

AT WELLINGTON

<b>Appellant:</b>	<b>AF (Fiji)</b>
<b>Before:</b>	A R Mackey (Chairman) M A Poole (Member)
<b>Representative for the appellant:</b>	The appellant represented himself
<b>Representative for the respondent:</b>	No appearance
<b>Date of hearing:</b>	15 February 2011
<b>Date of decision:</b>	22 March 2011

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**DECISION**

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**INTRODUCTION**

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining an application for recognition as a refugee by the appellant. The appellant is a national of Fiji. This matter was heard at the same time as an appeal made by his wife. For clarity, separate decisions have been prepared for each appellant.

[2] This is the second time that both this appellant and his wife have appealed against the decline of a claim to refugee status in New Zealand; see *Refugee Appeal Nos 76513 and 76514* (24 June 2010).

## **SUBSEQUENT APPEALS IN TRANSITION CASES**

[3] This appeal was lodged with the Refugee Status Appeals Authority (“the RSAA”) on 17 November 2010 prior to disestablishment of the RSAA on 29 November 2010. It had not been determined or allocated by that date. Accordingly, it is now to be determined by the Immigration and Protection Tribunal (“the IPT”); see section 448(1) and (2) of the Immigration Act 2009 (“the Act”).

[4] Further, pursuant to section 448(2), the appeal is to be determined under section 195(2) of the Act, which provides:

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

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

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

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

- (a) a refugee under the Refugee Convention (section 129); and
- (b) as a protected person under the Convention Against Torture (section 130); and
- (c) as a protected person under the International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

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

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

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

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

[10] As the same factual matrix is relied on in respect of all of the three matters the Tribunal must consider under section 198(1) of the Act, it is appropriate to record all that evidence, both for the purpose of comparison to the first claim and then, later, for the assessment of the additional protected person claims. That evidence is set out below as "The Appellant's Second Claim".

### **THE APPELLANT'S FIRST CLAIM**

[11] The appellant and his wife arrived in New Zealand in December 2008 on visitors' visas. They lodged their first claim for recognition as refugees in November 2009 and after an interview with the RSB, the claims were declined in March 2010. They then appealed to the RSAA (76513 and 76514). The nub of this appellant's claim was that throughout his life he had encountered incidents of discrimination and abuse from indigenous Fijians because of his Indian ethnicity. This began during his school years when he suffered verbal abuse and, from time to time, was pushed around.

[12] His family was routinely subjected to racial abuse by people in the area, particularly when his father tried to recover money from indigenous Fijians for debts to the family's canteen. On two occasions, these incidents became more serious and threatening and the police were called in one instance. They took 45 minutes to respond, which the family thought unsatisfactory.

[13] The appellant was able to complete his education to the sixth form and eventually obtained employment with an American company doing data entry work. He continued in that employment until he came to New Zealand. He believed there was some discrimination in his employment, particularly in relation to the promotion of indigenous Fijians as supervisors above him.

[14] After his marriage, he and his wife, together with his parents, moved to an area of Z largely populated by indigenous Fijians. They felt intimidated there by this indigenous majority and, after the appellant and his wife came to New Zealand, his parents moved back to their own original home.

[15] In summary, the appellant felt as though he was treated as a second-class citizen and lived in a climate of general insecurity and fear. His credibility was accepted by the RSAA. While discrimination was found, the RSAA did not consider he had established a well-founded fear of being persecuted on return. His appeal was dismissed.

### **THE APPELLANT'S SECOND CLAIM**

[16] The short account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[17] The appellant stated that his current claims had indeed been given by him at the first appeal hearing (76513) and were noted between [4] and [18] of that decision. This outline thus substantially recorded the basis upon which he was now presenting his second claim. The only new factor, that was giving both him and his wife additional fears of return, was that set out in a letter he had sent to the RSB in September 2010. There it is claimed that despite assertions to the contrary, the situation in Fiji was far from normal and Fiji was now regarded as one of the top human rights abusers in the Pacific. Reference was made to the "World Socialist Website" (reference not provided) report that the Fijian military junta led by Commodore Frank Bainimarama had released a decree on 28 June 2010 targeting journalists and the media and that made it hard to get information about the government as there was limited freedom of speech. This media decree had been condemned by the Australian Foreign Minister, Mr Stephen Smith. A copy of a report from the United Nations Security Council condemning the Fiji military regime (undated) was also provided.

### **JURISDICTION TO CONSIDER THE SUBSEQUENT REFUGEE CLAIM**

[18] The RSB considered this subsequent refugee appeal pursuant to the provisions of section 129J(1) of the Immigration Act 1987 which provided:

**"129J. Limitation on subsequent claims for refugee status -**

- (1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim."

[19] They considered that the subsequent claims for this appellant (and indeed, his wife) were not based on significantly different grounds from their previous claims and accordingly, there was no jurisdiction to consider their subsequent claims. That was the decision appealed to the RSAA which has, under the transition process, now been passed to this Tribunal.

[20] Pursuant to section 195 of the Act, a person may appeal to the Tribunal against the decision by a refugee and protection officer under either section 140(1) or section 140(3) where that person's most recent previous claim was declined under Part 6A of the former Act. This appellant's first claim was declined under Part 6A of the former Act and accordingly, an appeal is available to the appellant even where an appellant has effectively repeated a previous claim.

[21] Where an appeal is brought under section 195(1)(a), (as effectively has taken place through the transition process in this case), section 200 of the Act applies. This states:

**200 Determination of appeal against refusal or declining of subsequent claim for recognition as refugee or protected person**

- (1) Where an appeal is brought under section 195(1)(a), the Tribunal must first consider—
  - (a) whether there has been a significant change in circumstances material to the appellant's claim since the previous claim was determined; and
  - (b) if so, whether the change in 1 or more of the circumstances was brought about by the appellant—
    - (i) acting otherwise than in good faith; and
    - (ii) for a purpose of creating grounds for recognition under section 129.
- (2) The Tribunal must dismiss the appeal if it determines that—
  - (a) there is no significant change in circumstances; or
  - (b) the change in 1 or more of the circumstances was brought about by the appellant—
    - (i) acting otherwise than in good faith; and
    - (ii) for a purpose of creating grounds for recognition under section 129.
- (3) The Tribunal must consider the claim for recognition in accordance with section 198(1) if it—
  - (a) determines that there is a significant change in circumstances; and
  - (b) does not determine that the change in 1 or more of the circumstances was brought about by the appellant—
    - (i) acting otherwise than in good faith; and
    - (ii) for a purpose of creating grounds for recognition under section 129.
- (4) Where an appeal is brought under section 195(1)(b), the Tribunal must first consider whether the subsequent claim is manifestly unfounded or clearly abusive, or repeats a previous claim.
- (5) If the Tribunal determines that the subsequent claim is manifestly unfounded or clearly abusive, or repeats a previous claim, it must dismiss the appeal.

- (6) If the Tribunal does not determine that the subsequent claim is manifestly unfounded or clearly abusive, or repeats a previous claim, it must consider the claim for recognition in accordance with section 198(1).
- (7) Where an appeal is brought under section 195(2), the Tribunal must determine the matter in accordance with section 198(1), as if the appeal were an appeal to which that section applied.
- (8) If the Tribunal reverses a decision in relation to a person to whom section 195(6) applies, the Tribunal must dispense with its consideration of any humanitarian appeal lodged in accordance with section 195(7)(a) by the person.

## **CONCLUSIONS ON JURISDICTION ON THE REFUGEE APPEAL**

[22] From an assessment and comparison of the first and second claims for refugee status made by the appellant, the Tribunal is satisfied that not only does this appeal repeat a previous claim in virtually all respects, it is also manifestly unfounded or clearly abusive. The reasoning for both these conclusions is readily drawn from the analysis and findings made in respect of discrimination, as opposed to persecution, in Fiji and the country information that the Tribunal has been required to consider before reaching its conclusions on the two protected person claims, pursuant to sections 130 and 131 of the Act, set out later in this decision.

[23] While the Tribunal is fully satisfied that this subsequent refugee appeal must be declined on jurisdictional grounds, pursuant to section 200(5) of the Act, because of the necessity to consider the factual matrix of the appellant's case in respect of the protected person claims, the Tribunal has, for the sake of completeness, and possibly unnecessarily, in the alternative, also considered the Refugee Convention issues again. That assessment is then followed by the assessment of the two protected person claims.

## **THE REFUGEE CONVENTION – THE ISSUES**

[24] 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."

[25] The Tribunal is required to address two issues in this regard. In terms of

*Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

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

## **ASSESSMENT OF THE CLAIM UNDER THE REFUGEE CONVENTION**

[26] This appellant, along with his wife, gave open and frank evidence. There was no attempt to exaggerate their profiles which are basically those of economic migrants who wish to pursue a better life in New Zealand.

[27] The nub of their claims for refugee protection and/or protected person status, solely relies on the issues of discrimination against Fijian Indians by ethnic Fijians in Fiji and the claim that the Fijian government has failed, and will do so in the future, to provide protection from that discrimination.

### **Fears of discrimination compared to well-founded fear of being persecuted**

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

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

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

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

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

“[26] The focus of the Refugee Convention is a prospective one, looking forward

at risks that may be encountered by individual applicant on return.

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

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

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

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

[31] In *Refugee Appeal No 76512*, between [17] and [28], the RSAA considered the principle of non-discrimination being fundamental to the enjoyment of fundamental rights guaranteed by both the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the standards set by the international community under the International Convention on the Elimination of all forms of Racial Discrimination, 1966 ("CERD"). The RSAA noted at [27], that CERD imposed obligations to combat and eliminate racial discrimination leading to unequal enjoyment of a range of rights guaranteed under both the ICCPR and ICESCR in civil, political, economic, social, and cultural life.

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

[33] The RSAA in *76512* found that the country information available established



that there remained some degree of institutionalised discrimination against Fijians of Indian ethnic origin in Fiji and that tensions existed between Fijian and Fijian Indian communities such that Fiji was stratified along ethnic lines with indigenous Fijians tending to dominate the public sector employment.

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

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

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

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

[36] In *Refugee Appeal No 76513*, the Authority then went on to apply the findings from *76512* to the facts of the case and found that the appellant in that case had suffered isolated instances of discrimination in the past because of his Indian ethnicity and that this has manifested itself in racial abuse, minor assaults and one more serious assault. They noted that he had suffered no serious injury of any kind on any occasion. It was also noted he had been discriminated against in his education and that his home has been broken into and his family intimidated and robbed. The Authority accepted that it was likely that this situation would prevail in Fiji when the appellant returned. In that appeal, even noting the discrimination, it was observed that appellant had been able to secure employment and find accommodation.

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

## **ASSESSMENT OF THE CLAIM TO REFUGEE STATUS**

[38] Applying the findings of the RSAA in the abovementioned cases against the facts as found in this appellant's appeal, the Tribunal is satisfied that he has not established a real chance of being persecuted if returned to Fiji. Any perceived persecution risks to him are found to be highly remote and speculative. Accordingly, there is no necessity to go to the second issue in the refugee context relating to Convention reason. In this alternative assessment therefore, the appellant's second appeal to be recognised as a refugee is dismissed.

## **THE CONVENTION AGAINST TORTURE**

[39] 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."

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

## **ASSESSMENT OF THE CLAIM UNDER THE CONVENTION AGAINST TORTURE**

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

## **THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

[42] Section 131(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

[43] Section 131(6) provides that "cruel treatment" means cruel, inhuman or degrading treatment or punishment.

[44] The issue arising from these two subsections of the Act is: are there substantial grounds for believing that the appellant would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported to the appellant's country of nationality or a nominated third country?

### **ASSESSMENT OF THE CLAIM UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

[45] On the facts as found above, their application to the relevant provisions of section 131 of the Act and the legal analysis set out above, the Tribunal is satisfied that the appellant has not established substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. Accordingly he is not found to be a protected person within the meaning of section 130 of the Act.

### **CONCLUSION**

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

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

[47] The appeal is dismissed.

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A R Mackey  
Chairman

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