REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 74756

AT AUCKLAND

Before:	S L Murphy (Member)
Counsel for the Appellant:	S Munif
Appearing for the NZIS:	No Appearance
Date of Hearing:	7 May 2004
Date of Decision:	28 June 2004

DECISION

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[1] This is an appeal against a decision 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 appellant, a national of Hungary, of mixed Roma/ethnic Hungarian ethnicity.

INTRODUCTION

[2] The appellant is a single man in his late 20s who arrived in New Zealand on 31 March 2002 and filed an application for refugee status two months later on 31 May 2002. He was interviewed by a refugee status officer on 1 October 2002 and a decision declining his claim was delivered on 30 June 2003. It is from that decision that the appellant has appealed to this Authority.

THE APPELLANT'S CASE

[3] The appellant is of mixed racial origin. His father was Roma and his mother is an ethnic Hungarian. He has one sister. The appellant's father was a self-employed cabinet maker. He died in 1993.

[4] It was apparent from the appellant's evidence that his only obvious

connection to the Roma race is through his surname. His surname is used by both Roma and non-Roma, however because a number of Roma have the name, it is an indication that the bearer of the name is or could be Roma.

[5] The appellant was largely assimilated into Hungarian society. He is of fair complexion, with light hair (the Authority notes that he acknowledged in the course of the hearing that his race was not apparent through his appearance). Because his father (who had a characteristically Roma appearance) was institutionalised at an early age and subsequently fostered out, he has never had any connection with his Roma grandparents or their family. Neither the appellant nor his father had a Roma accent. Nor did the appellant have any ongoing Roma cultural ties (although some of his friends at school had been Roma). His family did not live in a Roma area and socialised mainly with their white Hungarian neighbours.

[6] The appellant is not aware of his father having suffered any particular discrimination as a Roma, although he believes that he may have been reluctant to talk about such matters. The appellant, himself, however did suffer discrimination in several areas of his life, the details of which are discussed below.

Education

[7] The appellant started primary school in G. Initially he had no problems, but later he became ostracised by his fellow students, when they discovered that he was of Roma origin. The appellant believes that they would have been suspicious of his Roma origin from the outset due to his name, and that that his Roma origins would subsequently have been confirmed when they saw his (dark skinned) father picking him up from school.

[8] The level of discrimination he suffered from the staff varied from year to year depending on the particular teacher. From standard three or four, the appellant was made to sit alone at the back of the classroom.

[9] Because of the discrimination suffered at school by the appellant and his sister, the appellant's parents decided to move cities in 1986. They hoped that the appellant and his sister's racial origin might remain unknown if they moved schools, and that they could have a "fresh start". When they moved schools, the appellant was immediately put into a "C" class for misbehaving or non-performing students. The class comprised approximately 10-15% Roma children. The appellant did not, however, feel particularly disadvantaged by being in that class.

[10] At that school, however, the discrimination and harassment continued. The appellant was given grades that did not reflect his achievements, which he believes was due to his race. Because he was always threatened and harassed by his fellow pupils, his father had to pick him up from school, as walking home would have presented a further opportunity for harassment. His parents gave permission for him not to attend class outings as such events in the past had resulted in the appellant being bullied by the white pupils.

[11] The appellant's father wrote to the teacher regarding the mistreatment the appellant suffered, however no changes resulted.

[12] The appellant felt that the level of discrimination he suffered was commensurate with that of the other Roma pupils.

[13] After completing primary school, the appellant started to attend secondary school, to train as a milling and machine operator.

[14] For the first two years the staff treated the appellant well. However in the third year, his maths teacher took a dislike to him, calling him "stinking gypsy" on several occasions. As a result of this dislike, the teacher failed him. The appellant then took a remedial examination, which he passed. The teacher who administered the examination, who had taught the appellant in his second year, was surprised that the appellant had failed the course, commenting that he had been one of the best pupils in the second year. This reinforced the appellant's view that he had been failed on discriminatory grounds.

[15] The appellant's fellow pupils at secondary school did not trouble him initially but when they learned of his Roma origins they began to ostracise him.

[16] The appellant completed secondary school in approximately 1992.

[17] After completing school, the appellant worked for a few months as an orderly in the Children's Clinic. He did not face any difficulties securing that job. He also did not face any discrimination in the job – his ethnic origin was never mentioned.

Military service

[18] The appellant commenced compulsory military service in 1993.

[19] Upon entering the army, he was required to give personal details, including of his racial origin. However he believes that, because of his name, they knew his race from the outset.

[20] He and other Roma cadets were routinely woken at dawn, and allocated menial jobs, including, on occasion, washing the toilet floor with a toothbrush. He was referred to by the derogatory term of "red gypsy". He noticed no difference in the treatment of Roma of different complexion: the light skinned Roma such as himself suffered equally to those with dark skin. In spite of the discrimination suffered by the Roma cadets, no sense of solidarity developed between them.

[21] The appellant complained to his higher officers regarding his treatment but his complaints were ignored. He summed up his military service as having been "a terrible experience".

[22] The appellant completed his military service in 1994.

Attacks against the appellant

[23] The appellant was attacked in 1989, when he was on the way home from a disco. His assailants were three young men. They had asked him for a cigarette, and when he did not provide one, one of them accused him of eyeing up his girlfriend in the disco. The youths shouted racial abuse during the attack. The appellant believes that they would have heard that he was Roma at the disco, because he knew many people there.

[24] The appellant suffered a similar attack in 1996, when he was again coming home from a disco. This time he was followed for a period by youths, and then attacked with a knife. The resultant laceration required stitching. Again the attack had a racial dimension, and again the appellant believes that the attackers would have known his racial origin through mutual associates at the disco.

[25] The appellant did not report either attack to the police.

Events leading to departure

[26] After being unemployed for a short period after military service, the appellant secured, without difficulty, temporary employment in a tool manufacturing company. He did not face any discrimination in the job. However, after a few months the firm went out of business.

[27] The appellant then secured, again without difficulty, employment at a mobile telephone company, in approximately 1996. Things went well at the company initially, but after a while serious difficulties arose. It was these difficulties that caused him to eventually leave Hungary and seek refugee status in New Zealand.

[28] The appellant's role in the company was to complete contracts for customers who were purchasing mobile telephones. This work involved checking the identification of the customer as against the photograph in their ID card, and photocopying their identification documents (being their personal ID card, their accident insurance card, and their tax card). Without valid ID documents, the customer was not eligible for a telephone. Once the appellant had checked and photocopied appropriate identity documents, and telephoned the central telephone company to confirm that the prospective customer did not have outstanding debts with regard to an existing telephone, the customer was eligible for the telephone.

[29] There were two other employees in the shop. One of these was the shop owner, who had hired him, and the other was the shop manager. Although the appellant got on well with the shop owner, his relationship with the shop manager was always troubled, as the shop manager did not like him.

[30] Normally the mobile telephones were highly priced. At times, however, the shop would have sales drives, and telephones would be available at a considerable discount, if the persons concerned contracted with the company for a line for two years. While sales drives were on, the appellant was paid an additional amount per contract.

[31] Initially, the appellant was unaware of any irregularities surrounding the sales drives. However, eventually, it transpired that a criminal gang had been paying people 1000 *forint* to buy telephones, which they then on sold overseas for a much inflated sum, leaving the original purchasers to renege on the line contracts. The appellant believes that the shop owner and shop manager were paid 3000 *forint* to turn a blind eye to these illegal transactions.

[32] The appellant, during the first sales drive, overheard a whispered conversation between a suspicious looking person and the shop owner, followed by what appeared to be an exchange of money. The conversation he overheard related to an amount to be paid for the purchase of ten telephones. After this he saw the same person come into the shop on a number of occasions.

[33] After overhearing that discussion, the appellant noticed that a number of people who were purchasing telephones had the appearance of being somewhat unkempt, in contrast to the more affluent looking previous customers. However he did not question their purchase of the telephones, because they met the criteria for purchase.

[34] The appellant gave evidence that he never had to reject a person's application on the basis that their face did not match that in the photograph in their identification card photograph, as "always the person whose photo was in the card came in to complete the contract".

Police investigation

[35] At the end of 1997, the appellant, without warning, received a written summons to attend the police station. He was called to attend as a witness regarding a fraud investigation surrounding the contracts.

[36] He understands that both the shop owner and the shop manager were also called to attend the police station as witnesses. However the appellant was interviewed on more occasions than his colleagues.

[37] Over a period of approximately a year, the appellant was summonsed by the police to provide them with evidence on at least 50 occasions. He attended the police station so regularly that the guard at the entry came to know his face, and waved him through reception. He was treated courteously by all of the investigating officers, other than the chief officer of the section, who disliked him from the outset and said he would be "locked up".

[38] Every time he was interviewed by the police, he was asked about his recollection of the circumstances surrounding each of the contracts that were completed, and whether he recalled "something [he] didn't find right at the time". The appellant denied any wrongdoing. Samples of his handwriting were taken, and compared against the signatures of the purchasers, to establish whether the appellant had forged the clients' signatures on the contracts. The handwriting expert was unable to state conclusively that the handwriting was the appellant's, saying instead that it may or may not have been the appellant's.

[39] Several months after the police investigation started, the appellant was fired from his position in the shop.

[40] After approximately a year of regular police interviews the appellant became the key suspect in the fraud investigation. The police at this stage said that the appellant knew in advance that the people concerned could not and would not pay for their telephones, and that the appellant had received a bribe in return for approving the purchases. After he became a suspect, the chief of police slapped him on several occasions on the back of the head, in an endeavour to get him to confess that he was paid 3000 *forint* for the contracts. The appellant continued to deny this.

[41] In October 2001 the appellant was tried and convicted of forgery. He was the first defendant of nine. The other eight co-defendants were persons who had purchased telephones for the scam. Six or seven of his co-defendants were also Roma. The appellant says he did not recognise any of his co-defendants – he was aware that he would have seen them at the time of the contract, but did not recall any of their faces.

[42] Two or three of the co-defendants gave evidence at the trial that they had paid the appellant an illegal sum of money for him to agree to the fraudulent contract.

[43] The appellant recalls that the judge treated him and the other defendants disparagingly.

[44] The appellant was convicted and sentenced by the Lower Court for "fraud, resulting in major economic loss, committed continuously and systematically and 10 counts of forgery of private documents, acting as abettor in one count and as accessory in nine counts, to a total of two years jail and three years disenfranchise."

[45] The appellant did not submit a copy of the Lower Court judgement. The Authority made efforts to obtain a copy of the judgment but was unsuccessful. However the appellant stated that the judge advised him that he had been convicted: "because such a large number of defaulters [were] going through me, the likelihood was that I was the one who benefited financially". He also stated that the evidence of the handwriting expert that "there is a possibility that some of the signatures were my fabrication" was used to prosecute him.

[46] Another Court (the City Court of Szeged) ordered against the appellant the execution of 18 months of the two year jail sentence that the Lower Court had

ordered.

[47] After the conviction, the appellant fled Hungary for New Zealand on the suggestion of his lawyer.

[48] After the police started investigating the fraud, the shop owner with whom he had previously had a good relationship "turned against [the appellant] in a racist fashion". In spite of his initially good relationship with the shop owner, the appellant stated that he believes he was employed with the specific purpose of being the "fall guy" for ongoing fraud that the shop owner and manager were involved in.

Appeal of court decision

[49] After the appellant departed for New Zealand the judgments were appealed to the District Court of Chongrad (sitting as Appeals Court). The decision, dismissing the appeal, was rendered in a 12 page judgment dated 3 May 2004, a translated copy of which was tendered in evidence.

[50] The court document records the grounds for appeal, with respect to the appellant as being "lack of evidence submitted at the Lower Court hearing" including:

> "(a) The failure of the investigation to discover the identity of defendant's clients.
>
> (b) [the appellant and another defendant's] not guilty pleas were ignored and were found both guilty on the admission of guilt of the co-defendants."

[51] With respect to (a) the Court found that this "[did] not affect the appellant's legal liability, and that knowledge of the identity of the defendant's clients would "only increase the number of his co-conspirators".

[52] With respect to (b), the Court found that the Lower Court had made "no procedural mistake or omission and reasoned convincingly why it accepted the self-incriminating evidence of the co-defendants as against the denial of [the appellant]."

[53] In confirming the conviction, the Court found "the defendant was aware of the fact that the persons appearing before him for filling in subscription applications did not use their own ID cards."

[54] The appellate court confirmed the 18 month sentence of the City Court of

Szeged.

[55] The Court recorded that a further case is outstanding against the appellant, seemingly with respect to the same transactions. They are “one count of forgery of private documents, committed continuously” and “3 further counts of forgery of official documents”.

[56] In 2000 the appellant collapsed and was referred to a psychologist. He was diagnosed as having panic attacks, and needed treatment for a year. Since arriving in New Zealand these problems have abated.

THE ISSUES

[57] 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."

[58] 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

[59] The Authority accepts much of the appellant’s evidence. However, as discussed below, it makes no finding as to whether in fact the appellant violated the Hungarian criminal code.

Does the appellant have a well-founded fear of persecution with regard to his conviction for fraud?

[60] The Authority finds that the appellant does not have a well-founded fear of persecution.

[61] A central principle of refugee law is that "[f]ear of being legally prosecuted before regular courts … [cannot] *in se* and *per se,* constitute a fear of persecution as defined by the Convention."[1] In other words refugee status may not be granted to an individual solely on the basis that he or she is at risk of prosecution or punishment for breach of the ordinary criminal law. This is so even if the justice system in the country of origin fails to meet generalised standards of fairness.[2] The same principle clearly applies to persons (such as the appellant) who have already been prosecuted and fear execution of their sentence.

[62] This does not mean that any person facing prosecution is to be denied refugee status. There are circumstances in which prosecution may be tantamount to persecution under the Refugee Convention, for example where "a government with persecutory intent [uses] the criminal law as a means of oppressing its opponents".[3] The same concept may be expanded to include other classes of protected persons. Thus where a government uses the criminal law as a means of oppressing racial minorities, prosecution may be tantamount to persecution.

[63] In this regard, the Authority notes that if an appellant is able to prove that he or she has been subjected to a racially motivated prosecution, the following fundamental rights are potentially breached: Article 5(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, namely "the right to equal treatment before the tribunals and all other organs administering justice", Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), regarding the right not to be subjected to "arbitrary arrest or detention", and Article 14 of the ICCPR, which provides that "All persons shall be equal before the courts and tribunals", and a right to a "fair and public hearing by a competent, independent and impartial tribunal established by law".

[64] Without the benefit of interviewing the other witnesses, and viewing the forensic evidence, it would be very difficult for the Authority to determine whether

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[1] Hathaway, The Law of Refugee Status (1991) at 169, quoting the Canadian decision of *Louis-Paul Mingot* (1975), 8 I.A.C, 351 at 356.
[2] Hathaway, The Law of Refugee Status (1991) at 170
[3] *Ibid*

the appellant was in fact guilty of the fraud for which he was convicted. However it is not necessary for it to do so. The focus of the Authority's inquiry is on whether the prosecution of the appellant breached any of the above rights to the extent that the resultant sentence could be considered to be persecutory.

Country information

[65] The United States Department of State *Country Reports on Human Rights Practices 2003: Hungary* (25 February 2004) ("the 2003 DOS Report") reports that the Hungarian judiciary is independent:

> "The law provides for the right to a fair trial, and an independent judiciary generally enforced this right. Trials are public, but, in some cases, judges may agree to a closed trial to protect the accused or the victim of a crime, such as in some cases of rape. Judicial proceedings generally were investigative rather than adversarial in nature."

[66] There is, however evidence of some bias against Roma in the criminal justice system. The 2003 DOS Report goes on to say as follows:

> "Many human rights and Romani organizations claimed that Roma received less than equal treatment in the judicial process. Specifically, they alleged that Roma were kept in pre-trial detention more often and for longer periods than non-Roma. This allegation was credible in light of general discrimination and prejudice against Roma; however, there was no statistical evidence, since the data protection law does not permit identifying the ethnicity of offenders. Since the majority of Roma were from the lowest economic strata, they also suffered from substandard legal representation."

[67] Similarly, a report by the International Helsinki Federation for Human Rights 2003, *Human Rights in the OSCE Region,* 24 June states as follows:

> "The Hungarian Helsinki Committee carried on the project "Equality before the Law in the Criminal Justice System – For Roma and Non-Roma suspects" to determine whether any anti-Roma biases influenced the outcome of criminal procedures against them. A careful examination of 146 cases of petty theft, theft and robbery involving 69 Roma and 77 non-Roma suspects altogether was conducted. The early results of the project's pilot phase – based on a small sample – seemed to support the opinion that a certain degree of discrimination may be traced in the criminal procedure. Preliminary findings showed that the average length of pre-trial detention was longer for Roma suspects than that for non-Roma (385 as opposed to 232 days) and that the average length of effective (i.e. not suspended) prison sentences imposed by courts also tended to be longer for Roma (504 as opposed to 319 days). Additionally, the preliminary study found that in 62.1% of the cases involving Roma suspects, their criminal files contained hints relating to their ethnic origin, a fact that may have influenced the proceeding authorities' decision."[4]

[68] There is some country information to suggest that well integrated and fair

[4] International Helsinki Federation for Human Rights 2003, *Human Rights in the OSCE Region,* 24 June, p3

skinned Roma such as the appellant are less liable to discrimination than other Roma.

> "According to Barany, [an academic who specialises in Hungarian Roma affairs], well integrated Roma, whether fair-skinned or not, face much less discrimination than do less integrated or more easily identifiable Roma."[5]

Well-foundedness

[69] In light of the possibility of bias against Roma that appears to inhere in the Hungarian justice system, the Authority has carefully considered the appellant's claim.

[70] However, the Authority finds that the appellant is not at risk of Convention based persecution. Firstly, it finds that the process leading up to the conviction was generally sound for the following reasons:

a. The appellant's non-Roma colleagues were interviewed by the police, indicating that the police did not apparently focus their inquiries on the appellant alone;

b. On the appellant's evidence, the police conducted exhaustive inquiries into the case for a year prior to identifying the appellant as a suspect, including forensic inquiries;

c. The appellant was not subjected to pre-trial detention;

d. The appellant had access to legal counsel and exercised a right to appeal.

[71] The obvious exception to the due process afforded the appellant is the occasions on which the appellant was slapped by the chief of police, in an endeavour to force a confession as to his guilt. However in the event they did not result in an admission of guilt. Accordingly, they did not play any direct part in the appellant's conviction. To the extent that this physical mistreatment could indicate a race based bias against the appellant on the part of the local chief of police, the Authority finds that any such bias was, in all the circumstances, insufficient to demonstrate that the prosecution was so inherently flawed as to amount to race based persecution. It is also noteworthy that the appellant advised that the other police officers treated him courteously.

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[5] Immigration and Refugee Board of Canada – 1 September 1998 "Hungary: Identification and culture of Roma; skinhead and neo-nazi groups; police affirmative action programmes; state protection; European airport transit procedures" HUN30081.EX

[72] Furthermore, without making a finding as to the actual guilt or innocence of the appellant, the Authority is of the view that there was evidence that the Court reasonably relied on in order to convict the appellant. This included:

i. evidence from the handwriting expert that it was possible that the appellant had forged the signatures of the clients; and,

ii. evidence from several co-defendants that they had paid the appellant an illegal sum of money in order for him to agree to the fraudulent contracts.

[73] The Authority also observes that, although the appellant had earlier advised the RSB that he believed that he was convicted because he was Roma, he did not make claim in the course of the hearing that the conviction was on account of his race, even when specifically given the opportunity, on four occasions, to tell the Authority what he considered to be flawed or unfair about the process leading up to his conviction. Had elements of the prosecution process been overtly racially discriminatory, one might have expected the appellant to have raised (and indeed emphasised) this matter in his oral evidence.

[74] In summary, therefore, the Authority finds that the appellant's conviction and sentence for fraud is not Convention based persecution.

[75] As an observation, the Authority notes that statistical biases in the conviction of racial minorities may be observed in the criminal justice systems of many countries, including long standing democracies such as New Zealand. However the existence of such a bias in the system does not generally translate into Convention based persecution. Overt racial discrimination in a prosecution is difficult to prove in individual cases. Accordingly, claims of racially biased prosecution need to be carefully scrutinised on a case by case basis. Where an appellant is able to bring to bear clear evidence that he or she has been wrongfully convicted, or that there is a real chance that he or she is at risk of wrongful conviction, and that race has played or will play a part in that conviction, the Convention may well be engaged. However, in cases such as the present, where there is evidence upon which a court might reasonably rely to convict an appellant, a finding of Convention based persecution will generally be unavailable on the facts.

[76] Finally, for the sake of completeness, we note that the appellant has been subjected to discrimination in the past with regard to his schooling and his military

service. Without making a finding as to whether the past discrimination amounted, in a cumulative sense, to persecution, both his military service and his schooling are now well in the past. Since leaving school, the appellant has had no difficulty in securing employment. He has been the victim of some violence with a racial component, in the form of two assaults, one of which was relatively serious. However the assaults appear to have been isolated in nature, and it is noted that he did not seek police assistance. The assaults in themselves are of insufficient frequency and gravity to be demonstrative of a pattern of abuse that would suggest that he is at risk, to the level of a real chance, of future persecution. To that end, we note that persecution has been defined as "the sustained or systemic denial of basic or core human rights such as to be demonstrative of failure of state protection".[6]

[77] The framed issues are therefore answered in the negative.

CONCLUSION

[78] For the above reasons the appellant is not a refugee within the meaning of the Refugee Convention. Refugee status is denied. The appeal is dismissed.

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S L Murphy
Member

[6] See Hathaway, *The Law of Refugee Status* (1991) 104-108, as adopted in *Refugee Appeal No. 2039/93* (12 February 1996) at 15