

**REFUGEE STATUS APPEALS**  
**AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76172**

**AT AUCKLAND**

**Before:** A R Mackey (Chairman)

**Counsel for the Appellant:** Avondale Law (H Hylan)

**Appearing for the Department of Labour:** No appearance

**Date of Decision:** 15 February 2008

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**DECISION**

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[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 the grant of refugee status to the appellant, a national of Malaysia.

**INTRODUCTION**

[2] The appellant travelled to New Zealand via Thailand on a valid passport in late September 2006 and was granted a three-month visitor's permit on arrival on 1 October 2006. He had travelled to this country after noting an article in Malaysia offering employment in the kiwifruit industry in New Zealand. A week after his arrival, he commenced work in kiwifruit orchards in the Te Puke area. In February 2007, he moved to the Hastings area and began working on an apple orchard. The work permit he had obtained expired in April 2007 and he did not apply for an extension. He continued to work illegally after that. After he had been visited by an immigration officer in August 2007, who advised him to leave the country within three weeks, the appellant spoke to his employer who advised him to seek refugee status. Accordingly, a claim was made on 28 August 2007. He was interviewed on 25 September 2007 and a letter declining his application, dated 14 November

2007, was sent to him at an address in Te Puke to where he had returned. On 12 December 2007, the Authority received a notice of his application for appeal.

### **JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW**

[3] In certain circumstances the Authority is permitted to determine an appeal on the papers without giving an appellant an interview. This arises under s129P(5)(a) and (b) of the Immigration Act 1987 (the Act), where the appellant was interviewed by the RSB (or given an opportunity to be interviewed but failed to take that opportunity) and where the Authority considers the appeal to be *prima facie* “manifestly unfounded or clearly abusive”. The Authority’s general jurisdiction in this regard was examined in *Refugee Appeal No 70951/98* (5 August 1998).

[4] The Authority, through its Secretariat, wrote to the appellant’s representatives, Avondale Law, on 22 January 2008. That letter advised that, in the Authority’s preliminary view, the appeal was *prima facie* “manifestly unfounded or clearly abusive”, for reasons set out in that letter. It was noted that the appellant had not provided any evidence in support of his claim that he had a well-founded fear of being persecuted should he be returned to Malaysia.

[5] In the Secretariat’s letter, the core of the appellant’s claim was addressed in the following manner:

“[The appellant] claimed he feared returning to Malaysia because he had been discriminated against during a time when he had been suffering mental illness. The full details of his claim and the alleged risks of suffering future discrimination because of his mental illness are set out in the refusal letter and decision of the RSB, dated 14 November 2007, in particular at p13 of that decision. There is thus no need to repeat them fully in this letter, but merely to bring them to your attention.

On the basis of the evidence now before the Authority, which includes the whole of the RSB file, and the evidence relied upon by the RSB and submissions of your client, along with the decision of this Authority in *Refugee Appeal No 72558/2001* (19 November 2002) relating to conclusions of the Authority that discrimination, of itself, does not amount to persecution, there is no indication that this appellant faces a real chance of being persecuted in Malaysia should he return there at this time. His experiences in Malaysia in the past did not indicate that he was being persecuted and there appears to be no well-founded basis for any prediction of him being persecuted in Malaysia in the future.

A detailed analysis of medical treatment available in Malaysia and the attitude of the general public towards mental illness, along with [the appellant’s] own personal situation, was carefully assessed in the RSB decision and, whilst not bound by those conclusions, the Authority is satisfied that not only is there a failure to establish *prima facie* evidence of the risk of being persecuted on return, but also

that the Malaysian state would not be unwilling or unable to provide protection, in the terms of the Refugee Convention, to the appellant on return.”

[6] The Secretariat’s letter advised the appellant that the Authority had jurisdiction to determine the appeal on the papers without offering an interview pursuant to s129P(5) of the Act. It also explained that the responsibility for establishing an appellant’s refugee claim lay with the appellant, pursuant to ss129P(1) and 129P(2) of the Act, as referred to in *Refugee Appeal No 72668* (Minute No 2) (5 April 2002) and in *Anguo Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

[7] The appellant was provided with an opportunity to present submissions and/or evidence to support his claim by 6 February 2008 and was notified that unless persuaded otherwise, the Authority could proceed to determine the appeal without giving the appellant an opportunity of attending a further interview.

[8] A response was received from the appellant’s representatives in a letter dated 5 February 2008, which was received by the Authority on that date. This set out seven pages of submissions from the appellant’s counsel, Mr Hylan, which have been fully considered by the Authority.

### **CONCLUSION ON WHETHER TO DISPENSE WITH AN INTERVIEW**

[9] This appellant was interviewed by a refugee status officer on 25 September 2007. The Authority has had the opportunity to carefully consider the submissions put forward by Mr Hylan and his request that a hearing before the Authority should be allowed. After considering all of those submissions and the other evidence available on the appellant’s file, the Authority is satisfied that the appeal is one that is manifestly unfounded or clearly abusive, and the submissions do not warrant an oral hearing before this Authority. The reasons for rejecting the submissions now follow.

[10] Mr Hylan submitted that the RSB had not fully appreciated the appellant’s claim from the statements and details he had provided at interview, in particular, the appellant’s claim as a person with mental health issues who had been subject to discrimination in Malaysia. Counsel submitted that the appellant could not obtain any protection in that country and that this was “a clear case of persecution for his being a member of a social group of persons who are mentally ill”.

[11] My Hylan went on to note that the RSB accepted the attitude of the general public towards the mentally ill in Malaysia was unfriendly and not conducive to their well-being and against which there was no “concrete protection” by the Malaysian authorities. He further submitted that the appellant was in fear of discrimination by society at large where there was an atmosphere of shame and ridicule and that this effectively indicated that there was a sustained and systemic violation of basic human rights in respect of mentally ill people in Malaysia.

[12] The submissions go on to claim that the appellant had demonstrated how he had been subjected to discrimination by family, friends and society and that there was a lack of government protection.

[13] It is further claimed that the real chance test set out in the RSB decision had not been followed and several human rights violations which the appellant claimed he had suffered had not been considered.

[14] Finally, there is reference to a United States Department of State report which concluded with the comments:

“Other problems include police abuse of detainees, over-crowded prisons and use of emergency ordinance.”

[15] This is claimed to be the track record by the Malaysian authorities that was not appreciated by the RSB. The documentary evidence of the hospital where the appellant had undergone treatment was also not correctly appreciated and that the improvement in his health after his arrival in New Zealand, though relevant, was not favourably considered by the RSB.

[16] Unfortunately, none of those submissions indicate that the appellant has suffered or would suffer anything beyond a low level of discrimination in Malaysia, as opposed to real chance of being persecuted on return or a substantive failure of state protection by the government of Malaysia. The result, therefore, is that both elements required to establish that an applicant is “at a real risk of being persecuted” on return, are simply not established.

[17] The appeal will therefore be determined on the papers, pursuant to ss129P(5)(a) and 129P(5)(b) of the Act, without giving the appellant an opportunity to attend a further interview.

## **THE APPELLANT'S CASE**

[18] The following is a summary of the appellant's case as set out in the DOL file.

[19] The appellant is a single man in his late 30s. He has three siblings, two sisters and one brother (apparently a twin). He completed schooling qualifying with a college diploma in 1991. He then worked in various accounting jobs and travelled overseas to work in Gabon and South Africa. He also travelled on holiday to China, Thailand and South Korea in 2000. In 2003, he was issued with a valid Malaysian passport.

[20] In 2004, he lost his job. He stayed at home and began to suffer from mental illness, experiencing depression, trauma, fear and loss of sleep. He sought medical treatment at the hospital in Palau, Penang and was admitted as an in-patient for a short period, where he was treated by a Dr Hwa, consultant psychiatrist, and a Dr Teh. He was discharged in March 2004 and continued to receive antidepressant medication after that. He found he could not get employment as he still had difficulty walking into the streets and found that his mind would go out of control.

[21] He claimed that after his mother had informed friends and relatives of his illness, he started to experience discrimination from them. One of his sisters quarrelled with him. The appellant did not make any complaints to the Malaysian authorities about the discrimination as he did not know who to complain to. He claimed to feel isolated and decided to seek refuge in another country based on doctor's advice that he should see the "greenery" in other places.

[22] In September 2005, he received further antidepressant medication from the hospital. In September 2006, after noting an advertisement relating to employment in the kiwifruit industry in New Zealand, he travelled to this country as noted above.

[23] The appellant fears maltreatment/discrimination against him because of his mental illness if he returns to Malaysia and that there is nowhere in Malaysia he could go to and thereby avoid the discrimination.

[24] Since he has been in New Zealand, the appellant has not sought medical treatment or assistance of any kind and appears to have obtained employment in

the kiwifruit and apple industries and has generally been able to support himself whilst he has been here.

## **THE ISSUES**

[25] 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."

[26] 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 APPELLANT'S CASE**

[27] As the Authority has determined that it will not interview the appellant, an assessment of credibility will not be made. Accordingly, his account, as recorded above, is accepted for the purposes of determining this appeal.

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

[29] The Authority has previously noted that discrimination, in itself, is not sufficient to establish a case for refugee status, nor does every breach of a claimant's human rights necessarily amount to a situation of "being persecuted" within the coverage of Article 1A(2) of the Refugee Convention; *Refugee Appeal No 71404/99* (29 October 1999) [65] to [67].

[30] The Refugee Convention was never intended to protect persons from all or any forms of harm, even serious harm, but confers protection where there is a risk of serious harm that is inconsistent with the basic duty of protection owed by the state to its citizens; Hathaway *supra* at 103.

[31] While the appellant's mental condition in Malaysia may have been distressing and he may have suffered some discrimination by friends and relatives on some occasions, this did not in any way amount to serious harm tantamount to "being persecuted" even when considered cumulatively. Thus, while the focus of the Refugee Convention is a prospective one and the question is whether the appellant faces a real chance of being persecuted if he returns to Malaysia at this time, in this case, past persecution is clearly not established and there is no basis for indicating anything beyond a low level of discrimination against him arising in the future, even if he does suffer a relapse to poor mental health.

[32] The appellant at the present time appears to be healthy and is not in need of treatment. Accordingly, the first issue that has to be addressed is that the appellant would need to establish that the conditions he would return to in Malaysia would set up a real chance of his suffering serious mental illness on his return. The evidence presented by him simply does not establish that. Indeed, on the basis of his current mental health, which appears to have been restored to him, there is nothing to indicate that he would suffer mental health problems on return.

[33] Accordingly, the first limb required to establish persecution (that is, a well-founded fear of suffering serious harm) has not been established. Strictly speaking, it is then unnecessary to go on and consider whether there would be a failure of state protection. However, in this case, it is clear from the objective evidence and indeed the appellant's own ability to access treatment for his medical health in Malaysia in 2004 and 2005, that there is no failure of medical treatment available to him in Malaysia.

[34] All of the submissions raised by the appellant's counsel have been carefully considered but the Authority is not satisfied that any of these submissions establish a real risk of the appellant being persecuted on return. The obligation is, of course, on the appellant to establish his own case.

**CONCLUSION**

[35] The Authority therefore finds that the appellant does not have a well-founded fear of being persecuted on return to Malaysia. The first issue framed above is therefore answered in the negative. That being the case, the second issue does not fall for consideration.

[36] The Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. The appeal is dismissed. Refugee status is declined.

"A R Mackey"  
A R Mackey  
Chairperson