

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76366

AT AUCKLAND

Before: A R Mackey (Chairman)
Representative for the Appellant: Appellant represented himself
Date of Decision: 23 July 2009

DECISION

[1] This is an appeal against a 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 was born in Penang, Malaysia in mid-1975. He is of Chinese ethnicity and states that he has never experienced difficulties either through ethnicity or religion.

[3] Following problems with moneylenders and debt collectors the appellant obtained a visitor's permit to travel to New Zealand in October 2006 and arrived here during that month. He then took up employment on various orchards in the Bay of Plenty area. He was issued with a New Zealand seasonal work permit in November 2006 and over the period until 2008 obtained various visitor and transitional work permits. He was declined a general work permit in July 2008 and a student permit in November 2008.

[4] On 17 March 2009, the appellant lodged an application for refugee status with the RSB. He was interviewed on 9 April 2009 and in a decision dated 27 May

2009 his application for recognition as a refugee was declined. He then appealed to this Authority on 4 June 2009.

[5] The Authority, through its Secretariat, wrote to the appellant at his last known address on 19 June 2009 stating that the Authority had reached a *prima facie* conclusion that his claim was 'manifestly unfounded or clearly abusive'. He was given until 4pm on Friday 3 July 2009 to present submissions responding to matters raised in the Secretariat's letter and any other submissions or evidence that might possibly support a valid refugee claim.

[6] The appellant sent a letter to the Authority dated 1 July 2009, received on 3 July 2009, the contents of which have been taken into account later in this decision.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[7] In certain circumstances the Authority is permitted to determine an appeal on the papers without the appellant being given an interview. This arises under ss129P(5)(a) and (b) of the Immigration Act 1987 (the Act) where an appellant was interviewed by the RSB (or given the opportunity to be interviewed but failed to take that opportunity) and where the Authority considers the appeal is *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).

[8] The Secretariat's letter of 19 June 2009, advised that it was the Authority's preliminary view that the appeal was one that was 'manifestly unfounded or clearly abusive' on the basis of the claim presented by the appellant. The letter set out the preliminary view that it appeared there would be no failure of state protection to the appellant in Malaysia on his return and, importantly, any predicted risk to the appellant (from moneylenders) was not one which fell within any of the five Refugee Convention reasons.

[9] In the Secretariat's letter it was also explained that the appellant bore the responsibility for establishing his claim pursuant to ss129P(1) and 129P(2) of the Act, as examined further in *Refugee Appeal No 72668/01* and Court of Appeal decision in *Anguo Jiao v Refugee Status Appeals Authority* [2003] NZAR 647.

[10] The letter sent by the appellant and received on 3 July 2009, merely restates the appellant's prediction of constant danger from a "loan shark" who is well connected in Malaysia and therefore the appellant would be unable to hide.

[11] The letter and submissions provided in response by the appellant have not caused the Authority to alter any of the views set out in the Authority's letter of 19 June 2009.

WHETHER TO DISPENSE WITH AN INTERVIEW

[12] This appellant was interviewed by a refugee status officer on 9 April 2009. An opportunity has been provided by the Authority for the appellant to provide convincing evidence that an interview should not be dispensed with. The submissions provided have failed to do this.

[13] In the circumstances of this case therefore the Authority will determine the matter on the papers without giving the appellant the opportunity to attend a further interview.

THE APPELLANT'S CASE

[14] The appellant's claim, as set out in his Confirmation of Claim and in his interview with the RSB, is that he will be seriously harmed by "loan sharks", or agents of loan sharks, if he returns to Malaysia. This assertion is made because he borrowed money from moneylenders/loan sharks, in order to pay his mother's medical expenses, and he has been unable to repay that loan. He explained that he had been beaten and threatened by agents of the moneylenders before he left Malaysia and fears that they will kill him because he owes a large sum of money.

[15] He also explained that when threatened and chased by agents of the moneylenders, who had a knife, he was able to avoid them by going into a police station, although when he explained the reason he was being chased was because he owed money to the loan sharks, the police advised they could not help him.

[16] He advised the RSB that he had not paid back any of the money that he had borrowed as it had all been used to pay family medical expenses.

[17] As stated, in his letter to the Authority, the appellant has again set out the danger to his life from the loan sharks and states that it was this that prompted him to apply for refugee status in New Zealand so that he could start a new life here.

THE ISSUES

[18] 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."

[19] 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

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

[21] The Authority's letter to the appellant of 19 June 2009 relevantly stated:

"Refugee status in New Zealand is determined by reference to the Refugee Convention 1951 and the 1967 Protocol thereto. Article 1A(2) of the Refugee Convention provides:

"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 the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

It will be noted that this Article refers to a “well-founded fear of being persecuted” thus establishing an objective test. This Authority, in a decision in *Refugee Appeal No 71427/99* (16 August 2000), adopting other international jurisprudence on this issue, held that in establishing whether, on the particular facts of a claim, it is established that there is a well-founded fear of being persecuted, the following formula must be applied:

Persecution = serious harm + the failure of state protection

On the basis of the evidence now before the Authority, your claim does not appear to establish that there would be any failure of state protection, nor that any risk of serious harm to you on return to Malaysia would arise for reasons of any one of the five Convention reasons mentioned in Article 1A(2) of the Refugee Convention.

The substance of your claim appears to be that you predict you could be subjected to serious harm from money-lenders, or their representatives, with whom you became involved in Malaysia in 2005.

This Authority has, in previous determinations, recognised that Malaysia is a country where there is a presumption of state protection, unless convincing or compelling evidence to the contrary is provided; see *Refugee Appeal No 75447* (4 April 2005) at [21]. No convincing or compelling evidence has been provided to the contrary in this case at this time.

Additionally, your predicted risk from the money-lenders (who are non-state actors) is not one that apparently falls within any of the five Refugee Convention reasons set out above. As noted therefore, on the basis of the evidence now before the Authority, the preliminary view is that your claim, as presented, is one that is either clearly abusive or manifestly unfounded.”

[22] As noted in the Authority’s letter, in previous determinations this Authority has recognised that Malaysia is a country where there is a presumption of state protection, unless convincing or compelling evidence to the contrary is provided; see *Refugee Appeal No 75447* (4 April 2005) at [21].

[23] In this case no convincing or compelling evidence has been provided to the contrary. From his evidence to the RSB it appears that the police did give him some short-term protection whilst at the same time pointing out the reality of his situation, which was that he had incurred a substantial civil debt. In these circumstances the Authority does not consider that the appellant has established a real chance of being persecuted on return and in particular that there would be a failure of state protection.

[24] Additionally, and importantly in this case, the appellant’s predicted risk is from moneylenders, or agents of the moneylenders. As noted in the Authority’s letter this is not a predicted risk from any one or more of the five Convention reasons set out in Article 1A(2) of the Convention. Nothing in the appellant’s letter to the Authority of 1 July 2009 displaces that view. Simply stated, there is a lack of nexus between the appellant’s prospective predicament and a Refugee Convention ground. On that basis alone, the Refugee Convention has no

application to this appellant's circumstances and so his claim for refugee status must fail.

CONCLUSION

[25] The Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Both of the issues identified above are answered in the negative, the latter on an assumptive basis. Refugee status is declined. The appeal is dismissed.

"A R Mackey"

A R Mackey
Chairman