

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76442

AT AUCKLAND

<u>Before:</u>	A R Mackey (Chairman) D Henare (Member)
<u>Counsel for the Appellant:</u>	H Craven-McLeay
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	16 February 2010
<u>Date of Decision:</u>	4 March 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 recognition of refugee status to the appellant, a national of India of the Sikh faith.

INTRODUCTION

[2] The appellant is a single man in his mid-20s who arrived in New Zealand in late June 2009 and applied for recognition as a refugee on 9 July 2009. His application was declined by the RSB on 29 October 2009. An appeal on his behalf was then lodged by the office of Roger Chambers, with whom counsel is associated.

[3] The matter proceeded in the usual manner, commencing at 10am. However, before a morning break was taken at 11.30am, the appellant was told, through the assistance of a competent interpreter, that he should return for the continuation of the hearing at 11.45am. He failed to do so. The Authority, counsel

and the interpreter waited until 12.45pm for the appellant to return. After discussion and submissions from counsel on all issues, a Minute dated 17 February 2010 (attached only to the original decision) was then issued, explaining that a two-day adjournment would be granted in case, for some unforeseen reason, the appellant had got lost or was unable to find his way back to the hearing room after leaving the Authority's premises during the morning break.

[4] Counsel undertook to take all practical steps to find the appellant and to obtain further instructions. The Authority was advised on 22 February 2010 that counsel had been unable to contact the appellant and had received no further instructions, despite having made enquiries at the addresses and contact telephone numbers available to Mr Chambers' office.

[5] In the circumstances, the Authority has concluded that the appellant has chosen not to provide any further evidence in support of his appeal and that he has done this of his own volition. The Authority is, however, satisfied, from the evidence already provided, that a fair and balanced determination can be completed at this time, without the need for a resumption of the hearing.

[6] The nub of the appellant's claim is that he predicts being persecuted by the police in India on his return to his home or elsewhere for reasons of harbouring and supporting Kashmiri terrorists.

[7] The essential issue in this appeal is whether the appellant's account is credible. His case is set out below.

THE APPELLANT'S CASE

[8] The appellant was born in Z village, Jalandhar district, Punjab in 1985. He is the third of five children. His parents and family remain on the family farm of approximately two acres. After about 10 years of schooling, the appellant began working on the farm in 2003, along with his brother, father and paternal grandfather.

[9] In addition to his farming activities, the appellant started driving a taxi at the age of approximately 18. The taxi was owned by a neighbour of the appellant who taught him to drive. The appellant obtained a driver's licence which was all that was necessary for him to be able to drive a taxi. He drove the taxi for a period of several years on about five to 10 days per month. He obtained his customers from

the taxi rank either in Shahkot or in Jalandhar. These were the only two places that he operated from.

[10] The taxi rank in Jalandhar was in the city but the appellant did not know the street name. To find it, he asked for its location and likewise, to find the location his customers wished to travel, this was done by asking for directions.

[11] In Shahkot, the taxi rank was in the main street of the city. He did not know the name of the district or part of Shahkot in which the taxi rank was located, apart from stating that it was next to the police station.

[12] The appellant took his clients to destinations in the local districts in each city. He got to know the area of Jalandhar city quite well so that he could take people to their destinations.

[13] In early 2008, the appellant picked up four businessmen in his taxi at the Jalandhar taxi rank and drove them to the Jalandhar railway station. It was about a 10 minute drive. Apart from asking him to drive to the station, no other conversation took place with these men and the appellant could not tell where in India they were from through their accent. He did not pay much attention to them. As there were no other fares available that day, he went home. The next day, early in the morning, six or seven policemen came in a police car to his home and took him to a police station in Shahkot. They did not give any reasons to him or to his family for his detention. No conversation took place in the police car and he was not handcuffed. At the police station he was asked if he was part of a gang of Kashmiri terrorists. From this, the appellant understood that the police thought he was part of some Kashmiri gang. They told him that he had taken Kashmiris from the taxi stand to the railway station and that he was therefore part of a Kashmiri gang. The appellant denied any connection with the Kashmiri men.

[14] After denying any connection with Kashmiris, the police beat him with *lathis* and hit his head against a wall. He was also forced to urinate against an electric heater which gave him an electric shock. The maltreatment continued for a period of some 15 to 20 minutes. After that, somebody came to the police station and arranged for his release.

[15] The appellant later found out the release had been negotiated by the *Sarpanch* from his village who had paid a bribe to the police which had evidently been arranged by the *Panchayat*.

[16] On his release, nothing was said to him by the police. He was just released

from the cell he had been held in. He was then taken by the *Sarpanch* in a car to his home. His main injury from the maltreatment by the police was a wound to his head which he had treated by the village *hakim*. He pointed to a visible scar on his head. He said he had also been hit on the wrist with a *lathi*.

[17] Neither the appellant nor any member of his family has ever had any other problems with the police.

[18] After the incident, the appellant decided to live outside of his home village as he was in fear of the police. About two or three days after the police detention, he went to live with some relatives approximately 20 kilometres from his home. He stayed there for five or six months until he came to New Zealand. While staying with these relatives, he assisted them with farming work but did no further taxi-driving. He maintained contact with his parents by telephone a few times but there was no visit either way. His parents asked if he was all right but there was no further comment.

[19] The appellant was able to organise his departure from India after he had heard a rumour that there were people coming from New Zealand to Jalandhar and there was a person there who could assist in taking people to New Zealand.

[20] He went to Jalandhar and met a man called AA at the bus station. He had no recollection of who took him there or how the meeting was arranged but stated:

“I just met him.”

[21] AA had no office or rooms. After a discussion at the station, the appellant told him his story and explained about the beatings that he had sustained. AA said that he would take the appellant to safety. The whole conversation took approximately half an hour.

The appellant's failure to return to the hearing

[22] It was at this point in the evidence that a morning break was taken, the details of which are referred to earlier in this decision. It was explained that a 15 minute refreshment break would be taken and the appellant should then return for the continuation of the hearing. This was explained in some depth by the interpreter who made arrangements to supply him a small snack. The appellant asked if he could go out of the building and was told that he could do this but it was wiser to remain in the premises, take the refreshment break and then continue. He eventually left the premises when counsel thought he was taking a

bathroom break. He failed to return and has made no further contact with counsel or the Authority.

Other evidence taken from the appellant's statement and on the RSB file

[23] The appellant had stated that after meeting with AA in August 2008, he agreed to pay him Rs500,000. This money had been borrowed from various sources by his family. In September 2008, he obtained a clear police clearance from the Shahkot police station and then, in late September 2008, an application for a work visa was lodged with the New Delhi branch of Immigration New Zealand.

[24] On 18 June 2009, a limited purpose visa was issued to the appellant to travel to New Zealand and he departed on 21 June 2009.

[25] After arriving at Christchurch airport, the appellant, who had travelled with a number of other Punjabi men (who had also apparently used the services of AA), moved to Blenheim in an attempt to take up the employment contract he had entered into with Mana Corporation. When it was ascertained that that contract was without substance, the appellant stated that he met, along with some other Indian friends, a Mr Kulwant Singh in Blenheim to whom he told his story. Kulwant Singh then arranged for his refugee claim to be lodged.

[26] The Authority has had the opportunity of considering the application for the limited purpose visa, along with the medical and x-ray forms the appellant completed in India in support of his application for a visa.

THE ISSUES

[27] 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."

[28] 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

[29] The Authority has, for many years, interpreted the term “being persecuted” in the refugee “inclusion clause” as the sustained or systemic violation of basic human rights, demonstrative of a failure of state protection. In other words, core norms of international human rights law are relied on to define the forms of serious harm which are within the scope of “being persecuted”. This is often referred to as the human rights understanding of “being persecuted” and is fully explained in *Refugee Appeal No 74664/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125].

[30] Before turning to consider the appellant’s credibility, the Authority notes that this is an unusual case where the appellant chose to leave the Authority’s premises after giving approximately one and a half hours of oral evidence to the Authority. The Authority, as noted above, granted a short adjournment of two days in order to ascertain whether or not the appellant had perhaps got lost in Auckland city, a place unfamiliar to him, and thus had failed to return for that reason. However, after a period of five days, his counsel was unable to make contact with him and he has taken no steps to contact them or to explain why he failed to return. In these circumstances, the Authority is satisfied that the appellant had been offered the opportunity for an oral interview and had begun giving evidence in that manner. Of his own volition, he chose to withdraw from the hearing before it had reached its completion. In the circumstances, the Authority is fully satisfied that, from the evidence available, both on the file and orally provided, there is no lack of fairness or balance in reaching a determination in this case on the totality of the evidence now available. This is particularly the case bearing in mind that an appellant bears the responsibility for establishing his claim under s129P(1) and 129P(2) of the Act as referred to in *Anguo Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

[31] The Authority received not only the written submissions from counsel but also short final submissions from Ms Craven-McLeay. She submitted that the adjournment was the correct course as maybe the appellant had misunderstood the interpreter and did not know Auckland, and also that he was possibly fearful of people in authority, although the Authority clearly explained its independent role to

him. She adopted the written submission which had been taken into account by the Authority.

Credibility

[32] The Authority is satisfied, considering all the evidence available in its totality, that the core of the appellant's claim is untrue. His claim has been fabricated in an unfortunate attempt to provide some basis for a refugee claim in New Zealand after his understandable disappointment at not obtaining employment in this country.

[33] The reasons why the Authority disbelieves the core of the appellant's story are based on inconsistencies and implausibilities in his evidence. Before the Authority, the evidence he did provide was unimpressive, extremely vague and somewhat casual for a person who claimed such a parlous predicament.

Inconsistencies

[34] Before the RSB, in reply to the question "How did you know the men were from Kashmir?", the appellant stated that they had told him they were from Kashmir and that they wanted to go to the railway station. However, before the Authority, the appellant stated that apart from telling him to take them to the railway station, the four men had no other communication with him and he could not recognise where they were from by their accent.

[35] In his evidence relating to the detention by the police, he stated in his original statement and to the RSB that the police had explained, when they came to his home to detain him, that he had been harbouring and supporting Kashmiri terrorists. However, before the Authority, he stated that when the police came to his home, they said nothing; they just took him and there was no conversation in the police car when they took him to the Shahkot police station.

[36] When the appellant gave evidence to the RSB about the length of his detention, he stated that after two days, family members, along with the village *Panchayat*, made a payment to the police and got him released. However, before the Authority, the appellant stated, after arrival at the station and his professing no knowledge of the Kashmiris, he was then maltreated by beatings with *lathis*, hitting his head against the wall and having to urinate against a heater over a period of some 15 to 20 minutes. When asked if there were any more occasions, he said there was one beating of 15 minutes and "then someone came and got me out of

the station". There was simply no mention of being detained overnight.

[37] Clearly all of the three incidents have been inconsistently reported with no logical reasons for the inconsistencies.

Implausibilities

[38] The appellant claimed to have driven a taxi for five to 10 days a month for three years. Despite this, he was unable to give anything but vague answers when asked about routes or locations within the areas he drove. The Authority finds that he has fabricated his claim to be a driver and that it is a device he came up with as part of his false claim to have associated with Kashmiris.

[39] While not going directly to the core of his claim, the Authority found the appellant's recollection of his meeting and negotiations with AA to be a fanciful fabrication or at most highly implausible. To literally fall into conversation at the bus station in Jalandhar with a person he had never met and then, within half an hour, explain all of his problems and agree to pay the substantial amount of Rs500,000 is a highly fanciful story. The Authority is satisfied this does not equate in any way with the truth of what actually did happen. The Authority finds that his approach to this evidence and much of his other evidence was highly evasive and vague in an attempt to avoid getting into any detail in an otherwise fabricated story.

[40] In addition to the above problems with the appellant's evidence, the Authority also agrees with the concerns expressed by the RSB that it is highly coincidental that some 22 or 23 Punjabi Indians should travel to New Zealand at approximately the same time, using the same agent, without some degree of common planning. This appellant failed to disclose the background to this matter and the actual lodging of the claim itself with any apparent frankness. While these items are not at the core of the claim, they reflect the overall vagueness and evasiveness of the appellant's evidence.

[41] Assessed in the round, the Authority is satisfied that this is a fabricated claim which cannot be believed and thus his credibility, apart from being a national of India of the Sikh faith from the Punjab, is rejected. In these circumstances, he does not meet the requirements of the first issue set out at [28](a).

[42] The Authority also notes, that while it is, on the above findings, unnecessary to reach such conclusions, based on the actual evidence the appellant gave to the

Authority about the extent of his maltreatment by the police in India, there was only one incident of maltreatment in which this appellant has been involved. Even if the evidence in relation to that incident were accepted (which it is not), this does not appear to establish evidence of past sustained or systemic persecution of this appellant.

CONCLUSION

[43] The first issue set out above is answered in the negative. It is therefore unnecessary to consider on the second issue. The Authority finds that the appellant should not be recognised as a refugee within the meaning of Article 1A(2) of the Refugee Convention. The appeal is dismissed.

"A R Mackey"
A R Mackey
Chairman