

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

**REFUGEE APPEAL NO 76514**

**AT WELLINGTON**

<b><u>Before:</u></b>	B L Burson (Member)
<b><u>Representative for the Appellant:</u></b>	The appellant represented herself
<b><u>Appearing for the Department of Labour:</u></b>	No Appearance
<b><u>Date of Hearing:</u></b>	3 June 2010
<b><u>Date of Decision:</u></b>	24 June 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 Fiji.

**INTRODUCTION**

[2] The appellant claims to have a well-founded fear of being persecuted in Fiji by reason of her Indian ethnicity. The principal issue to be addressed in this regard is the well-foundedness of the appellant's fears.

[3] What follows is a summary of the evidence given by the appellant in support of the appeal. An assessment follows thereafter.

**THE APPELLANT'S CASE**

[4] The appellant was born in the mid-1980s. She grew up in the small town of X where she lived all her life prior to her marriage in mid-2008, at which time she moved to Y with her husband. She is the eldest of three children born to her parents. Her father worked in a shop in their village until his death in 2003.

Following her father's death, her mother commenced employment in a nearby factory until this was closed recently and her mother made redundant.

[5] The appellant's two siblings still live in X. Her sister gained her High School Certificate and Vocational Diploma in 2009 and is soon to marry. Her brother, aged 17, is still at school and studying for his 6th Form Certificate.

[6] The appellant completed 7th Form in 2005 and obtained the 7th Form Certificate. She encountered discrimination towards the end of her schooling. At school she described herself as an average or above average student. She studied hard and hoped to get a scholarship to university. However, she told the Authority that pass marks were set on a differential basis. Indians were required to obtain 276 points whereas indigenous Fijians were only required to obtain 240 points.

[7] In some vocational courses selections were done on an ethnic basis. There were only very limited selections of Indians even though they studied hard. For example, in one particular college, for every 10 Fijians selected only one Indian would be selected. The appellant found this discouraging and unsettling. She described it as "putting her back in life".

[8] The appellant found out that people who scored lower points than her in their high school marks managed to obtain government scholarships to university. These were all indigenous Fijians. In addition to these general scholarships there was also the Fijian Scholarship Board which supports only indigenous Fijians. There is nothing similar for Indians.

[9] She therefore applied for a private course in Y. The fees were paid by an uncle and a grandparent. To support herself during her study, the appellant took on casual work in a factory. However she found out that the work tended to be given to indigenous Fijians – they tended to be called up more often for work than she and other Indian casual workers.

[10] The appellant was still at school in 2000 when the coup happened. In the aftermath of the 2000 coup there were burglaries of Indian houses in X. One day the appellant's family woke up and realised that they had been burgled. A bag containing a grandmother's jewellery had been taken. The police were called and conducted a search but although the bag was found in the yard, the jewellery had been taken. No one was ever arrested.

[11] Some Indian families who lived near to a village where indigenous Fijians lived in the X area were attacked at this time. Their house was set alight and they were displaced to a centre run by the local Indian association. Her school organised the delivery of humanitarian supplies to the displaced Indians. The appellant and other Indian students went to the centre and were shocked to learn that one of the women had been raped and the men beaten. This affected the appellant greatly. From that time on she has lived in a state of insecurity and fear. From time to time through the media she learnt of other attacks on Indians by indigenous Fijians adding to her insecurity and fear.

[12] After completing her vocational course, the appellant returned home to X where she remained for the next few months. She found employment there in her field of study. However, after two months, she was invited by an aunt living in New Zealand to come and visit. She extended her stay for a number of months. She tried to find work in New Zealand because after being here she realised that she felt free. She did not have a constant fear of possible danger and a feeling of being treated as a second class citizen in her own country. However, she was not granted a work permit to work here and so she returned to Fiji.

[13] After returning to Fiji she resumed working for the person in X until her marriage. Following her marriage she moved to Y with her husband where they stayed until they both came to New Zealand.

[14] The appellant told the Authority that problems between Indian and indigenous Fijian families often arise over land. Her family lease land from a government agency. Although they do not grow cash crops on this land they do raise some animals for food. However, many other Indian families lease land from private indigenous Fijian landholding enterprises. There is a tendency for these leases not to be renewed and she has seen many examples of houses on sites formerly occupied by Indian families which have been allowed to remain unoccupied simply because the indigenous Fijian landlord did not want an Indian family living in the property. Many Indians are forced to move to the towns to find work as casual labourers.

[15] The appellant does not believe her situation will be any better in the future. She believes it will be difficult for her and her husband to find accommodation and employment. They will struggle. Also, she will live in a climate of real fear. The appellant told the Authority that although she had not been persecuted in a physical way she had been persecuted in a "psychological way" and this has put

her back in life. When she thinks about returning to Fiji she becomes extremely anxious and is perpetually afraid about walking at night or getting onto public transport.

## **THE ISSUES**

[16] 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."

[17] 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**

[18] The Authority accepts the appellant as a credible witness. She spoke eloquently about her situation in Fiji in an open, candid and consistent manner. The Authority accepts that the appellant has encountered the instances of discrimination that she has indicated. Her claim will be assessed against this background.

**Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?**

[19] In *Refugee Appeal No 75612* (June 2010), the Authority noted:

[19] As Thornberry "Confronting Racial Discrimination: A CERD Perspective" observes in *Human Rights Law Review* Vol. 5, No 2 (2005) at 254:

The principle of non-discrimination is fundamental to the human rights enterprise - part of its architecture. It is a way of getting to equality in the enjoyment of human rights by addressing negative practices denying equality.

[20] The Authority's jurisprudence has recognised the centrality of non-discrimination in the enjoyment of fundamental rights guaranteed under both the ICCPR and ICESCR – see, respectively, *Refugee Appeal No 74665/03* (7 July 2004) at [94] – [103] and *Refugee Appeal Nos 75221 and 75225* (23 September 2005) at [85] – [90].

[20] The Authority went on to consider, at [21]-[26], the standards set by the international community under the International Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD). The Authority noted, at [27], that CERD:

imposes 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.

[21] The Authority also examined recent country information regarding discrimination against Fijian citizens of Indian ethnic origin. The Authority noted:

- (a) In 2006, the armed forces commander, Commodore Voreqe (Frank) Bainimarama, overthrew the elected government in a bloodless *coup d'état*. In 2007 the interim military government was replaced by a nominally civilian interim government headed by Bainimarama as Prime Minister. On 9 April 2009, the Court of Appeal declared the coup and the interim government unlawful. On 10 April, the government abrogated the constitution, imposed a state of emergency, and began to rule by decree – see at [29] and [31].
- (b) 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 have been subjected to assaults and home invasions by non-state actors – see [32] and [33].
- (c) Discrimination against Fijians of Indian ethnic origin exists in the social and economic spheres – see [34]-[41] and [45].
- (d) Fijians of Indian ethnic origin tends to be underrepresented in the legislature – see [44].

[22] After reviewing this country information the Authority concluded:

[46] ... while there is no specific targeting of Fijians of Indian ethnic origin for physical abuse on account of their ethnicity by state agents following the

December 2006 coup, from time to time state agents may be slow or fail to adequately respond to instances of physical abuse and property violations perpetrated against them by private individuals. It is not clear on information before the Authority, however, if any failure to adequately respond is a function of their ethnicity, lower socio-economic status, combination of both, or other factors.

[47] More broadly, while some degree of legal protection from racial discrimination exists, there is some doubt as to whether the legal regime in Fiji fully complies with the standards set in CERD by the international community to combat and eliminate racial discrimination in all its forms. It is unclear how effective the legal regime currently in place will be in practice. Certainly country information available to the Authority establishes that there remains some degree of institutionalised discrimination against Fijians of Indian ethnic origin in Fiji. They are under-represented in the legislative branch. Government policy in terms of poverty reduction and other areas of social policy is, to some extent, directed by reference to ethnic criterion and not empirical data relating to the actual incidence of poverty or particular social need. Economic and social life in Fiji is stratified along ethnic lines, with indigenous Fijians dominating public sector employment. Tensions between the indigenous Fijian and Fijian Indian communities exist and are exacerbated by arrangements surrounding land tenure.

[23] The country information and conclusions contained in *Refugee Appeal No 76512* are expressly adopted by the Authority for the purposes of determining the present appeal.

[24] As noted however in *Refugee Appeal No 76512* at [48]:

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. 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.

#### *Application to the facts*

[25] Although the appellant has spoken eloquently about her situation, the Authority finds that she has not established that she faced a well-founded fear of being persecuted in the past. The appellant has certainly encountered isolated instances of moderate instances of discrimination in the past and may well continue to do so in the future. While unjustifiable and reprehensible, she has not experienced any serious harm as a result of this past discrimination. She has always managed to find employment and housing.

[26] What has happened to her in the past is a reliable indicator of what she may encounter in the future as there has been no significant change in country

conditions in Fiji since she has been in New Zealand on this second occasion. Accordingly, the Authority finds that although it can be expected that she may face isolated acts of unjustifiable racial discrimination in Fiji in the future in economic and social spheres of life, there is no reason to suppose that she will not be able to find adequate employment and accommodation, or access essential health services and facilities because of her ethnic origin. In short, any discrimination she may encounter in enjoyment of her rights in the economic and social spheres will not lead to her suffering serious harm.

[27] Finally, the authority does not over look the appellant's claim to have been psychologically harmed as a result of her experiences of racial discrimination and living in a country where the military have usurped control of the government on multiple occasions. The Authority accepts that these events have been distressing for the appellant and may continue to be so.

[28] The issue of psychological harm arising from feelings of generalised insecurity was considered in some detail by the Authority in *Refugee Appeal No 71404/099* (26 October 1999). The Authority noted:

[74] In *Refugee Appeal No. 4/91 Re SDJ* (11 July 1991) the Authority accepted that persecution is not restricted to "physical" acts, such as loss of life or liberty. In doing so it referred to what was said by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 430-431 (HCA):

"Other forms of harm short of interference with life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol. Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution...."

Hence the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason...."

As earlier mentioned in para 67 above, the Authority is of the view that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard.

[75] As to psychological harm, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 1(1) explicitly recognizes that torture includes severe mental pain or suffering:

"For the purposes of this Convention 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ...."

While it is clear that forms of psychological or mental harm are included in the concept of persecution (see further Deborah Anker, *Law of Asylum in the United States* 3rd ed (1999) 214-218), not all forms of such harm are so included, a point which the very general submissions for the appellant appear to overlook.

[29] The Authority observed that the extent to which the human right to “security of the person” extended beyond the right to be free from arbitrary deprivation of liberty was unclear – see [77] and [78] but that it was not necessary to reach any final conclusion on the issue.

[30] Similarly, it is not necessary in this case for two reasons. As to the appellant’s fear of being subject to physical attack, her fears in this regard are essentially speculative. She has not been subjected to an assault on the past and the chance of this happening to her form the realm of pure conjecture or surmise. This has no part to play in determining whether a fear is well-founded – see *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572; (1997) 144 ALR 567, 576 (HCA); *Refugee Appeal No 76228/01* (5 April 2002) at [131]. Second, there is no medical evidence before the Authority to establish that the appellant has suffered any particular harm as a result of this generalised feeling of insecurity arising from her experiences of racial discrimination and her fear of the military government or will do so in the future.

[31] For these reasons the Authority answers the first principal issue in the negative. The need to consider the second does not, therefore, arise.

## **CONCLUSION**

[32] For the reasons mentioned above, the Authority finds 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.

“B L Burson”

B L Burson  
Member