

AT WELLINGTON

Appellant:	AD (Fiji)
Before:	A R Mackey (Chairman) M Poole (Member)
Representative for the appellant:	The appellant represented himself
Representative for the respondent:	No appearance
Date of hearing:	14 February 2011
Date of decision:	4 March 2011

DECISION

INTRODUCTION

[1] This appeal is against the decision of a refugee status officer of the Refugee Status Branch (“RSB”) of the Department of Labour (“DOL”) declining the grant of refugee status to the appellant, a national of Fiji, aged 39. The appeal was made to the former Refugee Status Appeals Authority (“RSAA”) on 15 November 2010 and now comes before this Tribunal pursuant to the transition provisions of sections 448(2) and 194(1)(c) of the Immigration Act 2009 (“the Act”).

[2] The core issue in this case is whether the appellant has a real chance of being persecuted on his return to Fiji at the hands of two ethnic Fijian ex-customers of his motor repair business. The appellant presented an almost total lack of relevant evidence in support of his claims to be a refugee or a protected person.

THE TRANSITION PROCESS

[3] Pursuant to a letter sent by the RSAA to the appellant on 19 November 2010, the appellant was offered the opportunity of having a “protected person” claim determined by the Tribunal at the same time as his outstanding refugee appeal, or to advise the Tribunal that he did not wish to pursue a protected person claim. This appellant stated that he did not wish to make a claim as a protected person.

[4] However, pursuant to section 198(1)(b) of the Act above, the Tribunal is directed to consider all three issues as to whether the appellant is a refugee, or a protected person either under the Convention Against Torture (“CAT”), or under the International Covenant on Civil and Political Rights (“the ICCPR”).

[5] Section 198(1)(b) of the Act directs the Tribunal to determine, in the following order, whether a person is:

- (i) a refugee under the Refugee Convention (section 129); and
- (ii) a protected person under the CAT (section 130); and
- (iii) a protected person under the ICCPR (section 131).

[6] In this appeal, the full obligations of the Tribunal, pursuant to section 198(1)(b), including the gist of the relevant definitions, were explained to the appellant at the outset.

[7] Given the same account is substantively relied on in respect of all three limbs of the appeal, it is appropriate to set that out first as “The Appellant’s Case”.

JURISPRUDENCE OF THE RSAA

[8] This Tribunal came into being on 29 November 2010, by virtue of section 217 of the Act. As noted in AA (Iran) [2010] NZIPT 800056 (22 December 2010), the Tribunal has inherited (subject to certain modifications by the Act) the jurisdictions of four former appeal bodies, including the RSAA. The RSAA determined all refugee appeals from the Department of Labour over the period 1991 to 2010. The development of New Zealand’s refugee law jurisprudence is substantially the product of the decisions of the RSAA’s decisions, and jurisprudence from the higher courts which arose from judicial review proceedings of RSAA decisions in that period. The

Tribunal intends to rely upon the jurisprudence so developed in determinations of appeals and matters before it subject, of course, to rulings by the superior New Zealand courts and ongoing developments in international refugee and protection law.

THE APPELLANT'S CASE

[9] The account which follows is that given by the appellant at the appeal hearing and previously. It is assessed later.

[10] The appellant is a married man aged 39 years. His wife and two children remain with family in the home district of Z.

[11] After completing about 10 years of education, the appellant undertook a form of apprenticeship as a mechanic/panelbeater. After about five years, in approximately 2006, he set up his own automotive workshop at his family home.

[12] After initially doing good business, in 2007 he ran into problems with two ethnic Fijian customers who refused to pay for the work that he had done on their behalves. He went to the police and made complaints and told the customers he would not do further work for them. After a short time, he asked the police what action had been taken. They advised him that they could not find any report on the matter.

[13] The appellant was owed about F\$1,000 by these defaulting customers. He attempted to find debt collectors to assist him but there were none within one and a half hours of his home.

[14] When he asked the customers to pay him, they threatened to burn down his workshop and/or assault him. Although neither of these things happened, the appellant became afraid and decided to shut down his business. He began working with his father selling kava in a local market.

[15] The appellant was later asked by one of the defaulting customers to do further work on his vehicle. He stated that he was no longer carrying out repair work. After that incident, the appellant's father suggested he come to New Zealand and paid the fare.

[16] The appellant arrived in New Zealand on 5 January 2009 on a valid passport.

He applied to obtain a work permit under the “skills” category of Immigration New Zealand. His qualifications and work experience were found to make him ineligible and the work permit was declined. He appealed to the former Removal Review Authority and, in a decision dated 12 April 2010, that appeal was dismissed.

[17] On 19 July 2010, he lodged a confirmation of claim for refugee status with the RSB and, following an interview in October 2010, that claim was declined on 9 November 2010. The appellant then lodged this appeal.

[18] Since he has been in New Zealand, the appellant has been advised by his father that the two ex-customers still ask about him and when he will return and fix their vehicles. He considers that if he returns to Fiji, the same people would come and ask him to fix their van and then beat him up if he does not comply. He is unsure as to whether the police would take any action if that happened. He did not think that he would move to live in a place such as Suva because his father lived in Z and would need assistance as a market vendor and also that Suva was “far away”.

COMMENTS ON PROTECTED PERSON CLAIMS

[19] The Tribunal explained the differences between refugee status and the other forms of protected person status set out in the Immigration Act and specifically asked him whether he had substantive grounds for believing he would be in danger of being subjected of either torture or cruel treatment in terms of the provisions of section 131(6) of the Act.

[20] The appellant said he had nothing further to add to the evidence already given. He reported a recent problem he had when a motor vehicle part that he had sent to his father in Fiji had not been received by him, although the customs office was still checking for it.

[21] He advised that he was currently working in New Zealand and living with his employer.

THE REFUGEE CONVENTION – THE ISSUES

[22] 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."

[23] The Tribunal is required to address two issues in this regard. 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 TO REFUGEE STATUS

[24] The appellant is accepted as a credible witness. He was open and frank in all of his answers. He readily accepted that he wished to remain in New Zealand for employment reasons, although he did fear the criminal activity of some ethnic Fijian people in his home district.

[25] The appellant's profile therefore is that of a Fijian citizen of Indian ethnic background who will be returning to Fiji after just over two years in New Zealand. Set against the country information discussed below, his profile is an unremarkable one and his predicament on return is certainly not one, when assessed in the round, that would lead to a finding that there was a real chance of him being persecuted or severely maltreated in any other way on return. Any risk to him is utterly insubstantive and remote. He has been the victim of two dishonest Fijian "bullies" who live in the same home district that he does. Their threats, while no doubt concerning, have not led to any follow-up action in the past. There is nothing else to indicate that the appellant would be subjected to serious maltreatment on return. By a long margin, he has not established that he is at a real risk of sustained or systemic violations of core human rights when he returns to his home in Fiji.

Consideration of “real chance of being persecuted” and country information

[26] In *Refugee Appeal No 76512* (22 June 2010), *Refugee Appeal No 76513* (24 June 2010) and *Refugee Appeal No 76156* (14 January 2008), the RSAA has recently fully analysed the predicament of Indo-Fijians in similar situations to the appellant in this case and has set out how issues of racial discrimination should be considered in the refugee context.

[27] In *Refugee Appeal No 76156* at [23] – [24], the RSAA relevantly noted that:

“[23] In refugee law, persecution has been defined as the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection; Hathaway, *The Law of Refugee Status* (1991) 104 to 108, as [24] adopted in *Refugee Appeal No 2039/93* (12 February 1996) at [15].

The Authority has previously noted that discrimination, in itself, is not sufficient to establish refugee status, nor does every breach of a claimant’s human rights amount to being persecuted; *Refugee Appeal No 71404/99* (29 October 1999) [65] to [67]. In that regard, the Refugee Convention was not intended to protect persons against all or any forms of harm, but confers protection where there is a real risk of serious harm that is inconsistent with the basic duty of protection owed by the state to its citizens.”

[28] In that same decision, at [26] - [30], it was found that:

“[26] The focus of the Refugee Convention is a prospective one, looking forward at risks that may be encountered by individual applicant on return.

[27] As the Authority found in *Refugee Appeal No 75780* and the other subsequent appeals in *Refugee Appeal Nos 76039* and *76082*, the December 2006 coup was notable for the absence of violence against Indo-Fijians in contrast to the earlier coups of 1987 and 2000. The Authority is satisfied that the country information available shows that, to date, the political environment following the December 2006 coup has not led to deterioration in the security of the Indo-Fijian community beyond the level of the occasional discriminatory event.

[28] In addition, it is a well-established principle of refugee law that nations are presumed capable of protecting their citizens. Clear and convincing evidence to the contrary is required to demonstrate a state’s inability to protect its citizens; see *Refugee Appeal No 523/92* (17 March 1995). It is noted that the Authority’s preliminary view, that the presumption of state protection applies in the appellant’s case, was put to him and his representatives for comment in the Authority’s letter of 13 December 2007. There was no reply received.

[29] The Authority is satisfied that even were the appellant to experience any discrimination or harassment on return to Fiji, he has not presented any evidence that he would be denied basic or core human rights by the Fijian authorities, demonstrative of a failure of state protection. This is particularly significant given that the appellant bears the responsibility for establishing his claim for refugee status; ss129P(1) and 129P(2) Immigration Act 1987.

[30] The Authority therefore finds that the appellant does not have a well-founded fear of being persecuted on return to Fiji.”

[29] In *Refugee Appeal No 76512*, at [17] - [28], the RSAA considered the principle of non-discrimination being fundamental to the enjoyment of fundamental rights guaranteed by both the ICCPR and the International Covenant on Economic, Social

and Cultural Rights (“ICESCR”) and the standards set by the international community under the International Convention on the Elimination of all forms of Racial Discrimination, 1966 (“CERD”). The RSAA noted at [27], that CERD imposes obligations to combat and eliminate racial discrimination leading to unequal enjoyment of a range of rights guaranteed under both the ICCPR and ICESCR in civil, political, economic, social, and cultural life.

[30] In *Refugee Appeal No 76512*, the RSAA then went on, at [29] - [45], to examine recent country information regarding discrimination against Fijian Indians and noted that there was no country information establishing that Fijians of Indian ethnic origin were being assaulted by the security or police forces on account of their ethnicity, but that from time to time, some had been subjected to assaults and home invasions by non-state actors (at [32] and [33]). It was also acknowledged that discrimination against Fijians of Indian ethnic origin exists in the social and economic spheres (see [34] – [41]) and that they were under represented in the Fijian legislature [44].

[31] The RSAA in *76512* found that the country information available established that there remained some degree of institutionalised discrimination against Fijians of Indian ethnic origin in Fiji and that tensions existed between Fijian and Fijian Indian communities such that Fiji was stratified along ethnic lines with indigenous Fijians tending to dominate the public sector employment.

[32] *Refugee Appeal No 76512* at [48], stated:

“While underpinned by anti-discrimination notions, the Refugee Convention requires something more than a future risk of suffering racial discrimination to be established to qualify a claimant for recognition as a refugee. It requires the establishment of the state of ‘being persecuted’, understood as serious harm plus the failure of state protection – see *Refugee Appeal No 71427/99* (16 August 2000) at [67]; *R v Immigration Appeal Tribunal; Ex Parte Shah* [1999] 2 AC 629, 653F; *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379, 403B.”

[33] Referring to this paragraph, the RSAA in *Refugee Appeal No 76513* noted at [27]:

“Thus, even if it is accepted that Fiji fails to protect some of its citizens against racial discrimination in terms of the standards imposed by the international community under CERD, this failure must nevertheless lead to a predicament for a claimant which reaches the threshold of being persecuted.”

[34] In *Refugee Appeal No 76513*, the Authority then went on to apply the findings from *76512* to the facts of the case and found that the appellant in that case had suffered isolated instances of discrimination in the past because of his Indian

ethnicity and that this has manifested itself in racial abuse, minor assaults and one more serious assault. They noted that he had suffered no serious injury of any kind on any occasion. It was also noted he had been discriminated against in his education and that his home has been broken into and his family intimidated and robbed. The Authority accepted that it was likely that this situation would prevail in Fiji when the appellant returned. However, noting this discrimination in that case, it was observed that the appellant had been able to secure employment and find accommodation.

[35] Similar findings were made in 76513 where it was concluded that there was no reason to suppose the appellant would not find accommodation and employment in the future and that, while he would be at risk of encountering occasional instances of racial discrimination, there was no real chance that any discrimination he may encounter would result in him suffering serious harm, even when those instances were viewed cumulatively, to the extent that the appellant did not have a well-founded fear of being persecuted in Fiji in the future. His appeal therefore failed.

CONCLUSION ON CLAIM TO REFUGEE STATUS

[36] Adopting the findings on his profile and predicament and analysis set out above in [26] - [35], the appellant has not established that there is a real chance of him being persecuted if returned to Fiji. Accordingly, the first issue in relation to the assessment of refugee status is answered in the negative. It is therefore unnecessary to go on to consider the second issue relating to Convention reason.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[37] 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.”

[38] Here the issue for the Tribunal is whether there are there substantial grounds for believing that the appellant would be in danger of being subjected to torture if deported from New Zealand to his country of nationality or any other nominated third country.

ASSESSMENT OF THE CLAIM UNDER THE CONVENTION AGAINST TORTURE

[39] 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.”

[40] On the same fact analysis and consideration of country information, the Tribunal is satisfied that this appellant has not established that there are substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand to Fiji. Accordingly, he is found not to be a protected person within the meaning of section 130(1) of the Act.

CONCLUSION ON CLAIM UNDER CONVENTION AGAINST TORTURE

[41] The Tribunal finds that the appellant should not be recognised as a protected person in New Zealand under the CAT as he has not established that there are substantial grounds for believing he would be in danger of being tortured on return. His claim on this ground fails.

THE ICCPR – THE ISSUES

[42] 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.”

[43] That issue is now addressed.

ASSESSMENT OF THE CLAIM UNDER THE ICCPR

[44] Pursuant to section 131(6) of the Act, “cruel treatment” means cruel, inhuman

or degrading treatment or punishment.

CONCLUSION ON CLAIM UNDER ICCPR

[45] Again, based on the same fact analysis and consideration of the country information, the Tribunal is satisfied the appellant has not established substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. The discrimination risks themselves for the appellant are found to be only at the level of remote or speculative risks. The discrimination, of itself, would not constitute cruel treatment as set out in section 131(1) or as further defined in section 131(6) of the Act.

CONCLUSION

[46] Assessed in the round, the appellant's refugee appeal and protected person claim fall considerably short of the requirements for recognition.

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

- (a) is not a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[48] The appeal is dismissed on all grounds.

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A R Mackey
Chairman

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