

AT AUCKLAND

Appellant:	BN (Fiji)
Before:	V J Shaw (Member)
Counsel for the Appellant:	M Kidd
Counsel for the Respondent:	No Appearance
Date of Hearing:	29 March 2012
Date of Decision:	20 April 2012

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee and protection officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining to grant refugee status and/or protected person status to the appellant, a citizen of Fiji.

[2] The appellant fears returning to Fiji because he expects that he will find it difficult to find employment so as to adequately support his family. He is also a pastor in the ABC Church and fears that in Fiji his church activities will bring him to the attention of the military. He also fears that he will also be prevented from establishing an ABC Church in his home village.

[3] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The account which follows is that given by the appellant. It is assessed later.

[5] The appellant, aged 35 years, is an indigenous Fijian. His home village is in XYZ province, some two hours' drive from Suva. His widowed mother continues to live in the village. His two sisters live and work in Suva. His brother has completed a diploma in electrical engineering and is currently living with their mother in the village while he tries to find suitable employment.

[6] The appellant was raised a Methodist. However, in the mid-1990s his mother joined the ABC Church. This caused some dissention within the village which was strongly Methodist and the appellant's uncle instructed the appellant and his siblings (their father having died when the children were young) that they were not to accompany their mother to the ABC Church, but were to remain Methodists.

[7] After completing high school, the appellant attended the Fiji Institute of Technology and in 1999 qualified as a carpenter and joiner. Thereafter he worked as a carpenter for various employers.

[8] Around 2002, the appellant joined the ABC Church and after several years felt a calling to become a pastor. In the church he attended in Suva, he acted as a pastor's assistant and was very involved in the youth ministry.

[9] On a Saturday evening shortly after the military coup in December 2006 when a curfew was in force, the appellant and some church friends were handing out gospel tracts near their church when they were approached by armed soldiers suspicious that they were holding a public gathering. The soldiers would not listen when the appellant and his friends tried to explain they were merely from the nearby church. Instead they ordered the group to take off their shirts and crawl along the road for some 50 to 60 metres. They were punched and kicked and the soldiers pressed their boots heavily down on their backs. After about 20 minutes the soldiers finally accepted that the men were not a threat and took them home in their army trucks. The appellant found the experience most distressing. He saw a doctor afterwards who gave him ointment and dressings for his injuries.

[10] The appellant obtained a work visa and arrived in New Zealand in May 2007. He made a visit home to Fiji to marry in December 2007 and his wife then joined him here several months later. The couple have since had two children.

[11] The appellant has been active within the ABC Church in Hamilton. During 2009 and 2010, he completed a Certificate in Theological Studies and in October 2009, he was issued a licence by the ABC Church to preach.

[12] At his church the appellant conducts a weekly service in Fijian for a small group of Fijian families and undertakes pastoral work with these families. He also holds bible study classes and helps out with youth activities. Over the last year he has delivered every two months or so a sermon for the Fijian component of a weekly Pacific Island DEF radio programme.

[13] In May 2010 the appellant's application for a further work visa was declined and subsequent requests for a work visa and a ministerial direction were also unsuccessful. The appellant was served with a deportation notice in August 2011. Without a work visa the appellant has largely had to survive on money and goods received from his church congregation.

[14] The appellant does not want to return to Fiji. He is concerned that obtaining employment will be difficult and with the rising cost of living he will struggle to financially support his family.

[15] He also fears that he could again be ill-treated by the military as happened at the time of the last military coup in December 2006. He has made a comment in one of his sermons broadcast on radio "People need to be led by the Holy Spirit and not by man-led government. God is not on their side." The Fijian government may be aware of this. Freedom of speech is restricted in Fiji and church ministers and pastors cannot freely express themselves in their preaching for fear of the government.

[16] The appellant would also like to establish a ABC Church in his home village but fears that he will be prevented from doing so as most of the villagers are Methodists and they will not tolerate a church of any other denomination in the village. In 2010, when the Seventh Day Adventists attempted to build a church in the village, the foundations were destroyed. He does not believe that the police would offer protection should the villagers similarly act to prevent him building a ABC Church.

Material and Submissions Received

[17] Counsel relies on his submissions and Fiji country material filed with the RSB. Also provided to the RSB, were several supporting letters.

[18] The Reverend AA, an ABC minister at a church in Suva has written (27 November 2011) to confirm his experience in May 2009 when he was banned by the government from preaching his weekly Sunday sermon on a local FM religious radio programme due to allegations about the content of his preaching.

The programme has now resumed but all broadcasts are closely monitored by the military and the current political situation does not allow Reverend AA and other ministers to preach “as freely as God inspires them”.

[19] A friend from the appellant’s ABC Church in Fiji, BB, has written (2 November 2011) describing the incident shortly after the December 2006 coup when he, the appellant and others from their church were approached by soldiers suspicious they were a protest group and ordered to crawl along the road.

[20] There is also a letter (19 November 2011) from CC, headman of the appellant’s home village. He confirms that the village abides by village regulations “laid by our forefathers” that no other religion or denomination will enter the village except the Methodist church. He understands the appellant wants to worship in the village with his family who attend the ABC church, but he says this cannot happen. In 2010 the village demolished the building foundation of a Seventh Day Adventist church. He does not recommend the appellant starting a new church in the village because he will face the same problem. He does not want his people to end up in prison for demolishing other church buildings.

[21] At the appeal hearing the appellant submitted support letters from the executive board of the ABC church in New Zealand and the Fijian members of the congregation to whom he ministers.

ASSESSMENT

[22] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[23] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made.

That requires consideration of the credibility of the appellant's account.

Credibility

[24] The Tribunal finds the appellant to be a credible witness.

[25] His claim will be assessed on the basis that he is a carpenter by trade and a pastor of the ABC church. In December 2006 at the time of the last military coup, he and fellow members of his church were apprehended near the church by soldiers who, wrongly suspecting them of being a protest group, made them crawl along the road for some 50 to 60 metres or so. On return to Fiji the appellant will continue his involvement in the ABC church, including preaching, and hopes to establish a ABC church in his home village, where most of the inhabitants are Methodists and opposed to churches of other denominations being established in the village.

The Refugee Convention

[26] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[27] 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."

[28] In terms of *Refugee Appeal No 70074* (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

[29] For the purposes of refugee determination, "being persecuted" has been

defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection; see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection; see *Refugee Appeal No 71427* (16 August 2000), at [67].

[30] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective; see *Refugee Appeal No 76044* (11 September 2008) at [57].

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

Fear of economic hardship

[31] The appellant is concerned that on return to Fiji he will find it difficult to obtain employment and, with the increasing cost of living, his family will experience significant hardship. He points to the experience of his brother who obtained a diploma in electrical engineering but almost two years later has not been able to find employment.

[32] However, it is speculative that the appellant would not be able to find employment. He is a qualified carpenter and since finishing his training in 1999 he worked as a carpenter for various employers up until coming to this country in May 2007. He also has experience of working as a carpenter in this country. The appellant and his wife also have immediate family in Fiji who will be able to assist with accommodation and other support while they re-establish themselves.

[33] In any event, difficulties the appellant might encounter in obtaining employment and consequent economic hardship will not be by reason of discriminatory treatment because of his political or civil status. In particular, he will not suffer discrimination because of his religious affiliation. Rather, any delay in obtaining suitable employment he might experience and meeting the high cost of living, will reflect generally poor economic conditions and underdevelopment in Fiji.

Fear of ill-treatment by the military

[34] The appellant experienced one incident of ill-treatment at the hands of the military around the time of the December 2006 coup. He and others from his church were made to crawl on their knees along the road for some 60-odd metres. While doing so they were kicked and the soldiers applied pressure with their boots to the men's backs. While undoubtedly a humiliating and distressing experience the appellant sustained no serious injuries. Nor was there any further such incident. The military did eventually acknowledge they had made a mistake about the appellant and his friends' intentions and took the men home in their trucks. Over the following five months before the appellant came to New Zealand he had no further problems with the military.

[35] The appellant fears that he could come to the attention of the military again through his position as a pastor in the ABC church. The military-backed government is sensitive to any criticism, including from within the churches as demonstrated by the banning for a period of Reverend AA's radio sermon after it was alleged he had criticised the government.

[36] Apart from this temporary prohibition in 2009 on Reverend AA's broadcasts there is no evidence that ministers and pastors in the ABC church in Fiji have been targeted by the government or are subject to undue interference in their conduct of church services or performance of other church duties. Members of the ABC church are free to practice their faith and worship. The relation between the ABC church and the government appears much better than that between the government and the influential Methodist church, which has had successive annual conferences banned, restrictions on various church activities other than Sunday services and its leaders subject to criticism and harassment: "Fiji military cancels Methodist church conference" *BBC* (23 August 2011).

[37] It is accepted that in Fiji church ministers and pastors of whatever denomination risk a hostile government reaction should sermons and other preaching be perceived to include politicised messages or criticism of the government. In consequence, as Reverend AA has stated, many may not preach as freely as they might feel inspired to do.

[38] In this country the appellant says that in one of his radio broadcast sermons he made the comment: "People need to be led by the Holy Spirit and not by man-led government. God is not on their side." There is no evidence that this relatively innocuous comment when made in the context of a religious sermon and broadcast in this country has attracted the negative attention of the Fijian government. Nor does such an isolated comment indicate a personal

predisposition on the part of the appellant to engage in openly politicised preaching. He had no political profile with the Fijian authorities when he left Fiji. He is not a prominent church leader, the ABC church in Fiji is not a major denomination and operates relatively free of restrictions. There is no real chance that if returned to Fiji the appellant will be seriously harmed because of his preaching.

Inability to establish church in home village

[39] The appellant says that on his return to Fiji he would like to establish a ABC church in his home village. The nearest such church, of which his mother is a member, is some miles away requiring a 45-minute walk.

[40] The difficulty is that, as in much of Fiji, the village is strongly Methodist and the establishment in the village of a church of another denomination would meet with hostility. This happened in 2010 when the attempt to establish a Seventh Day Adventist church was thwarted after the foundations of the new building were demolished by the head man and villagers.

[41] Were the appellant to proceed to build a ABC church in the village in defiance of the prevailing conservatism, he does not believe that the police will offer protection against attempts by the villagers to prevent building taking place. He also points to an incident some 10 years or so ago when his uncle was assaulted by a Methodist because he was a Seventh Day Adventist.

[42] It is not clear from the village head man's letter that the police would not intervene if a complaint was made. He states that he does not want his people to end up in prison demolishing other church buildings. This suggests the head man considers police intervention a distinct possibility which he wants to avoid.

[43] It may be that the appellant could establish a house church as some Pentecostal families in his village attend. A house church is not as visible as a new church building would be.

[44] The critical issue though for the Tribunal is whether, if the appellant must desist from his desire to build a ABC church in his home village because of overt hostility, including the threat of the church building being demolished and/or assault, this would amount to a significant breach of his fundamental right under Article 18 ICCPR to freedom of religion. Article 18 states:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief of his choice and freedom, either

alone or with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance. ...

Freedom to manifest one's religion or beliefs must be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or the fundamental rights and freedoms of others."

[45] How a religion is manifested will vary depending on the particular religious belief and the individual. Not all religious activities are equally critical. As explained in *Refugee Appeal No 74665* (7 July 2004) at [114]-[115], it is necessary to consider whether the prohibited activities are at the core of the relevant entitlement:

"Understanding the predicament of "being persecuted" as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm. If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement and serious harm is threatened, it would be contrary to the language context, object and purpose of the Refugee Convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin...

Under the human rights approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of "being persecuted". A prohibition is to be understood to be within the ambit of a risk of "being persecuted" if it infringes basic standards of international human rights law."

[46] In Fiji, despite there being no ABC church in his village the appellant was always able to practise his faith through regular church attendance at one of the 50 or so ABC churches in Fiji and participation in related church activities such as bible studies and youth activities. He is now a licensed pastor and on return to Fiji it will be open to him to undertake pastoral duties within the wider Fijian ABC church. When he visits his home village or stays there for any time there is a ABC church a few miles away which he can attend and where his mother is a longstanding member of the congregation.

[47] If, because of the hostility of villagers, the appellant has to refrain from establishing a ABC church in his home village this is not such an impediment to the core practice of his religious faith as to be encompassed within the notion of "being persecuted".

Conclusion on Claim to Refugee Status

[48] The appellant does not have a well-founded fear of being persecuted for a Convention reason if he were to return to Fiji. He is not entitled to recognition as a

refugee under the Refugee Convention.

The Convention Against Torture

[49] 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

[50] 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."

Conclusion on Claim under Convention Against Torture

[51] For the reasons discussed above, the Tribunal has held that there is no real chance that the appellant will be seriously harmed by the military if returned to Fiji. It follows that there are no substantial grounds for believing that he would be subjected to torture if deported from New Zealand.

The ICCPR

[52] 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

[53] 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.”

[54] Similarly, as regards the military, it follows there are no substantial grounds for believing that the appellant would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

[55] In addition to his claimed fear of mistreatment by the military, the appellant has raised the risk of him and his family suffering economic hardship because of the difficulty of finding employment in Fiji and the increasing cost of living there.

[56] The Tribunal has held that as the appellant is a qualified and experienced carpenter with a good employment record in Fiji, it is speculative that he would not be able to find employment on his return to Fiji. He also has his immediate family in Fiji who can provide assistance with initial accommodation while he and his wife re-establish themselves. He has not therefore established that there are substantial grounds for believing that he and his family will experience deprivation or harm of such severity or seriousness as to come within the ambit of a degrading or inhuman condition: *AC (Syria)* [2011] NZIPT 800035 at [82].

[57] Nor, critically, does poverty per se constitute degrading treatment for the purpose of Article 7. As explained in *BG (Fiji)* [2012] NZIPT 800091 at [148], as no general duty to provide against socio-economic deprivation can be fashioned out the prohibition on cruel, inhuman or degrading treatment, in the context of socio-economic deprivation, any qualifying “treatment” must transcend the failure of a state’s general economic policies to provide for an adequate standard of living.

[58] Any economic hardship the appellant may experience because of difficulties in obtaining employment and meeting the rising cost of living in Fiji, will not result from any discriminatory treatment or deliberate act or omission on the part of the Fijian authorities. It will be the result of generally poor economic conditions and underdevelopment in Fiji. As such there are no substantial grounds for believing that the appellant would be arbitrarily deprived of his life or suffer cruel, inhuman or degrading treatment if deported from New Zealand.

CONCLUSION

[59] 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; and
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[60] The appeal is dismissed.

"V. J. Shaw"
V J Shaw
Member

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Member