

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 74672

AT AUCKLAND

Before: L Tremewan (Member)

Counsel for Appellant: C Amery

Date of Decision: 10 September 2003

DECISION

INTRODUCTION

[1] The appellant is a citizen of Malaysia, of Chinese ethnicity, who seeks to lodge an appeal, out of time, against a decision of the Refugee Status Branch (RSB) of the NZIS, declining to grant him refugee status.

[2] For reasons which will become apparent, the appellant's substantive claim is without merit. In this decision, it will be seen that the Authority has found that he fails to satisfy the jurisdictional criteria for the lodging of an out of time appeal.

[3] The appellant arrived in New Zealand on 14 August 2002, and lodged his application for refugee status on 6 December 2002.

[4] In his refugee application, the appellant submitted that he feared a "mafia like gang" in Malaysia who were seeking to extort money from him and his family. The gang had attacked him once before, injuring his hand. They had threatened his parents and caused damaged at their home. He feared that the gangsters would kill him. The Malaysian police were, he stated, "unable" to protect him. They have Malay staff who "hate Chinese people". The Police were described as

“lazy”, and did not come quickly enough when called, or otherwise did not come at all.

[5] The appellant also stated in his application that the Police were also looking for him “because they wish to prosecute the gang based on my evidence”. A copy of a police report (in Malay, without an English translation) was attached to the refugee application.

[6] A refugee status officer (RSO) interviewed the appellant on 15 January 2003. During the interview the appellant also advised the RSO that he had a cousin who is a policeman in Malaysia and that he had asked his cousin to help him. His cousin advised that he had reported the matter to higher authorities but the appellant did not know whether he really had done this.

[7] A decision declining his application was published by the RSB on 14 February 2003. The appellant filed a notice of appeal three and a half months later, on 30 May 2003.

APPLICATION TO APPEAL OUT OF TIME

[8] Before turning to the procedural history of the appellant’s case, or looking at matters relating to the substantive merits of the appeal, the Authority reiterates that the appellant’s appeal was lodged out of time. This is to say that it was filed outside the ten working day period after which the appellant had been notified of the RSB decline decision (section 129O(3) Immigration Act 1987). Thus there are jurisdictional issues specifically arising in that regard.

[9] The Authority may only consider an appeal lodged out of time if it is satisfied that special circumstances warrant such an extension (sections 129O(3) and 129O(4) Immigration Act 1987). In previous decisions of this Authority (see for example *Refugee Appeal No. 71620/99* (28 January 2000)), the Authority has determined that the factors to be considered in determining whether “special circumstances” exist include the reasons why the appellant failed to lodge his or her appeal within the ten working day period and the substantive merit or lack thereof of the appeal.

[10] The appellant has claimed that the reason for the delay in filing his appeal (and therefore the reason why he seeks leave to file the appeal out of time) is because he did not receive the RSB decision (despite its having been sent by the RSB, by registered post, to the same address in Tauranga where the appellant continues to live).

[11] The Authority will consider the substantive merits of this appeal before concluding whether or not leave is granted to this appellant to lodge his appeal out of time.

[12] Pursuant to sections 129P(5)(a) and 129P(5)(b) of the Immigration Act 1987 (“the Act”), where an appellant was interviewed by the RSB or, having been given an opportunity to be interviewed, failed to take that opportunity, the Authority has a discretion as to whether to offer the appellant the opportunity to attend an interview. In exercising this discretion, the Authority will consider whether the appeal is *prima facie* ‘manifestly unfounded or clearly abusive’. Should that be the case, the Authority may determine the appeal on the papers, without offering the appellant an interview. The Authority’s general jurisdiction in this regard was examined in *Refugee Appeal No 70951/98* (5 August 1998).

[13] On 4 August 2003, the Authority, through its Secretariat, wrote to the appellant’s counsel Mr Amery (and copied the letter to the appellant), advising that the Authority’s preliminary view of the appellant’s appeal was that it was *prima facie* ‘manifestly unfounded or clearly abusive’, and giving reasons in this regard. It was noted that his account appeared not to identify any basis as to why the appellant would face a real chance of persecution for a Convention reason in the event that he returned to Malaysia.

[14] The Secretariat’s letter included the following:

“...In summary, the appellant’s claim is that when he was in Malaysia, in mid-2002, he and a friend were attacked by some local thugs. This was because they had refused to pay over money, which the thugs were endeavouring to extort. The thugs also visited the appellant’s home on later occasions, demanding money from the appellant’s parents. The appellant decided to leave Malaysia and did so legally, without incident, the following month.

Even accepting that the attack was serious, the Authority considers that a preliminary view of the situation does not disclose that the appellant faces a real chance of persecution for a convention reason on a return to Malaysia.

Firstly, it appears that the attack was a criminal act, motivated by financial gain. There appears to be no Convention ground relating to the harm feared— that is, that the feared harm is for reasons of the appellant's race, nationality, religion, political opinion or a particular social group. Having said that, it is noted that he claims that he was targeted on grounds of his race – being Chinese. However, it appears that that is incidental to the fact that he was seen as a person from whom money can be extorted and that that is the motivation.

Further, it is a well-established principle of refugee law that nations should be presumed capable of protecting their citizens. Clear and convincing evidence is required to demonstrate a state's inability to protect its citizens (see: *Refugee Status Appeal No. 523/92* (17 March 1995)). The appellant has not rebutted this presumption. It is noted that the police took note of the incident and made an official case. The appellant stated in his refugee status application that they wanted him to be a witness in the case. He did not follow the matter up (indeed he left the country the month after the incident) and it is also noted he has a cousin who is a policeman who could possibly assist him in that regard. In the absence of evidence to the contrary, the Authority's view the presumption of state protection applies in these circumstances. There is no evidence before the Authority that the appellant would be unable to access state protection from any harm he fears.

Next, another option which would appear to be available to the appellant would be to relocate within his home country, if you are concerned about the particular risks in his locality. Refugee claimants are obligated to seek domestic protection before turning to the surrogate protection of the Convention. The principles in regard to the Internal Protection Alternative (IPA) are set out in the Authority's decision of *Refugee Appeal No. 71684/99* (29 October 1999)."

[15] The Secretariat's letter advised that the Authority has the jurisdiction to determine an appeal on the papers, without offering an interview pursuant to section 129P(5) of the Act, in circumstances which, on a preliminary view, applied in the appellant's case. The appellant was provided with an opportunity to present submissions and/or evidence to support his claim, by 14 August 2003. Notice was given that, unless the Authority was persuaded otherwise by such submissions and evidence, it could consider and determine the appeal without giving the appellant an opportunity of attending a further interview. Reference was also made to *Refugee Appeal No. 70951/98* (5 August 1998).

[16] The Secretariat's letter also advised that the responsibility for establishing an appellant's refugee claim lay with the appellant, pursuant to sections 129P(1) and 129P(2) of the Act (as referred to in *Refugee Appeal No. 72668/01* (Minute No. 2) (5 April 2002) and in *Anguo Jiao v Refugee Status Appeals Authority* (CA 167/02, 31 July 2003, Keith J)).

[17] The Secretariat's letter further advised that 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' (see Hathaway, *The Law of Refugee Status* (1991) 104 to 108, as adopted in *Refugee Appeal No. 2039/93* (12 February 1996) at 15).

[18] On 6 August 2003, the Authority's Secretariat received a request from Mr Amery, by facsimile, seeking an extension of at least one week for the filing of further submissions. This request was granted, with submissions being required by 21 August 2003, as communicated to Mr Amery in a letter dated 8 August 2003.

[19] On 21 August 2003, the Authority received written submissions from Mr Amery, and a copy of an article "*Keeping the Dream Alive : The Politics of Chinese education in Malaysia*" Asiaweek, 4 September 1998. Also submitted was an affidavit from the appellant (sworn on 21 August 2003), and a certified translation of the police report submitted by the appellant.

[20] In summary, Mr Amery's submissions (in addition to covering various general legal issues) argued that the appellant and his family were discriminated against by local police because of their membership of the ethnic Chinese community. He argued in particular that the police had discriminated against him for their failure to follow up visits by thugs seeking to extort money from the family.

[21] Mr Amery also argued that the discrimination, in combination with other adverse factors, cumulatively reached a level where it could be described as persecution. Reference was made to the "long history of discrimination against Chinese in Malaysia", with "legislation which favours Malaysians against ethnic Chinese from the point of view of economic concessions" and "in education, there was discrimination against the immigrant population in favour of the Malay majority".

[22] Mr Amery also submitted that the appellant's case should be accepted as credible and leave granted allowing the appellant to appeal out of time.

[23] On 25 August 2003, the Secretariat, on behalf of the Authority, wrote a letter to Mr Amery, which was sent to him by facsimile. The material part of the letter read as follows:

"The Authority acknowledges receipt of your letter and accompanying documents, received on 21 August last.

We bring to your attention the fact that the translated copy of the relevant police report indicates that the appellant's attackers were themselves Chinese and that the reason given by the appellant to the Malaysian police for the attack, was that he had failed to repay a debt.

This appears to challenge your argument that the appellant's problems have been racially motivated. We reiterate that it appears that there is no Convention ground applicable to the situation.

In an abundance of fairness the Authority will allow you seven days to make any further submissions in respect to the appellant's appeal."

[24] On 26 August 2003, the Authority's Secretariat received from Mr Amery a letter, sent by facsimile. The letter stated as follows:

"Thank you for your fax dated 23 August (sic).

I acknowledge that the police report does relate to two Chinese nationals and that the reason for the attack related to a personal debt owed by the appellant to these men.

I obviously had certain instructions in the matter which I carried out on his behalf. There seems to be an obvious conflict with the material that has been translated.

Accordingly, I will not be making any further submissions and leave the matter to the Authority to make its final decision".

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[25] Having carefully considered all relevant matters, for the reasons which will be apparent later in this decision, the Authority is satisfied that the appellant's appeal is *prima facie* 'manifestly unfounded or clearly abusive'. The Authority also notes that the appellant was interviewed by the RSB.

[26] It is therefore appropriate to now proceed to determine the matters before the Authority on the papers, pursuant to sections 129P(5)(a) and 129P (5)(b) of the Act, without giving the appellant an opportunity to attend a further interview. All material and submissions tendered throughout the determination process have been taken into account in this determination.

THE APPELLANT'S CASE

[27] A summary of the appellant's case appears previously in this decision at paragraphs [4] – [6], and also in the extract from the Secretariat's letter set out at paragraph [14] above.

[28] In regard to his case, it is noted that whilst he has argued that, as an ethnic Chinese, he is at risk of persecution in Malaysia, it is apparent that the gangsters who have attacked the appellant in the past are also ethnic Chinese. The appellant has referred to these gangsters as wanting to extort money from him, although it is noted that in the police report he produced in evidence, the appellant told the police that he had not yet paid the men the 10,000 RM that he owed them. This was the reason he gave the police as to why he had been attacked.

[29] The appellant also claims that the police are "too lazy" to assist him and that because he is an ethnic Chinese and they are Malay, he is unable to receive their protection. It is also noted however that the appellant also claims that the police in fact wanted him to be a witness to assist them to prosecute the gangsters, and that he also has a cousin within the police to whom he was gone to seek help.

[30] The appellant fears for his safety if he returns to Malaysia.

THE ISSUES

[31] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:-

"... owing to a 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."

[32] 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

[33] As the Authority has determined not to interview the appellant, his account, as recorded above, is accepted for the present purpose of determining this appeal.

[34] The evidence suggests that when the appellant was in Malaysia he owed some money (10,000 RM) to some fellow Chinese, who were gangsters. It appears (according to what the appellant told the Malaysian Police) that he failed to repay the money and was attacked as a result. The gangsters have also been significantly troubling the appellant's family.

[35] It is a well established principle of refugee law that nations should be presumed capable of protecting their citizens. Clear and convincing evidence is required to demonstrate a state's inability to protect its citizens (see: *Refugee Status Appeal No. 523/92* (17 March 1995)).

[36] In this case it is apparent that the Malaysian police did make a record of the appellant's complaint (as evidence by the report which he has submitted to the Authority). According to the appellant's refugee status application, the Police were also looking for the appellant as they wanted to prosecute the gang based on his evidence (the Authority refers to page 10 of its file).

[37] Whilst the appellant has complained that on occasions the police would not come, or would not come quickly enough in response to complaints made by his family, on the other hand the evidence suggests that the police have been willing to assist the appellant in respect of the incidents which occurred. Indeed it appears that it is the appellant who has failed to cooperate with the authorities in this regard.

[38] There is no evidence before the Authority that the appellant would be unable to access state protection from any harm he fears and he has failed to rebut the presumption of state protection.

[39] It would also be observed that the appellant has an Internal Protection Alternative (IPA) available to him in that he could avoid any localised trouble which he may face by living elsewhere in his country of origin away from the gangsters. (see *Refugee Appeal No. 71684/99* (29 October 1999) as to the relevant principles in regard to the IPA.). There is a general obligation on a refugee claimant to seek domestic protection (in this instance, in the form of relocating oneself) before claiming the surrogate international protection of the Refugee Convention.

[40] Finally it is noted that even if the Authority accepted that the appellant faced a risk of future harm at the hands of the gangsters, such a risk is not for a Convention ground. To fall within the ambit of the Refugee Convention, it is necessary for a claimant to have a well-founded fear of persecution for a Convention Ground. These grounds are, a person's race, religion, nationality, membership of a particular social group, or political opinion. Quite simply, any harm feared by the appellant would not be for one of these reasons. The reason the gangsters have targeted the appellant is because he owes them money. Even if they were simply trying to extort money, the result would be no different. There is no Convention ground. On this basis alone, the Refugee Convention has no application to the appellant's circumstances.

CONCLUSION ON THE OUT OF TIME APPLICATION

[41] As noted earlier, this appeal was lodged out of time. It is noted that the margin by which it was filed out of time by several months. Even if the Authority accepted that the appellant was without fault as he did not receive notice of the decline decision within time, in any event, for the reasons noted above, the substantive appeal is entirely without merit. There are no special circumstances that could be said to warrant the Authority extending the time limit for the filing of the appeal; indeed, the interests of justice would clearly lie in the appeal being dismissed.

[42] The appellant is refused leave to appeal out of time. In that regard, the present application is dismissed.

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L Tremewan
Member