subsequent

claim may not be considered if a refugee and protection officer is satisfied the claim is manifestly unfounded or clearly abusive or repeats a previous claim, in accordance with section 140(3) of the Act.

[19] On 23 March 2011, the appellant responded, submitting that his claim was based on a genuine fear of returning to Fiji because of the failure of democracy in that country and his lack of confidence in the ability of the armed forces of the country to protect Fijian Indians. He submitted that systemic abuse continues in Fiji, where those opposed to the regime, and Fijian Indians, remain suppressed and are treated as "lepers". The appellant attached to his letter three news articles as follows: "Ex-Fiji minister seeks asylum in Australia: report" *Agence France Press* (7 March 2007); "Australian citizen claims he was beaten by Fijian soldiers" *ABC Radio Australia* (24 February 2011); "Fiji top of the agenda as Pacific ministers meet in Port Vila" *ABC Radio Australia* (14 February 2011). The first article referred to the fact that a Fijian former minister planned to seek political asylum in Australia after being arrested and allegedly beaten by soldiers in a crackdown on anti-regime activists. The article also referred to similar treatment for some politicians, trade unionists and government critics. The second article referred to the claims of an Australian citizen of Fijian descent who claimed to be beaten by soldiers when he visited Fiji in December 2010, having made public statements in Australia opposing some of the political developments in Fiji since the 2006 coup. The third article records the content of an interview of Richard Marles, Australia's Parliamentary Secretary for Pacific Island Affairs, about the absence of respect for human rights, democracy and freedom of press in Fiji, and a lack of confidence in the Pacific Island Forum, amongst other issues.

[20] At the RSB interview, the appellant was asked whether there had been any significant change in his circumstances since his last claim and he responded "no". When asked why he was claiming refugee status he responded that: "One of my mates told me to try again". The RSB questioned him further:

> Q. But nothing has changed since your last decision came out?
>
> A. No.
>
> Q. So the same facts that you applied for refugee status last time are the same ones you're applying for this time?
>
> A. Yes.

[21] On 5 September 2011, upon being invited by the RSB to file further submissions, the appellant responded that the situation for Fijian Indians was worsening in Fiji and that the government was "against Fiji Indians". He stated that the support and protection of the armed forces could not be assured, and that Fijian Indians were not safe on account of their race. He submitted that the fact that indigenous Fijian High Chief, Rada Tevita Mana, had to leave the country recently demonstrated that no one was safe in the country and that there was no law and order.

Whether a Significant Change in Circumstances Material to the Claim

[22] It will be recalled that, because this is a second refugee claim, the appellant must, by section 200(1)(a) of the Act, establish whether there has been a significant change in circumstances material to the appellant's claim since the previous claim was determined.

[23] The Tribunal finds that there has not been. The appellant conceded to the RSB that he repeats his first claim. A simple assertion in the second claim that the situation in Fiji is worsening for Fijian Indians, without any country information to support this assertion, does not demonstrate a significant change in circumstances. A review of current, reputed sources by the Tribunal does not indicate that the situation facing Fijian Indians in Fiji is worsening, nor that there is a real chance of Fijian Indians, on this basis alone, being persecuted in Fiji, as consistent with the Tribunal's findings in *AB Fiji* [2010] NZIPT 800045; see United States Department of State *Country Report on Human Rights Practices: Fiji* (8 April 2011); Freedom House *Map of Freedom in the World – Fiji* (2010); Amnesty International *Annual Report 2011: Fiji* (13 May 2011). The country information submitted by the appellant chiefly refers to the treatment of individuals critical of the government, completely unrelated to the appellant's circumstances and immaterial to his claim.

[24] The Tribunal is satisfied that the appellant's second refugee claim does not assert a significant change in circumstances material to the appellant's claim since the previous claim was determined. The jurisdictional threshold is not crossed and, pursuant to section 200(2)(a) of the Act, the refugee appeal must be dismissed.

[25] Although the refugee appeal must be dismissed for the reasons already given, pursuant to sections 200(6) and 198 of the Act, the Tribunal must still determine whether to recognise the appellant as:

(a) a protected person under the Convention Against Torture (section 130); and/or

(b) a protected person under the International Covenant on Civil and Political Rights (section 131).

ASSESSMENT OF THE PROTECTED PERSON CLAIM

Jurisdiction

[26] The refugee and protection officer of the RSB assessed the appellant's second claim to protected person status under the Convention Against Torture and International Covenant on Civil and Political Rights and dismissed it. An appeal against this decision lies under section 195(2) of the Act.

[27] Where a refugee and protection officer has considered a subsequent claim and determined that the person is not a refugee or protected person, section 195(2) of the Immigration Act 2009 provides:

> "A person may appeal to the Tribunal against a decision by a refugee and protection officer to decline a subsequent claim by the person to be recognised under any of sections 129, 130, and 131 as a refugee or a protected person (whether or not the refugee and protection officer recognised the person as a refugee or a protected person under the grounds set out in another of those sections, or both of those other sections)."

[28] Section 200(7) of the Act provides:

> "Where an appeal is brought under section 195(2), the Tribunal must determine the matter in accordance with section 198(1), as if the appeal were an appeal to which that section applied."

[29] Section 198(1) of the Act requires the Tribunal to conduct its orthodox enquiry into whether to recognise the appellant as:

(a) a refugee under the Refugee Convention (section 129); and

(b) as a protected person under the Convention Against Torture (section 130); and

(c) as a protected person under the International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[30] It is relevant to note that section 226 of the Act provides:

> "It is the responsibility of an appellant or affected person to establish his or her case or claim, and the appellant or affected person must ensure that all information, evidence, and submissions that he or she wishes to have considered in support of the appeal or matter are provided to the Tribunal before it makes its decision on the appeal or matter."

[31] Further, the Tribunal may rely on any finding of credibility or fact by the Tribunal or any appeals body in any previous appeal or matter involving the person and the person may not challenge any finding of credibility or fact so relied upon – see section 231 of the Act.

[32] Given that it is the appellant's responsibility to establish the claim and because the Tribunal may rely on past findings of credibility or fact, it is necessary to provide a summary of the first claim and the findings thereon, before turning to the present claim.

The Convention Against Torture

[33] 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 Convention Against Torture

[34] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

> "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[35] The Tribunal is satisfied that there are no substantial grounds for believing that the appellant would be in danger of being subjected to torture if deported from New Zealand.

[36] Like the refugee enquiry, the enquiry into protected person status is a prospective one. The decision-maker is required to assess whether there is a risk, in the future, of the person suffering the relevant harm. The appellant has been the victim of crime on one occasion in Fiji in the past, and as a Fijian Indian may experience minor discrimination upon return. However, such circumstances do not meet the required standard in terms of the level of harm or the intentional purposes of torture, nor do generalised assertions about a lack of democracy, state protection, and respect for human rights in Fiji. Further, the country information submitted by the appellant chiefly refers to the treatment of individuals critical of the government, which are completely unrelated to the appellant's circumstances and immaterial to his claim.

Conclusion on Claim under Convention Against Torture

[37] There are no substantial grounds for believing that the appellant would be in danger of being subjected to torture if deported from New Zealand. He is not a person in need of protection under the Convention Against Torture.

The ICCPR

[38] 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

[39] Pursuant to section 131(6) of the Act "cruel treatment" means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

> " (a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:

> (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment."

[40] As regards the level of harm required to constitute cruel, inhuman or degrading treatment or punishment, the Tribunal adopts the reasoning in *AC (Syria)* [2011] NZIPT 800035 at [82]:

> "[I]t is important to bear in mind that the level of harm required to constitute cruel, inhuman, or degrading treatment or punishment, whether for the purposes of the being persecuted analysis or as a stand-alone issue in the protected person jurisdiction, is a relatively high one. There is a broad acceptance in international jurisprudence and academic commentary that, whatever else may be required, the anticipated harm must be of sufficient severity or seriousness to bring it within the range of harm proscribed by the prohibition against cruel, inhuman, or degrading treatment or punishment. See generally, M Nowak and E McArthur *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, Oxford, 2010) at p558; W Kalin and J Kunzli *The Law of International Human Rights Protection* (Oxford University Press, Oxford, 2010) at pp 320-333; K Wouters *International Legal Standards for Protection From Refoulement* (Intersentia, Antwerp, 2009) at pp 381-391."

Conclusion on Claim under ICCPR

[41] For the reasons already discussed in respect of the claim under the Convention Against Torture, the claim under the ICCPR must fail. The appellant's claims do not establish any substantial grounds for believing that he would be in danger of suffering cruel, inhumane or degrading treatment, or arbitrary deprivation of life if deported from New Zealand.

[42] The appellant is not a person in need of protection under the International Covenant on Civil and Political Rights.

CONCLUSION

[43] This is the second time that the appellant has had a refugee and protection claim considered. There is no objective foundation for his claims. We would not expect to see any further claims lodged on these grounds.

[44] For the foregoing reasons, the Tribunal finds that the appellant:

(a) the second refugee appeal is dismissed;

(b) the appellant is not a protected person within the meaning of the Convention Against Torture;

(c) the appellant is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[45] The appeal is dismissed.

"S A Aitchison"
S A Aitchison
Member

Certified to be the Research Copy released for publication.

S A Aitchison
Member