

AT WELLINGTON

Appellants:	BI (Fiji)
Before:	C M Treadwell (Chair) M A Poole (Member)
Representative for the appellants:	The appellants represented themselves
Counsel/Representative for the respondent:	No appearance
Date of hearing:	26 May 2011
Date of decision:	27 January 2012

DECISION

INTRODUCTION

[1] These are appeals against decisions of a refugee and protection officer of the Refugee Status Branch of the Department of Labour, declining to grant either refugee status or protection to the appellants, citizens of Fiji.

[2] The appellants claim to be at risk of persecution and torture in Fiji by virtue of their Indian ethnicity. The issues which arise are whether the risk of being the victim of persecution is more than merely speculative and whether there are substantial grounds for believing they would be in danger of being subjected to torture if deported from New Zealand.

[3] The appellants are a husband and wife and their two minor children, aged nine and eight years, for whom the parents are the responsible adults for these appeals. The family arrived in New Zealand in December 2009 on visitors' visas issued by the New Zealand High Commission office in Suva, on the basis that they were to attend the wife's niece's wedding. They departed Nadi airport using their own genuine Fijian passports. On the advice of one of the wife's New Zealand-

resident brothers, on 18 August 2010, the family each lodged confirmations of claim to refugee status in New Zealand, dated 16 July 2010.

[4] The same claim is relied upon in respect of all limbs of the appeals. It is appropriate to set the claim out first. For the reasons that follow, the appellants' claims do not succeed.

THE APPELLANTS' CASE

[5] The accounts that follow are those given by the appellants at the appeal hearing. They will be assessed below.

[6] Before his marriage in 2001, AA ("the husband") worked on his father's sugar cane farm but in 2000, his father employed workers for the farm and the husband moved to Suva to work as a logging truck driver.

[7] He describes a number of problems he had encountered because he was a Fijian Indian of Muslim faith, subject to harassment from indigenous Fijians. The harassment included:

- (a) During the coup in 1997, at which point he was living on the outskirts of Lambasa, indigenous Fijians came and took cattle and goats from their farm and also took his neighbour's lorry and van.
- (b) In about 2005 or 2006, there was a break-in at the family home he shared with his wife in Suva. No-one was at home but a television, radio, money and jewellery were taken. He advised that he knew the break-in had been done by indigenous Fijians because he had subsequently seen them wearing his clothes. He reported the break-in to the police but they said they had no cars available in which to come out to take a statement. The husband had no transport and it was 10 kilometres to the police station. He subsequently travelled in by bus and lodged a written complaint.
- (c) In or around 2008, the husband had gone to Namosi for his employer, to bring out a load of logs. On the way out, in the middle of the forest, the road was blocked by logs and stones. Indigenous Fijians were manning the blockade. They asked for "the boss" and then demanded "goodwill", by which they meant money. The husband was alone in the truck and was dragged out of the cab,

beaten up and punched. The money in his pocket, amounting to \$180, was taken. The husband suffered a broken tooth. He did not seek medical attention because it was a six-hour drive to the doctor, but he went to a dentist the following day and had the remainder of the broken tooth removed. His employer reported the incident to the police and compensated the husband with \$140 towards the money stolen.

- (d) There was a further incident in which three police officers were gathered in a van outside the family house, drinking alcohol. When the husband's brother approached them and asked them why they were drinking, they made suggestive remarks about the wife and daughter. The husband asked them to shift the van from his driveway and was pushed into a drain. The police then left. The husband went to the police station in a taxi and laid a complaint. Three weeks later, arising from that incident, he was charged with assaulting a police officer and swearing. He appeared in court four times before he left for New Zealand. He was summonsed to appear again but, on failing to do so, was fined \$500. The husband says (letter 20 June 2011) that he has been advised by a relative that his complaint against the police for their conduct on that occasion has been dropped, with the finding that there was no case to answer.
- (e) The husband describes other incidents, including a number of times when his truck had been stopped by indigenous Fijians and his wallet taken with a warning given that if he reported it to the police, they would kill him. He was also robbed when he taxi-driving in Suva in 2004, with the assailants taking \$80 and his taxi meter.
- (f) He claims to have been tortured by indigenous Fijians because of his religion. He indicated that they prevented access to and from places unless they were paid them money. They had thrown stones at the husband and his house. The stones did not hit him.

The wife

[8] BB ("the wife") is a 32 year-old citizen of Fiji. As a child she lived on the leasehold farm where her father grew sugar cane. One of her older brothers was a prison officer in Suva and lived in the prison staff compound. She visited him during the school holidays, with her last visit there in or about 1990. She explains

that the prisoners got to know her from her visits to the prison and, once they were released from prison, they started to torture her. She encountered them when they were roaming around, and would come to her home begging for things. These problems with the prisoners started in 2001, after she and her husband had moved to Suva.

[9] She knew that the prisoners recognised her because, on one occasion when a group of people came to her house, one of them made a comment that he knew who she was and identified her as being the prison officer's little sister. That was the only time that a former inmate had identified her, but his associates often came to their place and asked for "this, that and the other". That inmate had a gang who returned repeatedly to beg at her house.

[10] There was a burglary at the house, during which pots and pans had been stolen. The wife is uncertain exactly when that had occurred but it was between 2000 and 2002. The former inmates would come to her home and threaten her, demanding food and threatening to beat up her and her children. However, on no occasion did any of these beggars or former inmates hurt her; they merely threw stones at the house and broke some louvre windows. Nor did they hurt her children, although she states that when they were begging outside the house, they would stop the children from going to school by standing in the way and saying "Go back home. You're not going to school". She does not know why the beggars would have cared about or attempted to prevent the children from going to school, but states that her children could not attend school when these people were around because her perception was that they might beat her children.

Appellants' comments on relevant law and country conditions

[11] An explanation and definitions of being a "refugee" and/or "protected person" have been given to the appellants. They confirm that they understand those explanations.

THE REFUGEE CONVENTION – THE ISSUES

[12] 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 appellants as:

- (a) a refugee under the 1951 Convention Relating to the Status of

Refugees (“the Refugee Convention”) (section 129); and

- (b) as a protected person under the 1984 Convention Against Torture (section 130); and
- (c) as a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[13] In determining whether the appellants are refugees or protected persons, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellants’ accounts.

Credibility

[14] The Tribunal finds that the appellants were credible witnesses and their accounts of the events they describe are accepted.

The Refugee Convention

[15] 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.”

[16] 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.”

[17] 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 appellants 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

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

[18] The issue of whether an appellant faces a real chance of being persecuted is a forward-looking assessment. The relevant determination is therefore whether or not the appellants face a real chance of being persecuted for a Convention reason if they were now to return to Fiji. In refugee law, persecution has been defined as the “sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection”; see *Refugee Appeal No 2039/03* (12 February 1996).

[19] The appellants may face some discrimination from indigenous Fijians in Fiji because of their Indian ethnicity or their Muslim faith. However, there is no evidence before the Tribunal to indicate that such discrimination would amount to a “sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection”; *Refugee Appeal No 2039/93* (12 February 1996). The Refugee Convention is only engaged where such discrimination can be characterised as a violation of an individual’s core human rights. In the present case, the risk of discrimination to which the appellants may be exposed falls well short of the persecution threshold.

[20] The episodes the husband describes are random incidents; he has been robbed and assaulted, and his house has been burgled. The wife has been subject to harassment in the form of beggars coming to the house and demanding food, throwing stones at the house and, in her mind at least, preventing the children from attending school. The incidents in which the husband has been involved have been reported to the police but there has been no satisfactory resolution to any of them. However, there is no suggestion that any of these incidents were the result of the appellants being targeted; they were random, opportunistic offences and, with the exception of the beggars who are said to have returned to the house on more than one occasion, they are unconnected events.

The children

[21] Particular regard is had to the appeals by the two children. The only actual experience of such matters these children have is to have seen the beggars asking for food and throwing stones at the house. While these events may be disturbing for younger children to witness, they are not incidents that expose the

children to any risk of harm.

[22] The primary expectation, of course, is that parents will do their best to shield their children from the effects of such incidents and any fear or anxiety they experience as a result. The parents on this appeal present as caring and supportive adults who want only the best for their children.

[23] Given that the Tribunal can expect the parents to sufficiently protect the children's mental and emotional well-being in this way, it is satisfied that there is not a real chance of them suffering serious harm in terms of their mental and emotional development.

Conclusion on Claim to Refugee Status

[24] There is nothing that points to anyone singling the appellants out for further harm, or that the recurring incidents of begging at the appellants' home would lead to any risk of harm.

[25] There is no evidence before the Authority which indicates that the appellants face a real chance of being persecuted in Fiji should they return there now. Their past experiences there do not constitute persecution and there is no basis for any fear of being persecuted there in the future.

[26] For all of the reasons above, the Authority finds that the appellants do not have a well-founded fear of being persecuted in Fiji.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[27] 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

[28] 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

[29] The factual matrix is the same under this limb of the claim as under the Refugee Convention.

[30] The duty to protect against torture under the Convention Against Torture is only engaged where the acts complained of are “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”.

[31] The husband and wife both claimed to have been tortured by indigenous Fijians; the husband claims that this was because of his religion. The wife claims to have been tortured by the former inmates, largely through their acts of begging and harassment.

[32] None of the incidents relied upon as being torture comes within the definition at paragraph [28] above. Not one involves severe pain or suffering and none were carried out at the instigation of or with the consent of a public official or other person acting in an official capacity.

[33] For the reasons already given, and having taken into account all of the appellants’ circumstances, the Tribunal finds that there are no substantial grounds for believing that they would be in danger of being subjected to torture if deported from New Zealand. Accordingly, the appellants are not protected persons under section 130(1) of the 2009 Act.

THE ICCPR – THE ISSUES

[34] 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

[35] 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; and
- (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.

Conclusion on claim under ICCPR

[36] Again, the factual matrix is the same under this limb of the claim as under the Refugee Convention.

[37] For the reasons already given, and having taken into account all of the appellants’ circumstances, the Tribunal finds that there are no substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. Accordingly, the appellant is not a protected person under section 131 of the 2009 Act.

CONCLUSION

[38] For the foregoing reasons, the Tribunal finds that the appellants:

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

[39] The appeal is dismissed.

"M A Poole"
M A Poole
Member

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M A Poole
Member