

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 70618/97

AT AUCKLAND

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| <u>Before:</u> | S Joe (Chairperson) D J Plunkett (Member) |
| <u>Counsel for the Appellant:</u> | Mr B Burson |
| <u>Representative for the NZIS:</u> | No Appearance |
| <u>Date of Hearing:</u> | 8 October 1997 |
| <u>Date of Decision:</u> | 30 June 1998 |

DECISION DELIVERED BY D J PLUNKETT

This is an appeal against the decision of the Refugee Status Branch (RSB) of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a national of Bangladesh.

INTRODUCTION

The appellant is a 28 year-old single man from Dhaka, Bangladesh. He is from the Bihari ethnic group. His father is deceased and his mother lives in a refugee camp in Dhaka. He has no brothers or sisters.

The appellant arrived in New Zealand on 19 April 1996 on a false passport. He was granted a visitor's permit for 14 days. On 2 May 1996, solicitors on his behalf submitted an application for refugee status. Following an interview with the RSB on 8 May 1997, the appellant's solicitors were notified of the decline of his application by letter to them on 25 June 1997 enclosing a written decision of the same date. From this decision, the appellant appealed to this Authority.

BACKGROUND

In order to consider the appellant's case, it is helpful to understand the socio-economic situation in Bangladesh and the recent history of the Biharis there.

SOCIO-ECONOMIC CONDITIONS IN BANGLADESH

Bangladesh is among the world's poorest countries, according to the World Bank's World Development Report (see The Economist Intelligence Unit Country Profile 1996-97, for Bangladesh at p9).

It has been described as follows (see United States Department of State Country Reports on Human Rights Practices for 1996 for Bangladesh at p1417):

“Bangladesh is a poor country. Annual per capita income is approximately \$250; about 43 percent of the country's 123 million people exist on incomes insufficient to meet minimum daily needs.”

The wretched conditions of the general population are evident from the following publication, Steinar Askvik, “Bangladesh” in Peter Baehr *et al* eds, Human Rights in Developing Countries Year Book 1995 (93 at pp111-112, footnote references omitted):

“Bangladesh is often referred to as the ‘basket case’ among the developing countries. This term was first used by Henry Kissinger in 1974, to signify ‘a deeply impoverished country with a rapidly growing population living in a river delta subjected to frequent floods and deadly cyclones.’ Statistical indicators reflecting socio-economic development provide evidence that the country is one of the poorest in the world. According to the United Nations Development Programme (UNDP) human development index, in 1994 Bangladesh was ranked as 146 out of 173 countries...”

The country is now almost self-sufficient in food, although this was not the case in 1994 due to drought. There is still widespread hunger, but there is currently little overt starvation... Although overall poverty has declined somewhat and several socio-economic indicators show positive development, there is an ongoing process of marginalisation of a growing part of the population living in extreme poverty...

The 1990 report on human rights in Bangladesh noted that the most important category under the right to an adequate standard of living, is access to adequate food. Data on daily calorie intake of the average adult provide an estimate of the access to food. The Household Expenditure Survey (HES) of the Bangladesh Bureau of Statistics shows that a large part of the rural population has a very low level of calorie intake. During 1988 - 1989, the average daily intake was 2,215 calories per person, while the poverty line was defined at 2,122 calories *i.e.* the amount of calorie intake defined as necessary to avoid malnutrition. Hence, 48 percent of the population were living below the poverty line in ‘absolute poverty’. A hard-core poverty line is defined at a calorie intake of 1,805 calories, signifying the proportion of the rural population living under ‘extreme poverty’ to be 30 percent.

Corresponding proportions of absolute and extreme poverty for urban areas are estimated to be 44 percent and 21 percent respectively.”

The conditions for employment, health and education are particularly relevant to the appellant's case (*ibid.* pp114-117):

“According to official figures, only about two percent of the workforce is unemployed. This number is based on those who are registered as unemployed. In practice, the basic problem is to find employment which provides sufficient income to yield an adequate standard of living. Furthermore, 18 percent of the workforce is underemployed in so far as they work less than 40 hours per week. They cannot survive without an income, and will seek any kind of employment however fleeting or poorly paid...

The demand for labour has somewhat gone up during recent years, and the number of job opportunities has increased. The problem is that at the same time the supply of labour has also been increasing due to the growth of the population. As a result, the employment situation has not generally improved, and the future prospects are that only 35 percent of the new entrants into the rural labour force will be absorbed through an increased labour demand...

Two thirds of the labour force in the urban areas works in the informal sector, *i.e.* they are not employed on a regular basis by a formal organisation. Either they are self employed (e.g. rickshaw pulling, petty trading), or they are wage employed (e.g. domestic servants, day labourers). The working conditions of those employed in the informal sector are poor. Wages are low, and no contracts regulate the relationship between employers and employees. In the formal sector, the most significant development has been the growth of the garment industry, which currently employs more than 900,000 people, 85 percent of which are women. In general, the proportion of women workers in the formal sector has doubled during the last decade and about 30 percent of the workers are now women. This increase is partly a result of increasing poverty, which forces more family members to work outside the home. In the formal sector, working conditions are also substandard. There is no legal provision for ensuring a minimum wage to 90 percent of the industrial workers, and, for instance 99 percent of the workers in the garment industry do not have ‘appointment letters’. Owners can dismiss them at any time, at their own discretion, without facing any legal complexity...

Poverty, poor sanitation and widespread malnutrition significantly contribute to the low life expectancy of Bangladeshis. Life expectancy at birth is 56 years, which is among the lowest in the developing world...

The infrastructure of the health care system comprises 64 district hospitals, 400 *thana* health complexes (in and out-patient treatment), and about 3,000 health and family welfare centres and subcentres at the union level. At the community level, there are 100,000 outreach posts for immunisation, as well as 30,000 satellite clinics for prenatal and postnatal care and family planning. The number of inhabitants per health care worker is 4,000, which is far lower than that of other comparable countries. Nevertheless, according to observers, ‘the health system is seriously flawed in management and operation, and most patients get very unsatisfactory treatment. There is no system for quality control and accountability, and there is a tremendous wastage of resources.’ For instance, at *thana* health complexes the bed occupancy rate is below 50 percent. ‘The proportion of child deliveries receiving skilled care is only 25 percent. Only about 30 percent of the population has access to the health care system, many rural people are totally unaware of the Government health services (...). Some NGOs have made commendable efforts to deliver more efficient health services, but they still only reach a small fraction of the population...

The Constitution of Bangladesh holds the State responsible for providing education and removing illiteracy. Primary education has been compulsory since 1993. Nevertheless, the illiteracy rate and the lack of primary education continue to be among the highest in the world. In 1990, the literacy rate among the adult population was estimated at 35 percent. The official primary school enrolment rate was 78 percent, and the completion rate was 39 percent, which means that only about 30 percent of children complete primary school. However, estimates differ and some observers claim that only 15 to 20 percent of an age group complete primary school.

Formal education in Bangladesh is offered at the following levels: primary school (age 6-10), secondary school (age 11-15), and higher secondary school (age 16 - 17). There are approximately 50,000 primary schools, 13 million students, and 190,000 teachers. The educational system at the primary level, however, is in a particularly poor state and staffing is inadequate. During the 1980's, the quality of education declined as a consequence of an increasing student per teacher ratio. Educational materials are scarce and classrooms are crowded."

THE BIHARIS

The Biharis are a group of Urdu speaking non-Bengali Muslims, residing in Bangladesh. There are approximately 300,000 (and perhaps as many as one million), of whom some 250,000 live in 66 refugee camps.

Originally from the State of Bihar in India, they opted for migration to East Pakistan (now Bangladesh) at the time of the partition of the Indian sub-continent in 1947. During the war leading to the independence of Bangladesh in 1971, they were accused of siding with Pakistan and since independence, most have opted to obtain Pakistani citizenship if they can. While Pakistan agreed in principle to accept them, resettlement has largely not been carried out due to resistance in Pakistan and the cost of resettlement. Many therefore live in refugee camps in Bangladesh. They may seek employment and conduct other activities but as non-citizens they do not vote or hold passports and may not be employed by the government. They may apply for Bangladeshi citizenship at any time and those who do, are granted full rights (see United States Department of State Country Reports on Human Rights Practices for 1993 at p1326; DIRB, Canada Bangladesh: Country Profile, June 1990 at p24).

THE APPELLANT'S CASE

The appellant's evidence is set out in summary form here and is assessed in a later section.

In 1947, at the time of the division of India and Pakistan, the appellant's father

moved from the State of Bihar in India to what was then East Pakistan because of his Muslim faith. The appellant was born there in 1969. In 1971, when the appellant was about two years old, his family lost their home and his father was killed by Bengali freedom fighters during the war of independence with what was then West Pakistan. The state of Bangladesh emerged from this war.

The appellant and his mother then went to live in an area of Dhaka called MP where they rented a house and sometime in the period from 1975 to 1978 they moved to a refugee camp for Biharis.

The appellant described to the Authority the atrocious living conditions for the 10,000 - 12,000 Biharis living in the camp. The appellant and his mother lived in a small flat, comprising the living quarters which was a room measuring eight feet by six feet and a small kitchen. They were on the third floor of a building made of concrete and brick. There was no window but they did have one ventilator. There was no running water in the flat itself and only three wells from which water could be drawn for the whole camp. Sometimes the taps did not work and long queues would form at the wells. They did not have a toilet in their own flat and the camp itself only had 13 male toilets and 13 female toilets, though about half of them did not function. People would therefore use the toilets at a nearby camp or at the local mosque or those provided by the city council outside the camp. They had electricity in their flat which powered one light and an electric stove. The electricity supply, however, was interrupted on up to two or three occasions a month and would take between three to four days to be reconnected.

The government has not carried out any maintenance on the camp in the 25 years since its establishment. The residents themselves pooled money for important maintenance work. The drains were also not properly maintained and when it rained sewage would flow out of the drains.

The inhabitants in the camp were entitled to monthly rations from the government of flour, wheat, oil, sugar and salt. The appellant produced to the Authority one of the ration cards his mother had used. The appellant told the Authority that, while he and his mother could have lived outside the camp if they wanted to, they could not afford to do so and would not have received the rations to which the camp inhabitants were entitled. The movement of camp residents was not restricted and they were free to go in and out of the camp as they pleased.

There was no doctor at the camp and medical treatment was difficult and expensive to obtain. There were two hospitals from which treatment could be obtained. In the first one, the appellant said that as soon as those seeking treatment mentioned their Bihari status and gave the refugee camp as their address, they would be given a distant date to return for treatment. The appellant said it was very hard to obtain a bed at the hospital and the doctors would charge 500 - 600 taka for the medicine despite the fact that it was supposed to be free. The second hospital was Saudi-funded but was so busy it was hard to get an appointment and it used cheaper medicines which, in any event, were not free. This facility was for all poor people, not just for Biharis.

While living in MP, and prior to going to the refugee camp, the appellant was refused entry to school because he was not a Bangladesh citizen and was a Bihari. His mother therefore decided to apply for Bangladesh citizenship but was declined because the authorities said the Biharis were "Pakistani - minded" and wanted to go to Pakistan. The appellant does not remember when this happened because he was too young but it was after their move to the refugee camp. The appellant received a basic Islamic education, including instruction in the Koran, at a mosque inside the camp and was taught how to read and write Bengali by a friend at his house. The appellant described his standard of Bengali as "not good" but average for people in Bangladesh. He also knows basic arithmetic and can speak Urdu. The appellant said that children in the camp now go to school but they did not when he was young.

The appellant's lack of formal education, as well as his Bihari origins, have limited his employment opportunities. He found difficulty in obtaining work and was variously told by prospective employers, when refused work, that he had either insufficient education or insufficient experience or was not a citizen or did not have a certificate from the local city council or was Bihari. He did obtain casual work from time to time loading and unloading cartons at a garment factory and worked on average for eight to 10 days a month (though it could be as little as five days) for which he would be paid about 50 taka a day, which was less than Bengalis would get at 70-75 taka a day. His mother worked part-time in a sewing factory for 10-15 days a month depending on the orders. The average monthly income of the two of them was about 1,000 taka, which the appellant said was just enough to live on. Some months they were able to save money but that would be spent in subsequent months. The rations received from the government would enable them to survive for about 15 days but for the rest of the time they would have to

buy food or, if they could not afford it, borrow it from others. On some days their intake of food was very low but there were no days when they had no food.

One day in early 1984, while the appellant and his mother were returning to the camp, they were accosted by seven or eight local thugs who knew his mother. The bullies asked for a "donation" and he asked for what reason. They declined to give them any money which resulted in verbal abuse. When he protested, he was hit on the arm with a stick and his wrist was broken. His mother took him to a hospital but they could not afford the medical treatment and so went to a local woman at MP to obtain herbal treatment. His arm healed but his wrist is still bent a little. He went to the police but they took no action.

The appellant was also once robbed by local thugs. This happened in January or February 1996. He was on his way home and was close to the camp entrance when he was confronted by a group of Bengalis who punched him and took 100 taka, which was two days' wages. He knew who they were and they knew him to be a Bihari. He did not go to the police because they did not help him on the earlier occasion when his arm was broken.

The appellant said that there were numerous minor incidents when he was accosted by local bullies who demanded money. Sometimes he would just be abused or called a "collaborator with Pakistan" and other times he would be beaten. He was beaten three or four times a year when the political situation in Bangladesh was stable (such as the period 1991-1992) or up to four to five times per month during politically chaotic periods (such as 1995-1996). The appellant did not go to the police because he got no help when he went in 1984.

The appellant also pointed out that he had never been able to vote.

The appellant was asked why he left Bangladesh. He replied that, since boyhood, he had a hatred of the country and had lost confidence in it. He described it as "living in hell" with no opportunities, a lack of police protection, no security of employment, no social security and no security of life. He also said it was unhealthy and made reference to the "social pressure". The NZ\$3,000 cost to get to New Zealand was borne by the same friend who had taught him to read and write and who had emigrated to the United States. This friend lent him the money when visiting Bangladesh. The appellant obtained a passport from an agent who substituted the appellant's photograph on a genuine passport. The agent recommended New Zealand because of its human rights record.

The appellant's mother only applied for citizenship once and he did not ever apply himself. The appellant thought that Biharis were not entitled to obtain Bangladeshi citizenship or a passport but even if there was such a right, he said that government officials created practical impediments. Apart from the rejection his mother had faced in obtaining citizenship many years ago, the appellant referred to another incident when a friend of his, who wanted to travel overseas to work, was declined a Bangladeshi passport in 1992 or 1993 because he was told that Bengalis should have priority over Biharis for overseas jobs. The appellant said that even if he had the right to apply for Bangladeshi citizenship he would not do so because they had killed his father and also because of the social injustice and intolerable life there. He said he wanted to live in either Pakistan or New Zealand.

The appellant produced his identity card issued by the Non-Locals Relief Committee of the refugee camp, together with a recent letter from his mother recording that she had lost her job due to old age, that local bullies were trying to evict her from the camp and that she had not obtained any help from the police or the administration because they wanted money. Photographs taken of the appellant's refugee camp and an adjoining one were also produced. The Authority records that counsel also produced a letter, a number of newspaper and magazine articles and other materials relating to the plight of Biharis in Bangladesh, and referred to other reports on human rights in Bangladesh.

At the conclusion of the hearing, counsel was given leave to produce written submissions. These were received on 24 October 1997 and, together with counsel's opening memorandum of 6 October 1997, have been duly considered. Indeed, counsel is complimented on his learned and provocative submissions. On 17 November 1997, counsel submitted extracts from the Daily Inqilab of 12 October 1997, with translations. Another article from this publication (dated 24 November 1997) was submitted on 28 January 1998. Certain additional materials were sent to counsel on 15 May 1998 by the Authority and counsel's comprehensive reply is dated 8 June 1998. These further materials have also been considered.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly 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, is unable or, owing to such fear, is unwilling to return to it."

In terms of Refugee Appeal No. 70074/96 (17 September 1996), the principal issues are:

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

ASSESSMENT OF THE APPELLANT'S CASE

Before the identified issues can be addressed, an assessment must be made of the appellant's credibility. The Authority generally accepts the appellant's story and his account of his harsh life in Bangladesh, though finds that he exaggerated the extent of his plight. In assessing the appellant's credibility, the Authority has had regard to the appellant's lack of formal education. The following aspects of his claim are not accepted:

1. His evidence as to the access of Bengalis to medical treatment (as compared with Biharis).

The appellant says that he was unable to afford medical treatment at a hospital for his broken wrist (treatment which, the appellant says, should have been free) and accordingly it was treated by a herbal practitioner. While the injury healed, it left the appellant with a somewhat bent wrist. This evidence is accepted, though the appellant was evasive when he was asked whether doctors would similarly extort money from Bengalis. He claimed not to know. The Authority disbelieves this evidence. The appellant lived in Bangladesh for more than 26 years and worked for, and with, Bengalis and would have known the answer to this question. The appellant's claim that he was to be charged for the treatment, because he is a Bihari, is not accepted.

2. The claimed number of occasions on which he was beaten by thugs.

The appellant was evasive and his evidence on this topic exhibited marked mobility as he took the opportunity to considerably embellish his account. The appellant described to the Authority the “little things” that happened at night when he was stopped by local thugs demanding money who abused him and hit him with their hands. He was asked how often this happened and replied “three or four times a year”. When it was pointed out to him that, in his statement filed in support of his refugee application, he said “two or three every month”, the appellant explained that it varied since at times of political chaos, such as 1995/1996, it was more but in stable periods, such as 1991/1992, it was less. The Authority observes that, if that was the position in 1995/1996 (which is when he left Bangladesh), it is surprising that he did not give this answer when initially asked the frequency of these incidents but gave the lower and earlier 1991/1992 frequency. The appellant was then asked how many times he was beaten or hit in the 1995/1996 period and responded that it was “four or five times or more” a month during the worst months. The appellant thus continued to embellish his account. From “two or three times every month” as set out in his statement, which he explained occurred during periods of political chaos, he reached “four or five times or more” during the worst months, a far cry from the initial three or four times a year.

3. His evidence as to Bengalis (as against Biharis) being the victims of robberies.

When the appellant was asked whether the thugs targeted anyone with money or only Biharis, he claimed not to know. When he was later asked if Bangladeshis were the victims of these robberies, just like Biharis, he repeated that he “had not much knowledge of this”. The Authority found the appellant’s demeanour evasive and unconvincing and disbelieves his evidence that he does not know.

The Authority had the impression of a ‘studied avoidance’ by the appellant of the comparative fate of Bengalis regarding medical treatment and robberies which may be contrasted with his knowledge that their average daily income was 20 - 25 taka higher than his. He knew their treatment when it suited him. The evasive and embellished description of the

robberies and beatings, together with his evasive evidence as to how Bengalis fared as the victims of local bandits or in seeking medical treatment, casts doubt on the reliability of the appellant's evidence generally as to the predicament of Biharis in Bangladesh, and particularly that of the appellant and his mother.

4. The purpose for which the photographs of the two refugee camps were sent to him by his mother.

It is not accepted that he would put his mother to the trouble and expense of obtaining photographs of the appellant's camp and an adjoining one, for the reason given, namely "to remember the camp where he grew up", when regard is had to the claimed poverty of his mother. The Authority found the appellant insincere when questioned about this. Furthermore, the claimed reason does not sit well with the presence of two photographs of an adjoining camp. A far more likely explanation is that they were obtained for the appellant's refugee claim, a suggestion he denied. While on its own a somewhat minor matter, it is another example of the appellant making up evidence to suit his case.

5. The appellant's claimed affinity for Pakistan and the reason he came to New Zealand and did not go there (see later).

THE BASIS OF THE APPELLANT'S CLAIM

The heart of the appellant's case, as ably presented by his counsel, is his socio-economic plight. As such, this is a rare case. The Authority is daily confronted by putative refugees who fear serious harm to their person or liberty. Counsel does not shirk from advancing his client's case on the basis of the privations he suffered living in the refugee camp in Bangladesh. It is, submits counsel, inappropriate to categorise claimants such as the appellant as economic migrants. It is the appellant's case that his socio-economic plight has been materially caused by government and societal discrimination and accordingly, he is entitled to the protection of the Refugee Convention.

PERSECUTION DEFINED

As formulated in the Refugee Convention, set out above, refugee status is

predicated upon a well-founded fear of “persecution”. While not defined in the Convention, the Authority has repeatedly accepted the test put forward by Professor Hathaway in his seminal text, The Law of Refugee Status (at pp104,108):

“... persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”

or

“... refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.”

(see, for example, Refugee Appeal No. 2039/93 (12 February 1996) at p15).

Counsel for the appellant submits that the socio-economic plight of the appellant as a Bihari amounts to cruel, inhuman or degrading treatment of the appellant by Bangladesh (being contrary to, *inter alia*, Article 5 of the Universal Declaration of Human Rights 1948). Reference is also made by counsel to breaches of the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1948 (ICESCR). Accordingly, it was submitted that the appellant had suffered persecution in the past and that there is no evidence that the situation would be any different now if he returned to Bangladesh.

Counsel’s argument faces two hurdles.

The first is that a distinction must be drawn between a breach (or breaches) of human rights and persecution, since it is not every violation of human rights that constitutes persecution. The breach (or breaches cumulatively) must be of sufficient severity to amount to persecution as that term is understood in international refugee law and accepted by the Authority; see Refugee Appeal No 2039/93 (12 February 1996).

This is particularly a difficulty for asylum-seekers, such as the appellant, whose claim is largely based on his socio-economic situation.

In Canada (Attorney-General) v Ward (1993) 103 DLR (4th) 1, 28, La Forest J. giving the judgment of the Supreme Court of Canada said:

“As explained earlier, international refugee law was meant to serve as a “substitute” for national protection where the latter was not provided. For this reason, the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for “persecution” in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants i.e. individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.”

As Professor Hathaway opines (*op cit.* p117):

“A line is therefore drawn between migration for reasons of “personal convenience” or in search of improved living conditions, and migration driven by fear of a human rights violation tantamount to persecution. Because economic hardship is not necessarily a contravention of human rights norms, it is correct to exclude from refugee protection persons whose sole motivation for migration is the desire to leave generalised, difficult economic conditions, or who only wish the opportunity to build a more economically secure life. Such persons are economic migrants, not refugees:

“The apprehension or calculation of the hardships which may be the lot of an entire group of people; and the reasonable desire to improve one’s condition in life, either psychologically, socially or morally, are not sufficient ...”

It can be seen therefore that asylum-seekers who are properly characterised as economic migrants will normally be excluded from the protection of the Refugee Convention because the hardships they face do not amount to persecution.

The second hurdle faced by counsel, which is dealt with in the following section, is the requirement that any persecution feared by the asylum-seeker be the consequence of discrimination against him or her because of one or more of the five Convention grounds. In other words, even if socio-economic hardships amount to persecution, the asylum-seeker must additionally establish a Convention reason for that persecution.

In the light of the Authority's conclusion that the appellant's socio-economic plight is not the result of discrimination against him as a Bihari (see later), the Authority does not propose to determine whether the appellant's straitened circumstances or the position of Biharis generally disclose breaches of the international Covenants by the state of Bangladesh. Such a determination would involve a comprehensive historical and contemporary analysis of the state's treatment of Biharis (and Bengalis) in a wide range of spheres.

The real issue in this case lies in the second hurdle and is whether there is a

Convention reason for the appellant's situation in Bangladesh, notably discrimination against him because he is a Bihari.

CONVENTION REASON

It is patent from the Inclusion Clause in the Refugee Convention that the persecution feared by the appellant must be "for reasons of race, religion, nationality, membership of a particular social group or political opinion" (emphasis added).

There must be a sufficient nexus between the persecution and (one or more of) the appellant's race, religion, nationality, social group or political opinion. The existence of discrimination against the asylum-seeker on one of the above grounds, which must be causative of the persecution, is essential. In the absence of such discrimination, the claim must fail:

"Under the Convention, then, if the peril a claimant faces - however wrongful it may be - cannot somehow be linked to her socio-political situation and resultant marginalisation, the claim to refugee status must fail. Put succinctly, refugee law requires that there be a nexus between who the claimant is or what she believes and the risk of serious harm in her home state." (Hathaway *op cit.* pp136-137).

This has been followed in New Zealand (see Refugee Appeal No. 3/91 (20 October 1992) at p71). The presence of discrimination is therefore necessary, though is not sufficient, to establish a refugee claim.

This has been endorsed more recently by the High Court of Australia in "Applicant A" v Minister of Immigration 142 ALR 331,334:

"... the feared persecution must be discriminatory. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination (race, religion, nationality, membership of a particular social group, or political opinion) mentioned in Art 1A(2). The persecution must be "for reasons of" one of those categories. This qualification excludes indiscriminate persecution which is the product either of inhuman cruelty or of unreasoned antipathy by the persecutor towards the victim or victims of persecution. Persecution of that kind is a general, non-discriminatory denial of fundamental rights and freedoms."

The fundamental requirement of a causal link between the harm feared (which must amount to persecution) and discrimination or marginalisation of the putative refugee (due to a Convention ground) mandates that economic migrants, irrespective of the harshness of their situation, are not refugees unless there is

such a link. In other words, the Refugee Convention has no relevance if there is no nexus between the economic conditions faced by the asylum-seeker and his or her race, religion, nationality, membership of a political social group or political opinion.

It follows that if the appellant's plight is not a consequence of differential treatment based on one of the five Convention grounds, but is one universally shared by Bihari and Bengali alike, the appellant will not enjoy the protection of the Convention.

Accordingly, the Authority will now assess the evidence supporting the appellant's claim that his plight is a consequence of discrimination against him as a Bihari by the government and the majority Bengalis. The Convention reasons identified by counsel are race and membership of a particular social group (Biharis). There is no need to consider whether Biharis are a particular social group because they are clearly a distinctive ethnic group in Bangladesh and are therefore a race for the purposes of the Convention. The Authority accepts the observation in the United Nations 'Handbook on Procedures and Criteria for Determining Refugee Status' (at paragraph 68) that race must be "understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage". The term has been analysed in Refugee Appeal No. 1222/93 (5 August 1994) where the broad meaning favoured by the Court of Appeal in King Ansell v Police [1979] 2 NZLR 531 was adopted. It is a question of whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their race, nationality or ethnic origins. The Biharis plainly meet this test.

EVIDENCE OF DISCRIMINATION

It is the appellant's case that he faced government and societal discrimination because of his Bihari ethnicity, in the following respects:

- (i) Denial of entry into primary school
- (ii) Refusal of medical treatment for a serious injury
- (iii) Physical attacks and verbal abuse by the Bengali population
- (iv) Refusal of employment
- (v) Lower remuneration than Bengalis when he did obtain employment.

The Authority will deal with each *seriatim*:

- (i) It is accepted that the appellant was denied entry into primary school at least partially by reason of his Bihari status (though predominantly by reason of his lack of citizenship). However, the Authority observes in this regard that this would have occurred in the mid 1970s, shortly after the civil war, that it occurred before primary education became compulsory in Bangladesh and that Biharis are no longer deprived of education (the appellant said that there is now a school in the camp for Bihari children). While the latter is of little consolation to the appellant, it is relevant in that it shows that the government does not presently discriminate against Biharis by failing to provide education and accordingly it may be taken into account in assessing whether the appellant faces a real chance of discrimination, amounting to persecution, whether in education or in any other sphere of life, if he now returned to Bangladesh. It is also noted that the appellant, despite the lack of a formal education, has literacy skills which he described as average for a Bangladesh citizen and basic numeracy skills.

- (ii) The Authority has already rejected the appellant's evidence that the hospital doctors sought to charge him for treatment of his broken wrist because he is a Bihari.

- (iii) The Authority has already remarked on the mobile and embellished nature of the appellant's evidence as to the attacks he suffered at the hands of local Bengali thugs and has dismissed his evidence that he does not know whether Bengalis are similarly robbed and assaulted. The Authority has no doubt that Bangladesh, in common with most, if not all, impoverished countries, has significant law and order problems. Counsel himself describes Bangladesh as generally violent. The Authority accordingly does not accept the appellant's claim that the harassment of him by local bullies was racially motivated. Even if it is true that he has been robbed, we find that he has merely been the victim of common street crime.

 As to the personal abuse and name-calling (he has been called a "collaborator with Pakistan"), such incidents, while racially motivated, do not, in any way, amount to persecution.

- (iv) It is the appellant's case that he was from time to time refused employment

for a number of different reasons; insufficient education, lack of experience, not a citizen, no city council certificate or because he was a Bihari. The Authority has no reason to doubt this evidence.

However, it is noteworthy that both the appellant and his mother were regularly employed, albeit in occasional work, in a country with gross economic problems. The appellant did casual work loading and unloading cartons for 10 days a month on average and his mother sewed for 10-15 days a month. The Authority notes that two-thirds of the labour force in the urban area works, like the appellant and his mother, in the 'informal sector'. That is, they are not employed on a regular basis by a formal organisation but work, *inter alia*, as day labourers. The working conditions of this sector are said to be poor, with the wages low (see Askvik *supra* at p115).

Their combined average monthly income was about 1,000 taka which the appellant said was just enough to live on. Indeed, the appellant said to the RSB that in some months they would save 100 to 200 taka, though, as he explained to us, that would be spent in subsequent months. The Authority notes that they were able to do this in a country in which 43% of the population exists on incomes insufficient to meet minimum daily needs (see United States Department of State Country Reports on Human Rights Practices for 1996 at p1417) and where, according to another source, 61.3% of urban households live below the poverty line with 40.2% below the 'hard-core' poverty line in the mid-1990s (The Economist Intelligence Unit Country Profile 1996-97 at p10). Another source (relying on a 1990 report) states that 44% of the urban population lives in 'absolute' poverty and 21% in 'extreme' or 'hard core' poverty (Andreassen/Swinehart, 1991, p66 quoted by Askvik *supra* at p112). Indeed, Bangladesh is regarded as "among the world's poorest countries" (The Economist Intelligence Unit Country Profile 1996-97 at p9, quoting the World Bank's World Development Report). Counsel accepts what is obvious, that Bangladesh is a "desperately poor country".

The Authority concludes that the appellant's difficulties in obtaining full employment were not predominantly because of his Bihari origins but were overwhelmingly a function of Bangladesh's economic situation, though we accept the appellant's evidence that his Bihari origins were a factor, albeit a minor one.

- (v) The appellant said that he was paid about 50 taka per day, less than the Bengali rate at 70-75 taka a day. The Authority accepts this evidence.

While the Authority accepts that the appellant faced additional difficulty in obtaining full employment because of his race, and that such employment as he found was less remunerative for the same reason, he was not deprived of the right to work. To the extent that he did suffer discrimination in the employment sector by virtue of his race, it was minor and insignificant and falls far short of the threshold that would be regarded as persecutory (for a discussion of the right to work and its violation, see Refugee Appeal No. 732/92 (15 August 1994) at pp16-18).

The Authority finds that the appellant and his mother enjoyed a level of employment and a standard of living unexceptional in Bangladesh.

In rejecting the appellant's case that his plight was caused by rampant societal discrimination, the Authority takes into account the long-standing view of an authoritative source, the United Nations High Commissioner for Refugees (UNHCR), of the situation of the Biharis. It has been the position of the UNHCR, since at least 1990, that, as a group, they are not generally deserving of refugee status:

"Another minority whose situation remains precarious is the Biharis, non-Bengali Muslims who for the most part supported Pakistani forces during the 1971 war. This Urdu-speaking minority was unwilling to become integrated into the social and political reality of Bangladesh. Of the million Biharis now living in Bangladesh, 540,000 claim Pakistani nationality and wish to live in Pakistan. Of these, 250,000 live in 66 camps, where the majority have been awaiting repatriation to Pakistan since 1982. Living conditions in these camps are generally very poor. The United Nations High Commissioner for Refugees has not, however, seen fit to grant refugee status to this group on the grounds that it does not meet the definition of refugee in the *United Nations Convention Relating to the Status of Refugees* (1951), since they are not subject to repressive measures." (DIRB, Canada 'Bangladesh: Country Profile', June 1990 at p24).

On 25 September 1991, the legal officer of the UNHCR in Canberra sent a facsimile message to the Refugee and Migrant Service, a non-governmental group which assisted refugees in New Zealand, describing the plight of the Biharis. It is instructive to record the entire facsimile:

"Re: Status of Biharis in Bangladesh

1. Biharis in Bangladesh, who number close to 300,000, are Muslims, originally

from the State of Bihar in India, who opted for migration to East Pakistan (now Bangladesh), at the time of the partition of the Indian sub-continent in 1947. Although they were not Bengalis, and hence subject to some communal discriminatory acts by the majority, they managed their living as Pakistani citizens unfettered.

2. The war leading to the independence of Bangladesh in 1971 left the Biharis in a more precarious situation, as they were accused of having sided with Pakistan. Since the independence, the Biharis, who have opted for Pakistani citizenship, have remained in Bangladesh as refugees, as the modalities of repatriation have proven too difficult for Pakistanis to work out. Apart from prohibitive costs of resettlement, the main obstacle remains the communal tensions and recurrent violence between the Biharis already in Pakistan and other ethnic groups. Despite Pakistan's official position on supporting the repatriation of Biharis to their country, the question has turned into a complex partisan political issue tied to other Pakistani ethnic problems. It is to be noted that in a most recent policy announcement by the present government in Pakistan, Mr. Nawaz Sharif, the Prime Minister, is reported to have agreed to a resumption of repatriation of Biharis to Punjab as of June 1992.
3. Most of the Biharis in Bangladesh, who are now living in refugee camps under wretched conditions, due mostly to extreme poverty of the country, have to suffer the added agony and indignity of having to await an unknown solution to their problems. Generally, they may seek employment, if they can find it, conduct other activities, but they have to endure the disadvantages of non-citizens. Biharis have the right to apply for Bangladesh citizenship, and those who do are granted full rights of citizenship.
4. The inhospitable life and uncertainties of living in very primitive camps, have been breeding grounds for some radicalism and violence by Bihari activists, to which Bengali authorities, including police and military, have responded with unsavoury tactics. Instances of harassment, beatings, long detentions, torture at interrogation especially against Bihari activists, have been reported. However, Biharis are not considered institutionally persecuted as a minority, are not subjected to wholesale discrimination, are not treated much worse than what regular citizenry faces, under a most uninviting economic, social situation.
5. Occurrence of Convention-related persecution against some Biharis are not discounted. However, they are more liable to case by case investigation than general treatment.
6. We have asked for further information from our Headquarters which will be shared with you as soon as we receive it." (sic)

As recently as 24 February 1997, the UNHCR in Dhaka, Bangladesh, at the request of this Authority in relation to other appeals, provided the following information (the full text of the facsimile being set out):

- "1. Reference is made to your a/m fax and also to its attachment querying information on general discrimination/persecution against Biharis in Bangladesh. Branch office is not aware of any incident where Biharis were persecuted or discriminated against because of their ethnicity. They may not get a job with the Government offices, which employs only the citizens of Bangladesh. But, if a Bihari claims herself/himself as a citizen of Bangladesh, then there is no obstacle in getting a Government job. Biharis who were born in Bangladesh and who can speak Bangla, can

obtain citizenship by claiming so to the authorities. Moreover, there is no systematic registration procedures for citizens of Bangladesh and one can easily obtain a citizenship certificate from elected members of the existing local government body by registering herself/himself in the voter's list. Traditionally, Biharis persistently claim themselves as Pakistani and with that identity they may not be able to get a Government job.

2. More information on the issue is available in Refworld. If you conduct a search on 'Biharis' and 'Nationality Legislation' of Bangladesh in Refworld, you may find these information." (sic)

When the UNHCR analysis was put to the appellant, he said it was not right and where he went, he was subject to "denial". Counsel accepts that the UNHCR letters cannot be disregarded as inherently unreliable but makes certain submissions as to the weight they should be accorded:

- (i) They do not disclose their supporting evidence and this must significantly affect the weight attaching to them. Furthermore, this must be contrasted with detailed evidence of the appellant and the lengthy news media articles provided.

In the Authority's view, the absence of the sources does not detract from the weight to be accorded to them, given the commanding nature of the source. It must be remembered that it is the very function of the UNHCR to know of such matters and the third and most recent expression of the UNHCR's position is from its own officer in Bangladesh. As to the evidence of the appellant, the Authority has already assessed the credibility of his claim that his plight is the result of discrimination and largely rejects it. The articles, while generally confirming the appellant's description of the poverty and privations of the Biharis, do not state that that condition is caused by discrimination. While reference is made to the government's neglect of the Bihari camps, that is hardly surprising given the economic condition of the country as a whole and there is no evidence from these articles or before the Authority that they are treated any differently from poor Bengalis. Indeed, it would appear that Biharis living in the camps, do obtain some benefit not accorded to those, whether Bengali or Bihari, who live outside the camps in the provision of monthly rations. This may be a rather modest benefit but it is some evidence that the government does provide certain assistance within its clearly limited resources.

It is also noteworthy that the United States Department of State makes no reference to discrimination against Biharis in its recent comprehensive 1997

report on human rights, including discrimination; similarly, its reports for 1993, 1994, 1995 and 1996. This independently sourced material further supports the UNHCR position.

- (ii) The letters are phrased in general terms suggestive of the view set out not being accepted by the UNHCR as some sort of absolute position. This is a semantic and unmeritorious submission.

Furthermore, counsel submits that the UNHCR recognises (in the facsimile of 25 September 1991) that some individuals may suffer Convention-related persecution. Plainly, that is right. It is conceivable that some Biharis do suffer discrimination, which could even be sufficiently severe to amount to persecution, because of their ethnicity. However, as we have already found, this particular appellant has not and there is no real chance that he will in the future.

- (iii) The UNHCR's view is not binding on the Authority.

The Authority agrees. However, it is relevant and carries weight and we treat it accordingly.

- (iv) The focus of the refugee determination process is on the circumstances of the individual claimant and thus the claim must be decided on the basis of the direct oral and documentary evidence.

As a general proposition, that is true. However, the Authority has assessed the appellant's oral and documentary evidence and finds that he has not suffered persecution in the past and there is no real chance of him suffering persecution in the future if he returned to Bangladesh. His fear of persecution is not well founded. The country information available to the Authority, particularly the UNHCR correspondence, reinforces the Authority's conclusion that the appellant's evidence as to discrimination against Biharis is unreliable.

The long-held opinion of the UNHCR that Biharis are not subject to general discrimination or persecution and are not entitled to refugee status must be accorded considerable weight. If the appellant's claim that they are subject to such persistent and prevalent societal and government discrimination was true, it

is inconceivable that the UNHCR office in Dhaka would not know of this.

The Authority therefore concludes, on the issue of discrimination, that the appellant's plight was due to the impoverished economic circumstances of Bangladesh and was not caused by discrimination against him as a Bihari, except to the extent that it was one of the factors which deprived him of a formal primary education and had some limited effect on his employment prospects and remuneration. The genesis of the appellant's aspiration for better economic opportunity is not, as counsel submitted, grounded in past persecution in the form of sustained ethnic discrimination.

WHETHER DISCRIMINATION AMOUNTS TO PERSECUTION

It is accepted that the appellant, living in one of the world's poorest countries, faced the additional burden of some discrimination from the private sector in obtaining more regular employment, and has been paid less than Bengalis, but such discrimination does not amount to persecution. In the circumstances of the appellant's case, taking into account the impoverished economic condition of his country of origin, such discrimination as he apparently faced in obtaining fuller and more remunerative employment does not meet the required threshold of persecution under the Convention.

It is recognised in refugee jurisprudence that differences in the treatment of various persons do exist to a greater or lesser extent in many societies and while this will constitute a breach of the victim's human rights, it is not every such breach that constitutes persecution (UNHCR Handbook on Procedures and Criteria for Determining Refugee Status para 54; Refugee Appeal No. 2039/93 *supra* p16). Persecution requires the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. The discrimination the appellant faced in the employment sphere falls far short of persecution. Nor does it amount to persecution when considered cumulatively with the personal abuse and name-calling to which he was subjected. So, while it is racially-motivated and therefore for a Convention reason, this discrimination does not amount to persecution.

The Authority therefore accepts that the appellant would, in the future, face some discrimination in obtaining fuller or more remunerative private sector employment, and may continue to be subject to racially motivated personal abuse, but this falls far short of the level of discrimination that amounts to persecution and which is

deserving of protection under the Convention. In other words, to the extent that the appellant's situation in Bangladesh was caused by racial discrimination, such discrimination, considered cumulatively, does not reach the severity required to be considered persecutory.

While the Authority has left open the question of whether the appellant's plight amounts to a breach by Bangladesh of human rights norms (because any such breach, even if it amounted to persecution, would not be for a Convention reason), we do find, on the evidence before us, that the level of racial discrimination that the appellant has suffered does not amount to persecution. Accordingly, there is no basis for finding that there is a real chance that he will suffer Convention related persecution in the future should he return to Bangladesh.

CITIZENSHIP

The UNHCR states that Biharis endure the disadvantages of non-citizens but have the right to apply for Bangladeshi citizenship and those who do are granted full rights of citizenship, including the ability to obtain a government job (see the UNHCR facsimiles of 25 September 1991 and 24 February 1997). The right to apply and the grant of full rights of citizenship (including the right to vote) to those who do apply is supported by other country information (United States Department of State Country Reports on Human Rights Practices for 1993 at p1326 and Askvik *supra* p123). It is reported that Biharis who decide to take Bangladeshi citizenship have "fared well" (see Times 18 July 1994, as quoted by DIRB, Canada, 2 April 1996 BGD 23489.E4/2/96).

It is apparent that some of the difficulties faced by the appellant resulted from his lack of Bangladeshi citizenship. It is clear from his evidence that this was the predominant reason for the refusal to admit him to school and he also made reference to this being one of the reasons given by prospective employers in turning him away. The appellant also accepted that one of the reasons that Biharis get no help from the government is because they choose not to seek Bangladeshi citizenship, though he also said that taking Bangladeshi citizenship would not improve his position because he would still be identified as a Bihari by his dialect.

The appellant said that his mother had once applied for citizenship on his behalf at the time that he was refused entry to school but this was declined because, she

was told, they were “Pakistani-minded”. This was when he was young and was presumably about 20 years ago in the mid-1970s . The appellant also said that he knew a Bihari who was refused a passport in 1992 or 1993 because he was told the priority for overseas employment went to Bengalis (the Authority notes that his friend may also have been turned down because he was not a citizen). It was the appellant’s view, as a result of his mother’s experience many years ago and his friend’s more recent experience, that while there may be a theoretical right to apply, in practice there were obstacles. However, the appellant’s evidence for this, two incidents, is slim and there is no support for it either in the country information obtained by the Authority or that submitted by counsel. Country information establishes clearly that Biharis do have the right to apply and are granted full citizenship rights in response. The rejection his mother faced when she applied at the time the appellant was to enter school, which would have been only a few years after the war of independence, is too remote in time to be indicative of the outcome of any such application, were the appellant to apply now.

The appellant has not, however, applied for citizenship himself and was adamant that he would never do so in the light of his experiences there and the killing of his father by freedom fighters in 1971.

Counsel submits that requiring Bihari to avoid persecution by claiming Bangladeshi citizenship, when they want to go to Pakistan, would be a breach of their right to self-determination as enshrined in Article 1 of the ICCPR and Article 1 of the ICESCR. These provisions articulate the right of “peoples” to freely determine their own political status and social and cultural development.

This is not an appropriate case for any comprehensive review of the ambit of the right to self-determination, and the Authority expressly leaves this issue open for another case, but observes that requiring the appellant to avoid the suffering that he faces to the extent he can, by acquiring Bangladeshi citizenship, does not strike the Authority as a serious infringement of the right of Biharis as a people to political, social or cultural development. The Authority cannot see any reason why the appellant cannot maintain his Bihari ethnicity and cultural identity as a Bangladeshi citizen. In any event, whether or not requiring the appellant to obtain Bangladeshi citizenship is an infringement of the right of Biharis as a people to self-determination, the obtaining of such citizenship is not going to have a demonstrable effect on the appellant’s situation in Bangladesh. Counsel submits that any argument that the obtaining of citizenship is a panacea for all the

problems the Bihari, and presumably the appellant, face in Bangladesh is misplaced. The appellant himself thought it would make little difference. We agree with this, though for different reasons than those advanced by counsel or the appellant. While the grant of citizenship will allow access to the rights available only to citizens (reference has been made to the inability to obtain a government job or to vote), it seems to the Authority that, in the context of the persecution feared by the appellant upon his return to Bangladesh, the only practical benefit of citizenship would be somewhat better access to private sector employment and the opportunity of a government job, though the appellant may regard the latter as an unlikely eventuality given the economic circumstances of the country. In other words, the issue as to whether or not the appellant has Bangladeshi citizenship or should be required to claim it to avoid the future difficulties he would face in Bangladesh as a non-citizen, is not going to materially affect his position should he return to Bangladesh. Furthermore, the additional difficulties he would face in Bangladesh as a non-citizen if he returned (no vote, no government job, some additional difficulty in obtaining private sector employment), do not amount to persecution, even when considered cumulatively with the problems he faced as a Bihari (somewhat reduced employment prospects and remuneration and personal abuse).

The Authority also records that it is sceptical as to whether the appellant's claimed affinity with Pakistan is genuine. When he had an opportunity to flee Bangladesh, he chose to come all the way to New Zealand rather than go to Pakistan, a country virtually on his doorstep. The appellant was asked why he did not go to Pakistan. He initially said he had no opportunity since the agent could only arrange travel to New Zealand. When pressed as to why he could get to New Zealand on the other side of the world but not to Pakistan, he said he did not know why and confirmed that he made no enquiries of anyone to go to Pakistan because, he says, he did not want to go illegally. This Authority was surprised by this answer in the light of his illegal entry into New Zealand on a false passport. To this, the appellant said they tried to go to Pakistan "a lot", but the government would not receive "us". The appellant clarified this by saying that his mother had wanted to go to Pakistan about 15 years ago but she did not get any response to her enquiry at the Pakistani High Commission and in 1992 the Bihari leader spoke to the Pakistani Prime Minister who agreed in principle but then Pakistan only took some Biharis. It is apparent that the appellant himself has made no attempt to get to Pakistan. The Authority found the appellant's evidence as to why he did not go to Pakistan unconvincing and concludes that he has no genuine affinity with Pakistan. This is

another reason for rejecting counsel's submission that requiring the appellant to avoid persecution by taking out Bangladeshi citizenship is an infringement of any right the appellant may have, as an individual Bihari, to self-determination.

CONCLUSION

While the Authority accepts that the appellant lived in impoverished and harsh circumstances, it does not accept the appellant's claim that his situation was a consequence of discrimination against him as a Bihari, except to an extent that is insignificant and does not, in any way, amount to persecution. Accordingly, there is no Convention reason for his socio-economic situation. His situation is the unfortunate fate of the poor in Bangladesh, Bihari and Bengali alike. The Authority finds that the appellant is an economic migrant. There is no real chance of the appellant being subject to persecution should he return to Bangladesh. His fear of persecution, if any, is not well-founded.

For the above reasons, the Authority concludes that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

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Member