

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76451

AT AUCKLAND

<u>Before:</u>	D Henare (Chairperson) B L Burson (Member)
<u>Counsel for the Appellant:</u>	R Chambers
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	3 March 2010
<u>Date of Decision:</u>	7 April 2010

DECISION

[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 India.

INTRODUCTION

[2] The appellant arrived in New Zealand on 22 June 2009, having been granted a limited purpose visa on 18 June 2009 to work for a company in the South Island.

[3] On 9 July 2009, the appellant claimed refugee status. He was represented by Roger Chambers, barrister. He was interviewed by the RSB on 8 September 2009. His claim for refugee status was declined in a decision dated 5 November 2009, against which he appeals to this Authority.

[4] The appellant claims that he has been arrested, detained and beaten by the Punjabi police on two occasions in 2002 and 2007 and harassed on multiple

occasions because the police, in the course of investigating a Muslim terrorist, have extorted bribes from the appellant. He predicts that, should he return to India, the police will resume their mistreatment of him.

[5] The essential issue to be determined in this appeal is whether there is a real chance of the appellant being persecuted for a Convention reason.

[6] When this matter came before the Authority on 3 March 2010, Mr Chambers sought leave to withdraw from the case. He had, however, on 5 February 2010, filed written submissions with the Authority and attached various items of country information. Mr Chambers indicated that the appellant had been given a copy of these submissions and that they stood as the appellant's submission in the appeal. Mr Chambers thereafter took no further part in the hearing.

THE APPELLANT'S CASE

[7] What follows is a summary of the appellant's evidence. It will be assessed later in this decision.

[8] The appellant is from a small rural village in the Punjab. The appellant's family have lived in this village for generations. He is the eldest son of three children. His family owned and farmed land of about five or six acres.

[9] The appellant's father died in 1989 when the appellant was 12 years old. The appellant left school at this time and the family land was leased for about five to six years. Between the ages of 12 and 19, the appellant looked after a few buffalo on the family property and also worked on a building site for a year.

[10] He married in 1997 and has two children. After his marriage, the lease of the family land expired and he started working on the family farm. In 2001, he leased an additional five to six acres of land.

[11] A nomad Muslim family, known as *gujjars*, had leased land adjoining the appellant's family farm. From time to time, the son of that family, whom the appellant knew as AA, asked the appellant to turn on the water pump to provide water from the canal adjoining the appellant's property, for their farm animals.

[12] Early in 2002, the appellant saw the police frequently visiting the home of that family. He asked AA about the reasons for these police visits. The appellant

was told that the police had accused AA of possessing weapons and ammunition and were harassing him and beating him. The appellant then noticed that AA and his family started moving their cattle off the land and shortly after, the family left the village.

[13] The police searched the land vacated by the Muslim family and found a rifle and a pistol hidden there. They began questioning the villagers whose land was near the Muslim family's land and soon focused their attention on the appellant. The police questioned the appellant at his house on a number of occasions about his knowledge of AA, who they alleged was a terrorist. The appellant believed that he was targeted by the police more than other villagers because his farm was the closest to the land AA and his family had occupied.

[14] In September 2002, the police arrested the appellant and took him to a local police station. They questioned him again about the whereabouts of AA and accused him of associating with a Muslim terrorist. They also threatened to accuse him (the appellant) of possessing the weapons if he did not disclose AA's whereabouts. When he could not comply, the appellant was beaten. The police applied heated rods to his feet, used a roller over his legs and gave him electric shocks. They also tied his hands behind his back and he was hung upside down. As a result, he suffered a dislocated shoulder. He was also beaten with straps on his lower back and was not given much to eat.

[15] Five days later, the village *Panchayat* came to the police station and paid money to the police to prevent them from continuing their beatings of the appellant. For the next six or seven days of his detention, the police continued their questioning of him. He was released following the intervention of the *Sarpanch* who paid further money.

[16] The appellant received medical attention for his injuries and recuperated at home. Approximately five months later, he returned to work on his farm.

[17] Some three or four months later, the police came to the appellant's home. They repeated the same accusations against him. In order to avoid further arrest, he paid them money. A pattern of harassment, involving false accusation and extortion by the police against the appellant, occurred over a period of four to five years. The appellant believed that whenever there was a change in police personnel in the village, his file was reviewed, and again, he became the target of police extortion.

[18] In March 2007, the police arrested the appellant at his home because he would not pay the bribe they demanded. On previous visits, the officers concerned had been content to take whatever money the appellant had to hand. On this occasion, the officer demanded a substantially higher sum which the appellant could not pay. He was taken to a police station and held there for a week. The police again questioned him about the whereabouts of AA, and accused him of possession of the weapons. Upon the appellant's denial of these accusations, the police beat him with straps on his back about five or seven times a day. He was left hanging upside down for hours and was also beaten on the soles of his feet with lathis.

[19] He was released, following the intervention of the *Panchayat* who paid a significant bribe. The appellant received medical attention on a daily basis for about four weeks.

[20] During the time the appellant was undergoing medical treatment, the police started coming to his home again. There were three visits by the police to the appellant's home in the period March to June 2007. The appellant was not at home for their third visit. Believing the police would continue to return for him, he made a plan to go into hiding.

[21] In June 2007, he terminated the leasehold land. He moved to a nearby village and stayed with a relative. Over the next two years, he shifted several times to stay with relatives because he was afraid of being found by the police. Occasionally, he stayed overnight at his family home. He also leased out his family land in 2008.

[22] The police continued to visit the appellant's family home, asking his wife and children about his whereabouts. Not finding the appellant, the police started to harass the appellant's brother, causing him to leave India.

[23] In August 2008, the appellant was introduced to an agent in Jalandhar who agreed to make arrangements to send him abroad, for a substantial fee. In October 2008, with the help of a friend, and upon payment of a fee, the appellant obtained a police clearance certificate from the Nadokar police.

[24] On 18 June 2009, a limited purpose visa was granted to the appellant to work in New Zealand. He departed India on 21 June 2009.

[25] The appellant arrived at Christchurch and travelled with a group of other Indian nationals to Blenheim, to discover there was only two or three days work

available. He met an immigration agent, Kulwant Singh, at a shop. The agent helped him to prepare his claim for refugee status and assisted him with travel to Tauranga to find work.

[26] The appellant has kept in contact with his wife in the Punjab. She advised him that his brother had gone abroad and that the police had visited the family home, threatening the children. She sought help from the *Panchayat* who asked the police not to trouble the family. Consequently, the police visits have stopped.

[27] The appellant fears that if he returns to India, he will once again be subjected to harassment, detention and beatings by the police. He says that his life was saved because of the payment of bribes to the police.

[28] He believes that should he travel elsewhere in India, his whereabouts will be reported to the police, as he would be identified as a native of the Punjab by his language.

Documents filed

[29] The Authority received a memorandum of submissions, dated 4 February 2010, from counsel and various items of country information relating to the situation of Sikhs in the Punjab and across India. During the hearing, the appellant submitted a map of the Punjab showing the location of his village.

THE ISSUES

[30] 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."

[31] 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

CREDIBILITY

[32] The Authority notes that the appellant's claim is one of more than 20 claims lodged by Punjabi Sikhs at around the same time, each having used the same agent in India and New Zealand and each having been granted a visa to work for the same employer in New Zealand. This unusual coincidence hints at pre-meditated manipulation of New Zealand's immigration system. While this cannot be determinative of the assessment of the appellant's claim, which is entitled to consideration on its merits, some caution is warranted.

[33] Having seen and heard the appellant, the Authority is in doubt whether the appellant's claim is part of this plan of manipulation, or is a true account, and he has been caught up in it. This is because:

- (a) The appellant gave his evidence in an open and straightforward manner. When questions were put to him for clarification, he did not attempt to be evasive or deceptive.
- (b) While there were minor aspects of his evidence where the appellant appeared confused, the core of his account was otherwise consistent with the account he gave to the RSB.
- (c) The level of police attention, including the periods of the appellant's arrest and detention without due process, and police mistreatment of him is consistent with country information, specifically, Human Rights Watch *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*, August 2009 (the HRW Police Dysfunction Report). The authors interviewed both police officers of varying ranks and the victims of police abuse. They documented a range of human rights violations committed by police in different parts of India, including arbitrary arrest, detention and torture as tactics of crime investigation.

SUMMARY OF CREDIBILITY FINDINGS

[34] Weighing these matters cumulatively, the Authority is in some doubt as to the credibility of the appellant's account. In accordance with usual practice in this jurisdiction, he is entitled to the benefit of the doubt. Accordingly, the appellant's account is accepted in its entirety. The Authority finds that the appellant has been

arrested, detained and beaten on two occasions in 2002 and 2007 and harassed on multiple occasions by the Punjabi police, to extort money from him.

OBJECTIVELY, ON THE FACTS AS FOUND, DOES THE APPELLANT HAVE A WELL-FOUNDED FEAR OF BEING PERSECUTED?

[35] “Being persecuted” comprises two elements - serious harm and the failure of state protection - see *Refugee Appeal No 71427/99* (16 August 2000) at [67]. Further, the appropriate standard for persecution is a sustained or systemic violation of core human rights; see in this regard J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1993) at p108 and *Refugee Appeal No 2039/93* (12 February 1996).

[36] Having accepted the appellant’s account, the Authority finds that the appellant has been arrested, detained and beaten on two occasions and harassed on multiple occasions by police to extort money from him. In order to determine whether the appellant has a well-founded fear of being persecuted as a result, it is necessary to consider country information concerning police conduct in the criminal justice system in India.

COUNTRY INFORMATION

[37] Country information establishes that state police forces operate outside the law, commit a range of human rights violations, and lack sufficient ethical and professional standards. This culture of police abuse is a systemic problem in India. Human Rights Watch press release *India: Overhaul Abusive, Failing Police System* (4 August 2009) states:

“The Indian government should take major steps to overhaul a policing system that facilitates and even encourages human rights violations...

For decades, successive governments have failed to deliver on promises to hold the police accountable for abuses and to build professional, rights-respecting police forces.”

[38] The HRW Police Dysfunction Report records the failings of state police forces and their lack of accountability, which contributes to human rights violations. At p57, the report notes that the police are engaged in arrests on false charges and detention without due process:

“Police have broad authority to arrest without a warrant any individual for whom they have a ‘reasonable suspicion’ of having a connection to (the law uses the phrase ‘concerned’ in) certain types of criminal offenses, or against whom they have received either a ‘reasonable complaint’ or ‘credible information’ of such involvement...

The Law Commission of India has noted that domestic law confers ‘a vast, sometimes absolute and on some other occasions, an unguided and arbitrary power of arrest upon police officers...’”

[39] A range of abuse of police powers is documented, including:

“Extortion... with the threat of false arrest; arrest based on false charges to fulfill arrest quotas; arrest or detention motivated by bribery... Moreover, police frequently fail to abide by judicially mandated safeguards against illegal detention.” [p58]

[40] The types of torture and ill treatment used by police, include:

“Police beatings with lathis, or batons, over varying periods of time are the most common type of abuse described by victims and local human rights groups.

Victims of abuse in police stations describe severe and recurring violence...;

Beating of the soles of the victim’s feet, which causes excruciating pain but does not leave visible marks. It is most commonly used against petty criminals to elicit information...;

Waking the victim at 2am; or in the midst of a deep sleep, and beating the victim with *lathis*. Wooden rods known as “rollers” may be pressed and rolled on the victim’s legs to cause extreme pain;

Shock treatment...applied to ear lobes, nipples and genitals. This is said to be most commonly used in theft cases;

In the “aeroplane treatment”, using lathis or other rods to hang a person upside down and beat them. [pp68, 69]

[41] The report also notes that harassment can occur to an innocent victim:

“There are times when an offender is absconding. So an associate is caught, who is harassed. It is not that we don’t realise he is innocent. But if we don’t harass, we will not get information.” [p79]

Application to the appellant’s case

[42] Having regard to the country information outlined above, the Authority finds the appellant’s fear is well-founded. Country information establishes that police misconduct in the criminal justice system in India, is widespread and rooted in institutional practice, using abuse and threats as a primary crime investigation tactic. While the HRW Police Dysfunction Report (at p13) notes that the government elected in May 2009 is committed to initiating police reforms, it will take time to change the culture within the police force, if it happens at all.

[43] The appellant’s arrest, detention and mistreatment occurred in the period 2002 to 2007 which ante-dates the field research conducted by Human Rights Watch. The Authority is satisfied that the repeated detention and harassment of the appellant, and the episodes of torture he has suffered, fall within the category of being persecuted. There can be no doubt that the continuing practices of police abuse mean there is a real chance of mistreatment of the appellant occurring in the future.

[44] For these reasons the Authority accepts that the appellant does have a well-founded fear of being persecuted if returned to India. The first principal issue is answered in the affirmative.

Is there a nexus to a Convention ground?

[45] The Refugee Convention requires that fear of persecution be for reason of one of five Convention grounds. In his memorandum, counsel submitted that “the appellant applied for refugee status on the grounds of persecution due to his (imputed) political opinion at the hands of the Indian authorities”.

[46] The Authority questioned the appellant at length about the police interrogation of him. The appellant’s evidence was clear. At no time did the appellant say he had been involved with Muslim terrorists. The police alleged that AA, not the appellant, was a terrorist. The appellant’s evidence was that the police wished to know the whereabouts of AA and, notwithstanding their threat to blame the appellant, clearly knew that the weapons they had found belonged to him (AA). The police made these threats of criminal charges against the appellant as a

device to extort money from him. On the evidence given by the appellant, no political opinion whatever, whether real or imputed, was involved.

[47] The second principal issue is therefore answered in the negative.

CONCLUSION

[48] For these reasons, 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.

"D Henare"

D Henare
Chairperson