

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 74922

REFUGEE APPEAL NO 74923

REFUGEE APPEAL NO 74924

AT AUCKLAND

<u>Before:</u>	L Tremewan (Member)
<u>Counsel for Appellant:</u>	S Sharma
<u>Appearing for NZIS:</u>	No Appearance
<u>Date of Hearing:</u>	21 June 2004
<u>Date of Decision:</u>	30 June 2004

DECISION

[1] These are appeals against decisions of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellants, citizens of India.

INTRODUCTION

[2] The appellants are a married couple and their 8 year old son. The family arrived in New Zealand on 5 August 2002. They made applications for refugee status on 3 June 2003, some 10 months after their arrival. The appellant parents were interviewed in respect of the claims on 21 August 2003. A decision declining the grant of refugee status was published by the RSB on 14 October 2003. It is from that decline decision that the appellants have appealed to the Authority.

[3] It is noted that the appellant parents have represented their son in regard to his claim, in terms of s141B of the Immigration Act 1987. He did not give evidence either before the RSB or the Authority.

[4] Although each of the three claims are legally separate, the claims all arise from the same alleged factual situation and this one decision encompasses the claims of all three appellants.

THE APPELLANT'S CASE

[5] The following is a summary of the evidence presented by the appellants. A credibility assessment of that evidence is later made in this decision.

[6] The appellant husband is aged 40. His wife is aged in her late 20s. They and the appellant son (their only child) were born in the district of Kolkata (Calcutta), in West Bengal.

[7] The appellants are of Bengali ethnicity and are practising Hindu. No aspect of their case is connected to their ethnicity or religion.

[8] The appellant parents completed their secondary education without incident. They married in 1994 and at that time lived with the appellant husband's family. The appellant husband established a reasonably successful business supplying retailers with cosmetic products. His wife obtained a qualification as a beautician and ran her own business in that regard.

[9] The appellants maintain that life was good for them in India and there was no reason to leave, except because of the events which took place on 13 August 2001.

[10] On that date, the appellant family decided to visit a particular temple, for worship. Whilst the temple was not their closest it was one which they liked and would visit on occasion. Whilst on the way there, they passed the home of Sailen Das, who was a leader of the Congress Party of India (Marxist) (CPIM) and the Dum Dum Municipality Chairman. Mr Das, an elderly man, was revered for his past work as a social worker and also because of his noted ability as a singer.

[11] However, on this day, whilst the appellants were walking past Mr Das' home, they witnessed some assailants fatally shooting Mr Das and then fleeing the scene. The appellants themselves, upon witnessing this event, also quickly turned and left for home, on foot.

[12] After arriving at home in an upset state, the appellant husband and wife feared that they may somehow be at risk for having witnessed the murder. They feared that as the murder was surely a political killing, they could be pressured – (both by Mr Das' CPIM party and their opponents, Congress – whom they assumed must have been responsible for the killing) into either giving or not giving evidence or in some other way becoming involved in the matter.

[13] Shortly after their return home, representatives of both the CPIM and the Congress Party called upon the appellants, pressuring them. Threats were made against their lives if they failed to co-operate either in the giving or the withholding of information as to what they had seen.

[14] Fearing for their lives, the appellants immediately went into hiding. Over the course of the next year, they moved to various parts of India including to Orissa, Andhra Pradesh and Delhi. Every where they went the party political people managed to track them down (particularly the Congress Party which was active across India and not just in the West Bengal area). Whilst managing to fortuitously avoid confrontations with any of these persons, nevertheless the appellants realised that they would not be safe in any part of India.

[15] The appellants obtained genuine legal Indian passports and decided to leave India.

[16] The appellants did not seek the assistance of the police or any other Indian authority because they did not have faith in the ability of the police to protect the family. Indeed, they saw the police as another problem - they might be involved in some sort of cover-up in relation to the case, in the event that they had made arrests. Instead they travelled to New Zealand, arriving in August 2002.

[17] Shortly after the arrival, the appellant wife attended a beautician's course at a polytechnic, later leaving due to health issues. A student permit which had been granted to her allowing her to take the relevant studies was revoked after her

enrolment at the institute was terminated. Shortly after that the relevant refugee status claims were made.

[18] The appellants have maintained contact with their respective families since they have been in New Zealand. In terms of information that is relevant to their claims, they have been warned by their families not to return to India as matters relating to the assassination of Mr Das have not yet been finally resolved.

[19] The appellants fear that on a return to India they could face grave danger, even death, at the hands of party political people and that the Indian authorities would not be able to ensure their safety.

THE ISSUES

[20] 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[21] 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

[22] Before turning to the issues as framed above, it is necessary for the Authority to make a determination as to whether the account presented by the appellants is credible. Due to the large number of inconsistencies (within the appellant husband's and the appellant wife's individual accounts and against each others accounts) as well as implausibilities, the Authority has concluded that the account presented cannot be relied upon and must be rejected in its entirety. The following are examples:

Evidence as to their Presence at the Time of the Killing

[23] Both the appellant husband and wife gave evidence that on the morning in question, they had left home with the intention of visiting a particular Hindu temple, for worship. It was for this reason that they passed Mr Das' home. The husband's evidence to the Authority was that it was about a 30 minute walk from the family home to the particular temple. On this occasion, however, they had left home by rickshaw but the rickshaw had broken during the journey and they had decided to walk the remainder of the way. If that had not happened, they would not have walked past Mr Das' home, but rather they would have travelled past at a much faster rate by rickshaw. In other words, it was clear from this evidence that the fact that the family came to be outside Mr Das' home, on foot, at the time of the assassination, was really only because the rickshaw had broken down and they had decided to continue on foot.

[24] The wife also gave evidence that on the day in question, they had left home by rickshaw but after the rickshaw had broken down the family had continued on foot.

[25] It is notable, however, that at their RSB interviews, the appellants gave somewhat different evidence. The appellant wife referred to the family as having walked to the scene (rather than go by a rickshaw which had broken down). This walk had taken half an hour. When asked about this disparity at the hearing, the appellant wife stated that she must have made some mistake (at her RSB interview) as she was so nervous. Whilst the appellant husband at his RSB

interview referred to the family as having left home on a rickshaw which had broken down (the same evidence that he gave before the Authority), his evidence raised a more concerning issue.

[26] The appellant husband has emphasised throughout the history of his refugee claim, the fact that Mr Das was not only a politician and social worker but a revered musician. The appellant husband, a person of some musical ability himself, had, he claimed, a strong desire to approach Mr Das to see whether he would be prepared to give him music lessons. This is a reason he has given for also being present outside the house on that day.

[27] However, if that evidence was correct (that the appellant husband was wanting to approach him for lessons) then this does not adequately explain the fact that the family only happened to be outside Mr Das' home, on foot, by coincidence on the day in question, it being recalled that if the rickshaw had not broken down the family would have travelled passed Mr Das' home at some speed, directly to the temple.

[28] In other words, the appellant husband's very detailed explanation as to his wanting to approach Mr Das seems at odds with the evidence that they were only outside his home through happenstance.

[29] When these matters were put to the appellant husband, he explained that while he had planned to approach Mr Das, he had not planned to do so on that particular day, until the opportunity arose after the rickshaw broke down and they were going to be passing Mr Das' home. He hoped that he would get a glimpse of the revered Mr Das who might be coming out of his house, and seize the opportunity to make a request for music lessons before continuing to the temple on foot. The Authority does not overlook this explanation; however, it seems highly unlikely. Moreover there are other concerns about this matter.

[30] For example, at the RSB interview, the tenor of the appellant husband's evidence was that there was a clear intention that he had intended to pay a visit to Mr Das on the day in question. He had had advice about Mr Das from a friend to this effect. Indeed, at his RSB interview, the appellant husband explained that his friend had told him that Mr Das lived on that particular street and that the appellant

husband could “ask anybody” and they would “show him the house” of “the famous singer and municipality chairman”.

[31] To the Authority, however, the appellant husband maintained that he well knew which house belonged to Mr Das and had known of it for about ten years. When asked about his evidence at the RSB interview, firstly the appellant husband expressed disbelief at what the RSB interview record contained and then explained that while he had indeed discussed the matter with his friend, he had known where the house was already. He could not explain why the tone of his evidence from the RSB interview would be different. The Authority retained concerns in regard to the appellants’ evidence as to the circumstances of the family’s presence at the scene on the day in question.

[32] Of further concern, in the appellants’ Confirmation of Claim to Refugee Status in New Zealand forms and in their (joint) detailed written statement, it was claimed that Mr Das had come out of his house and the appellants were actually talking with him for a few minutes before the three assassins came by and killed Mr Das. These statements suggest that the appellants were shouted at (apparently to get them to stand aside). This is contrary to the evidence at the hearing that they never spoke to Mr Das at all.

[33] When given an opportunity to comment on this evidence, the appellants each stated that the content of their applications forms and written statement was clearly mistaken in this regard. They noted that they had had assistance from a friend (who has since returned to India) in completing this paperwork. It was suggested that the friend had clearly misunderstood what they had said as to what had in fact taken place, and they had not realised that these mistakes had been made.

[34] The Authority appreciates that it is not an unusual occurrence for a person who does not speak English as their first language, to receive assistance from a friend or relative who may not correctly record relevant details. An appellant may not realise that a mistake has been made until it is later brought to their attention through the determination process. However, the Authority does not accept that an innocent explanation is available here.

[35] Firstly, it notes that both the appellant husband and wife are reasonably well educated people who each completed secondary education. The appellant wife has done further education in both India and in New Zealand and they each apparently ran successful businesses in India. Indeed, it is noted that in their refugee status claim forms, it was indicated that both the appellant husband and wife can read and write English. The Authority does not consider it likely that they would not have appreciated such a major error had taken place in the recording of their account in their statements and forms (which they have previously confirmed at their RSB interviews that they were familiar with and did not want to alter).

[36] Moreover, the account is of narrow focus. It is not a lengthy and detailed narrative but one which virtually relates to a single incident with flow-on ramifications. Surely the person whom they trusted to assist them would not have misunderstood whether the appellants were actually speaking – for some minutes - with this clearly famous individual prior to his being assassinated.

[37] The difference between the two scenarios is, in the Authority's view, significant enough that a careless mistake or misunderstanding would in the Authority's view be unlikely. When placed along side the other unsatisfactory aspects of the appellants' evidence, the Authority does not accept that these mistakes can be attributed to a simple error on the part of the appellants' friend.

Inconsistent Evidence as to the Identity of the Person Killed

[38] Another major error which was contained in the appellants' Confirmation of Claim to Refugee Status in New Zealand forms was the misidentification of the person whom they had seen killed. There they described him as a different CPIM leader, Sailan Ghosh (whom the Authority notes had been assassinated about three months prior to Mr Das). This name was specifically mentioned several times in the relevant application form.

[39] This discrepancy was first put to the appellants by the refugee status officer. The appellants agreed - as they did before the Authority - that there had been confusion between these two names and that it was Mr Das' murder and not Mr Ghosh's murder that they had witnessed. They reiterated that they had assistance with filling out the relevant paperwork. They also claimed at the Authority hearing, that they had in fact known the revered Mr Das as Mr Sailan Babbu (which the

Authority accepts would be a name of endearment) and that they had not known his correct name and had become confused in this regard.

[40] The Authority accepts that, particularly in the India culture, different names can be used to describe the same person and again it accepts that where a person receives assistance with the completion of forms and statements, this can give additional cause for mistakes.

[41] However, this is not accepted in the present case. First, according to the appellant husband, Mr Das was very well known to him as a politician (and singer). It seems highly unlikely that his correct name would not be known. Moreover, even if at the time of these events the appellants had not known his name, they could reasonably be expected to know it when the filling out of these refuge status forms occurred - a year and nine months after the assassination took place. On the appellants' case the killing of Mr Das had caused them to flee to different parts of India and on to New Zealand. It is inherent in their case that they have had to avoid persons wanting them to become involved in the investigation (or not as the case may be) in regard to Mr Das' killing.

[42] The appellants are not unintelligent people. As noted, they are reasonably well educated. It is beyond the bounds of credibility that, having been through so much, on their account, they would not notice or be unaware of the totally incorrect name having been provided in respect of the person whose murder they claimed to have witnessed.

What the Appellants Witnessed

[43] In terms of the actual killing, at the Authority hearing the appellant husband gave quite a detailed description of events. He described seeing three assailants, one of whom was disguised with a mask and two who were not, standing beside a motorbike. They were by a car which he thought was Mr Das' car, with the driver present. When Mr Das came out he had a brief conversation with the three men who walked towards him and Mr Das was then shot and fell to the ground.

[44] The appellant husband then saw the men have a fight with the driver and then try to run away. However when the men tried to leave on their motorcycle

(which, the appellant husband noted had “no number”) the motorbike did not start. They then grabbed a motorbike belonging to a member of the public, who happen to be passing at the time. The men then left the scene. The appellant husband then crossed the road with his wife and child and went home.

[45] It is notable that, in contrast to this quite detailed account, when the appellant husband was asked at his RSB interview what he had seen, although able to describe the three men killing Mr Das, he did not give any of this evidence with regard to the problems that the men had then had with their motorbike and how they escaped on a motorbike, stolen from a passing stranger.

[46] When asked about this aspect of his account at the RSB interview, the appellant husband had replied, “I can’t tell you what happened”. He added “They just ran away with their motorbikes. I don’t know where they’d gone. I was running away with my wife and son to save our lives”. When the refugee status officer (who was clearly familiar with news reports of the killing) asked about whether the men had stolen a motorcycle, the appellant husband stated “Only one I think I can’t tell you after that. Yes I can’t tell you what happened after that because I was busy to save my life at that time”.

[47] The Authority asked the appellant why he had been able to give this description of events at the hearing, but had been unable to do so at his RSB interview. His response was to confirm that he had seen the men snatch the other motorbike and then leave on that and that he could not always remember everything.

[48] Given the highly particular nature of this evidence, the Authority would expect the appellant husband to have recalled it consistently.

[49] As far as the appellant wife is concerned, in her description to the Authority, she described none of the three men as being disguised and in fact, gave no meaningful information as to any events after the actual shooting. She stated, “After that I covered my son’s eyes and turned [in the] opposite [direction] and I didn’t see anything else after that”. When asked what had happened after that, she said, “Then my husband, me and my son came home”.

[50] Later, the Authority asked her again about these matters and once more she merely described having seen “the three persons walk towards Mr Das, they were talking and then shot him”. Then she felt “nervous, covered [her] eyes, turned and saw nothing else”. The Authority specifically asked her whether she had seen how the assailants had got away, to which she had replied, “No I didn’t see”.

[51] However, at her RSB interview the appellant wife gave a much more detailed description of the relevant events. There her evidence was that after the shooting, she saw that the men could not start their motorbike and had run away in front of her, passing her, by foot. She added that, most probably, Mr Das’ driver had been there but she did not know whether he had tried to stop the men.

[52] The Authority asked the appellant wife why she had not been able to describe these same events (as to having seen the men being unable to start their motorbike and watching as they had then escaped on foot in front of her) at her appeal hearing. She stated that she had seen the shooting clearly but did not know about what had happened after that. When asked again why she had been able to give much more detail at her RSB interview, she then stated that she had not told the Authority much because she had thought that she had to keep her answers brief and not give too much detail.

[53] The Authority reminded the appellant wife that in the standard introduction which had been given at the commencement of the hearing, the appellants had been specifically advised that they should say anything that was relevant to their case and, specifically, that they should give full answers to their questions and not abbreviate their evidence. They were however told to insert pauses for the interpreter to translate the evidence before continuing on – so that nothing important was left out. The appellant wife acknowledged this, indicating that she had misunderstood.

[54] The Authority does not accept that explanation. Moreover, the appellant wife’s failure to provide this evidence (which she had given at the RSB interview) followed direct and specific questions from the Authority in respect to these matters. She could have been under no illusion as to what it was that was being asked of her.

Appellants' Evidence as to Leaving the Scene

[55] The appellants also gave unsatisfactory evidence in regard to how they left the scene of the murder. The appellant husband gave evidence before the Authority that the family had walked home after the incident. He stated that they had tried to get a rickshaw but that the rickshaw driver had wanted too much money for the fare. At his RSB interview, he had also stated that the family had walked home but gave the reason that this was because "if I take a rickshaw I would tell the rickshaw puller to ride faster and might tell him what [had] happened so I thought of walking home".

[56] The Authority asked the appellant husband why, if the rickshaw driver had wanted too much money for the fare, he did not simply take another rickshaw. It also asked why his evidence before the Authority had differed from that he had given to the refugee status officer. He replied that what he had told the refugee status officer and what he had said to the Authority was all true. He explained that he had asked a rickshaw driver to take the family home but that the driver had asked for too much money and, in any event, he thought it better not to take the rickshaw after all because the driver might ask lots of questions. He also stated that around that time of the morning (10 to 11 am approximately) it is "hard to get a rickshaw".

[57] In the Authority's view this was an unsatisfactory explanation for the inconsistency. Furthermore, the assertion that it would be hard to get a rickshaw in a part of urban Calcutta during a mid-morning to be highly implausible, even if there had been some local disturbance.

[58] It is also noted that the appellant husband gave evidence that on the way home a number of people approached the family (having seen them come from the direction of the murder – the news of which was quickly spreading). They began asking them questions although the appellant husband had not answered these. His wife, in her evidence, when asked whether people had talked to them on the way home replied, "No". It was only after the Authority explained her husband's differing evidence that she then stated that her husband may have had people talk to him but she was very upset and concerned for their child. Whilst not a major point, this is another inconsistency which serves to discredit their account.

Events After the Murder

[59] It will be recalled that it was the appellants' evidence that they had to leave the family home and go into hiding for a year prior to coming to New Zealand because of the extreme pressure put on them by party political people who wished them to either provide evidence, or not to divulge evidence, as to what they had seen. They travelled, in the course of that year, to various parts of India - including the states of Orissa and Andhra Pradesh, and to Delhi. Everywhere they went, they were located and they had to move on again. It will also be recalled that, on their evidence, at no time did they actually get confronted by the persons so intent on seeking them out, but were able to escape from them on each occasion.

[60] The Authority finds this evidence to be wholly implausible.

[61] India is clearly a large and extremely densely populated country (of over a billion people, see United States CIA *The World Fact Book: India*).

[62] Country information (disclosed to the appellants by the RSB and with which they take no issue) clearly indicates that arrests were made in respect to the Das killing on the very night of the murder (now some almost three years ago). That is not to say that, even so, witnesses would be sought or some influence brought to bear on them. However, the Authority finds the appellants' evidence that they would firstly have been identified by these party political people, and that these people would have gone to such extreme lengths to track them down - and yet never actually confront them - to be wholly implausible.

Time in Hiding

[63] There were unsatisfactory aspects in the appellants' evidence as to their time in hiding. For example, the appellant husband referred to their first place of hiding - with a relative - as somewhere they stayed for about a week. They had had to flee after that as their whereabouts had been ascertained by party political people. However, to the RSB he described that initial period as having been a month (although he said that they left at the end of September which would have been a period closer to six weeks). His explanation to the refugee status officer for the family having left that first place of hiding was because they felt bad about

imposing on the relations, although he had gone on to say that their whereabouts had been ascertained.

[64] The Authority asked the appellant husband as to why his evidence, in regard to this matter had been so different, at which point he then reverted to the evidence he had given to the RSB, stating that they had stayed there for “about a month” and had “roamed around for a year”. When asked further about these differences in his evidence, he stated, “I’m not alright here. I might make mistakes. I’m always thinking...I don’t event know what I am saying. I can’t go back home”.

Conclusion on Credibility

[65] The Authority acknowledges counsel’s submissions with regard to the credibility concerns in respect of the appellants’ claims, which became apparent during the hearing. Mr Sharma urged the Authority to appreciate matters such as cultural and language differences, and the effect on a person who had truly witnessed an horrific murder. The Authority has taken all of these matters into account, however, ultimately the Authority is simply unable to rely on any core aspect of the appellants’ account and it must therefore be rejected.

[66] The above issues must therefore be answered in the negative. There is no basis for the Authority to conclude that they are refugees within the terms of the Refugee Convention.

CONCLUSION

[67] The Authority finds that the appellants are not refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeals are dismissed.

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L Tremewan
Member