IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2011] NZIPT 800158**

AT LOWER HUTT

Appellant:	**AF (China)**
Before:	A R Mackey (Chair) M A Poole (Member)
Counsel for the appellant:	R Woods
Representative for the respondent:	No appearance
Date of hearing:	28 June 2011
Date of decision:	26 July 2011

DECISION

INTRODUCTION

[1] In late August 1997, the appellant, a Chinese national of ethnic Korean background, who had recently started working as a fisherman for a Korean company, arrived in Christchurch to join the crew of a Korean ship that spent long periods of time fishing in New Zealand waters. He became desperately unhappy with his working conditions and jumped ship at the port of Lyttleton in October 1998. He remained illegally in New Zealand, working primarily as a cook, until he tried to legalise his situation in New Zealand in late 2010 so that he could establish a life with his Malaysian partner. After reporting his passport lost with the police, a week later Immigration New Zealand (INZ) officials served him with a deportation order and took him into police custody. He was detained in X Prison, under section 313 of the Immigration Act 2009 (the Act), where he has remained since.

[2] After trying to lodge an injunction to prevent his deportation in December 2010, he lodged a claim for recognition as a refugee and/or protected person in January 2011. He was declined by the Refugee Status Branch on 20 May 2011 and now appeals to this Tribunal.

[3] Pursuant to section 198 of the Act, the Tribunal must determine whether to recognise the appellant as:

(a) a refugee under the Refugee Convention (section 129); and/or

(b) as a protected person under the Convention Against Torture (section 130); and/or

(c) as a protected person under the International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[4] The issue here is whether, as an ethnic Korean of the Christian faith being deported to his home town in the Jilin province in China, there is a real chance of him being persecuted on return. For reasons that follow the Tribunal finds any chance is highly remote.

[5] Given that the same account is relied upon in respect of all three limbs of the appeal, it is appropriate to record it first and then set out our assessment of the issues and findings on each of the three grounds.

THE APPELLANT'S CASE

[6] The account which follows is that given by the appellant and his partner, AA, at the appeal hearing.

[7] The appellant's father was born in a village that is now located within North Korea. In 1937, he moved north, over the Tumen River to the district of Jilin. The whole area was then occupied by Imperial Japan. After the end of World War II, the international boundary between China and North Korea was agreed to run along the Tumen and other rivers. Jilin became a semi-autonomous region within China, where many ethnic Koreans continued to live.

[8] The appellant's father married another ethnic Korean and they farmed a property near Jilin city. They had five children, three boys and two girls. The appellant is the youngest, born in 1970. His eldest sister is a widow who now lives in the Jilin province also. The next sister moved to South Korea about a year ago. The appellant understands she is divorced. He keeps in contact with his eldest sister about once a year by telephone. His elder brother lives in South Korea also. His other brother went to South Korea but has recently returned to the Jilin district of China where he is married and lives with his family. The appellant keeps some

contact with him. As he understands it, his brother and sister in Jilin province lead normal lives without any problems from the authorities. His parents are both dead.

[9] After completing schooling at the age of 15, the appellant worked as a farmer initially and then as a stone-crusher and brick-maker. In 1996, he came across an advertisement in a Korean language newspaper. They were trying to recruit fishermen who could speak Korean. The recruitment was placed by a Chinese company for work on fishing boats owned and operated by a South Korean company. The appellant applied and was accepted. The Chinese company, as agents, arranged everything, including his passport and seaman's documentation.

[10] In early 1996 he joined the crew of the Korean fishing boat and fished in waters around South Korea. After one month, that boat was impounded by South Korean officials and the appellant was sent back to China. He was offered the opportunity of joining another boat. In late 1996, he was issued a renewed passport and asked to join the fishing vessel, MV1, which operated out of Lyttleton Harbour in New Zealand. He was issued with a multiple entry fishing work visa in July 1997 and arrived in New Zealand on 29 August 1997. He was transferred to the fishing boat. The company retained his passport. He found life and working conditions on the fishing boat extremely difficult. His pay of US$200 a month was remitted back to his sister in China and he was given only a small amount of money for use when the boat came ashore for provisions or repairs.

[11] The appellant "jumped ship" in Lyttleton in approximately September or October 1998. He had made some preliminary arrangements with a fellow crew member who was, at that time, returning to Korea or China, having completed his contract. With the assistance of the friend, who was a fluent mandarin speaker, the appellant was put in touch with a Christchurch-based friend of a Chinese restaurant owner in Z who was looking for an employee.

[12] Coming ashore with only $20 and the clothes he was wearing, the appellant was picked up by the restaurant owner's friend who, after paying for a night in a hotel, introduced him to the "boss" of the restaurant who then drove him to Z where he commenced work as a cook. With the help of the boss, he was able to rent a small house in Z. He was paid approximately $200 per week. He communicated with the boss using his very limited Mandarin. He gradually learned a lot more during the four years he was in Z. He also studied English, through books not classes, at the same time.

[13] The appellant's passport remained with the shipping company representative although he kept his seaman's passport with him all the time he was illegally working in New Zealand. Unbeknownst to the appellant, until September 2010, INZ had his 1997 passport and a copy of his seaman's passport on their files. The shipping company had reported his absence to INZ as soon as they became aware of it.

[14] After four years in Z, the boss brought some new people from China to work in the shop and there was no job for him. He was, however, able to find another position in Y. He then worked there for some two and a half years before moving to Wellington and obtaining another job in Lower Hutt. He continued in that job, working illegally all of the time, until he attempted to regularise his immigration status in New Zealand in November 2010, as noted above.

[15] During the whole of the time he has been in New Zealand, he has kept some contact with his family in China by telephone. That contact continued until he was detained in X Prison.

[16] After the appellant had moved to Wellington in 2008, he took a room in a boarding house and there he met his partner, AA. They were attracted to each other and, after a short time, began to live together in a shared room in the same boarding house. AA remains there to this time.

[17] After a short association with her, the appellant explained the whole of his background and they decided between them to try to legalise his status. Initially, they took advice from an immigration consultant. Based on that advice, they decided, as the first step, to go to the police in W and report the alleged loss of his Chinese passport. AA and the appellant also made some anonymous enquiries with the Chinese Embassy. There AA, speaking on the appellant's behalf, and without explaining his background, asked if it was possible for him to be issued a new Chinese passport through the embassy in Wellington. They did not disclose his name, nor disclose his seaman's passport, proving his identity, to them. He had not produced the seaman's passport as he thought it was different from an identity card.

[18] AA was advised that they could not issue a Chinese passport and that that could only be done after return to China. However, the embassy would be able to arrange for a one-way permit to enter China, which he could use for his return flight, whereupon he could then take steps to obtain a new passport.

[19] On 1 December 2010, immigration and police officers went to the home of the appellant and AA. They served a deportation notice on him and took him into custody. He has been in X Prison ever since.

[20] INZ obtained a warrant of commitment from the District Court in Lower Hutt on 21 December 2010. On 22 December 2010, at the Wellington High Court, counsel for the appellant applied for judicial review of the deportation order. In a judgment by Joseph Williams J, on that date, the application was dismissed. The short judgment of Joseph Williams J is relevant and is set out in full below.

> "[1] [The appellant] is in prison. A removal order is to be executed on Christmas day deporting him to China. The applicant seeks interim orders preventing the removal, releasing [the appellant] from jail and freezing that position until the substantive judicial review proceeding is resolved.
>
> [2] The applicant has been in New Zealand illegally for 11 years. He was crewing on a Korean fishing boat but he jumped ship in Christchurch. He says his employer obtained his travel papers from the authorities in China and held them throughout his employment, and that he had never seen them.
>
> [3] The applicant was born and raised in China but his parents are North Korean and they may have been illegal immigrants into China. Despite having been raised in China, [the appellant] speak Mandarin only poorly. He and his family are all native speakers of Korean. He has no travel documents currently in his possession.
>
> [4] The essential argument advanced by Mr Woods on his behalf was that [the appellant's] citizenship was ambiguous. Since he had never seen his own passport and did not have any papers with him when he jumped ship, [the appellant] did not know whether he was a Chinese citizen or not. This raised the possibility that even if he was accepted into China he would in due course be deported back to North Korea. Once there the risk was that he would be treated as a defector and possibly killed or tortured.
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> [5] The law is clear (see *Attorney-General v Zaoui*) that New Zealand's obligations to prevent refugees from begin subjected to torture or arbitrary deprivation of life are absolute.
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> [6] The Chief Executive of the Department of Labour opposed the application arguing that the fear expressed by [the appellant] was pure speculation.
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> [7] On 15 December 2010, the Chinese Embassy issued [the appellant] a permit for entry into China and today at court counsel handed up a letter dated today's date confirming that the applicant is in fact a Chinese national. There can now be no risk that [the appellant] will be on-deported to North Korea.
>
> [8] In *Parmanadan v Minister of Immigration* the Court of Appeal made it clear that interim relief will not be granted without the applicant having a reasonable chance of success in challenging his proposed removal. Given the clarification of [the appellant's] nationality there is no prospect that the removal order in his case will be overturned.
>
> [9] The application is dismissed accordingly.

> [10] The Chief Executive of the Department of Labour seeks costs. Ms Casey for the Chief Executive argued that the application was made late and that Mr Woods had been advised earlier that [the appellant] was a Chinese national. I do not think an order for costs is appropriate in this case. It is true that proceedings started late. On the other hand it was only at the last minute that final and irrefutable clarification became available to me. Costs will lie where they fall."

[21] Of particular note is paragraph [7] and the conclusion by Joseph Williams J that the appellant "is in fact a Chinese national".

[22] The letter of 15 December 2010 from the Chinese Embassy was confirmed by a further letter to INZ dated 22 December 2010 attached to which was a permit for entry in the name of the appellant. The letter from the Chinese Embassy in Wellington states:

> "... I can now confirm that [the appellant] (dob [...]) is a Chinese national. A permit for entry (...) was issued on 15 December 2010 for him to travel back to China."

[23] The permit for entry correctly sets out his name and date of birth and states, both in Chinese and English, that his nationality is "Chinese". That permit was valid for a period of three months from 15 December 2010.

[24] On 22 December 2010, counsel, on behalf of the appellant, notified the RSB of the appellant's intention to lodge a claim for recognition as a refugee. That intention was followed up, after the Christmas break, when the confirmation of claim was lodged with the RSB on 24 January 2011.

[25] The appellant claims that he has no idea what would happen to him if he returned to his home district in China as he had left some 14 years ago. While he agreed that he could stay with his brother for a short period of time on return, he would have to be independent as his brother had his own family. He also agreed that he could get another passport when he returned to China and it may be possible for him to obtain a visa to travel to Malaysia where he could possibly join his partner whose nationality is Malaysian. His only reservation to this was that he had no idea if a passport would be issued as the Chinese officials would know he had been illegally in New Zealand for many years.

[26] He claimed that he had only learned about refugee status through his lawyers after he had been detained for deportation in December 2010. He also had no idea if the Chinese authorities would know he was a failed asylum seeker from New Zealand if he returned on an entry permit.

Evidence of AA

[27] AA is a Malaysian hairdresser who has been in New Zealand for approximately four years and is currently on a work visa until October 2011 enabling her to work as a hairdresser in Wellington. She lives in a rental property with the appellant. She is endeavouring to obtain permanent residence in New Zealand under a business residence policy.

[28] She confirmed that they had met in the same boarding house and have been living together as a couple since 2008. They communicated in Mandarin. The appellant had learned Mandarin in New Zealand and this had improved since they had been living together.

[29] In November 2010, she confirmed, they had firstly gone to the police station in W to report the appellant's passport as lost. They thought, on the advice they had received, that this was a good way for him to regularise his situation in New Zealand as he might then be able to obtain a valid and up-to-date Chinese passport.

[30] AA had given some thought to ultimately going to Malaysia as a couple but their preference was very much to remain in New Zealand. Additionally, they knew they had to obtain a passport for the appellant as a first step.

[31] AA had had little communication with the appellant's family in China or Korea, as it was difficult for them to understand each other. There had been some attempts at telephone communication since the appellant had been put into custody in early December. However, as his relatives only speak Korean, it was very difficult to communicate in Mandarin and she considered they did not understand each other.

Documentation

[32] Mr Woods made available to the Tribunal three articles. The first two of these referred to the challenges of protecting North Koreans who have recently fled from North Korea into China. The third and fourth explain graphic stories of poor working conditions in fishing boats off the coast of New Zealand over the past 10 years. All relevant information available has been taken into account by the Tribunal.

Submissions

[33] The Tribunal has also noted all the submissions received from counsel. These relied heavily on the appellant's risks as a person of North Korean ethnicity and his uncertain nationality status in China. He submitted the Chinese authorities had been alerted to the appellant's situation in New Zealand and "for this reason he faces a real chance of persecution if removed to China first because of his North Korean ethnicity and secondly because of China's record in dealing with both North Korean and failed refugee applicants returned to China".

THE REFUGEE CONVENTION – THE ISSUES

[34] Section 129 of the Act provides:

> "(1) A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.
>
> (2) A person who has been recognised as a refugee under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(3)."

[35] 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."

[36] As noted in many of the Tribunal's early decisions, such as *[2010] NZIPT 800056* (22 December 2010) and *[2011] NZIPT 800042* (4 March 2011), the Tribunal has substantively adopted the jurisprudence of the former Refugee Status Appeals Authority (RSAA).

[37] In terms of *Refugee Appeal No 70074* (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 claim under the Refugee Convention

[38] The appellant and his partner gave generally credible evidence. There appeared to be no attempt to exaggerate the appellant's profile. While understandably he considered himself to be ethnic Korean, he readily acknowledged, after explanation and discussion with the Tribunal, that his nationality was Chinese, as is clearly stated in documentation received from the Chinese Embassy in Wellington and in the findings of Joseph Williams J.

[39] The nub of his claim for refugee protection and/or protected person status relies on his claim that he may be seriously maltreated as an ethnic Korean on return to China. These risks may be exacerbated because of the profile he has established in New Zealand as a long-term illegal over-stayer and through his contact, and that of INZ, with the Chinese Embassy in New Zealand.

Interpretation of well-founded fear

[40] The RSAA, whose jurisprudence is adopted by the Tribunal in this regard, for many years interpreted the term "being persecuted" in the "inclusion clause" (Article 1(2) of the Refugee Convention) 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 may fall 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 74665/03* (7 July 2004) at [36]-[90].

[41] As noted in the issues set out above, an assessment of the "well-founded fear" element of the refugee definition has, at its core reference point, not the facts subjectively perceived by the claimant, but the objective facts as found by the decision-maker. This explanation of the objective standard required was summarised in *Refugee Appeal No 76044* (11 September 2008) at [57] which states:

> **"THE RISK ISSUE**
>
> **"A WELL-FOUNDED FEAR"**
>
> **The legal test**
>
> **[57]** In the Authority's jurisprudence the well-founded standard has been understood as mandating the establishment of a real chance of being persecuted. See for example *Refugee Appeal No. 72668/01* [2002] NZAR 649 at paras [111] to [154]. The standard is an entirely objective one. The trepidation of the refugee claimant, no matter how genuine or intense, does not alter or affect the legal standard and is irrelevant to the well-foundedness issue. Any subjective

> fear of harm, while relevant to the question whether the claimant is unable or unwilling to avail him or herself of the protection of the country of nationality, is of no relevance to whether the anticipation of being persecuted is well-founded. See *Refugee Appeal No. 75692* [2007] NZAR 307 at paras [76] to [90] and the *Michigan Guidelines on Well-Founded Fear* (2005) 26 Mich. J. Int'l L. 491."

[42] Adopting these tests in *Refugee Appeal No 76611* (25 November 2010), at [27]-[33], the Authority noted that subjective fears have "no place within the inclusion clause". The objective assessment of all the evidence which now follows does not establish a well-founded fear of this appellant being persecuted on return to China.

[43] As is clearly set out in the judgment of Joseph Williams J quoted above, the appellant's nationality is Chinese. The claim and submissions that he would somehow be seen as a North Korean national if he returned to the Jilin province of China can be given no weight. The appellant obtained a valid passport which he used to travel to New Zealand in 1997. He also obtained a valid seaman's record book, issued by the People's Republic of China, which he also used to travel to New Zealand and to board the vessel in New Zealand. Indeed, he retained the seaman's record book with him for the whole time he was in hiding in New Zealand over a period of some 13 years. He failed to produce that record book to anyone as strong evidence of his identity.

[44] Copies of these documents were provided to the Chinese Embassy and these are readily available to them. As the Chinese Embassy confirmed, they view him as being a national of China. Accordingly, on his return, there appears to be no reason why he could not obtain a valid Chinese passport on making application to the Chinese authorities. Likewise, there is no apparent reason why he could not obtain an updated entry permit document for his return travel.

[45] The appellant and the submissions of counsel appear to confuse ethnicity with nationality. This is simply not the predicament of this appellant. His family have been based in the Jilin province of China for more than 70 years and the appellant and all of his siblings were born there.

[46] This appellant, as noted above, is a Chinese citizen of Korean ethnicity. He is not a North Korean national who has recently fled from North Korea to China to seek some form of protection from the North Korean regime. This is simply not the predicament of this appellant. His family have been based in the Jilin province of China for more than 70 years, going back to the time when Korea and Manchuria were all part of the Imperial Japanese province. This appellant and all of his siblings were born in China and readily obtained Chinese nationality.

[47] In *Refugee Appeal No 76434* (15 April 2010) the Authority addressed the issue of risks to Chinese of ethnic Korean background in the province of Jilin, near the Chinese/Korean border. In particular, in that case the appellant had a far greater degree of involvement with Christianity than this appellant and, sometime ago, had assisted North Korean nationals who came across the border seeking asylum.

[48] In that decision the Authority reviewed country information available, with an emphasis on risks to Jilin Christians at [33]-[46]. At [38] of the findings it is noted that North Korean nationals who come to China as potential refugees and there are considered to be several hundred thousand of them living illegally in the Jilin province, are treated as "illegal immigrants" by the Beijing government and are at a high risk of return when apprehended by the Chinese authorities. It is the predicament of these people that is referred to in the country information provided by counsel: International Crisis Group *"Perilous Journeys: The Plight of North Koreans in China and Beyond"* (26 October 2006); Joel R Charny "Acts of Betrayal – The Challenge of Protecting North Koreans in China" (April 2005) Refugees International, Washington DC, USA.

[49] This appellant has a far lesser risk profile than the appellant in *76434* where the Authority found the risk of serious harm to that appellant, on the totality of his profile, was highly speculative and remote and certainly not at the level of a real chance.

[50] Thus, the country information, and indeed the predicament of the appellant's two siblings who live in China, do not reflect real risks of serious maltreatment by the Chinese authorities merely because they have a Korean ethnic background and may or may not have had interest in Christianity. There are many thousands of ethnic Koreans living in the Jilin self-autonomous province of China and the surrounding provinces that abut the North Korean border. Without any element of anti-government activities, such ethnic Koreans are not seriously discriminated against by the Chinese authorities and there is no evidence to show they have a real chance of being persecuted for reasons of their ethnicity. The chance of the appellant being persecuted is highly speculative, at most.

[51] The only additional factor adding to the appellant's profile and predicament on return is that he would be returning on a one-way entry permit. There is no evidence at this time that discloses the appellant would be viewed as a failed asylum seeker who is being deported from New Zealand. There is thus a highly

remote risk that attaches to him in that regard. The appellant, in his visit to the Chinese Embassy in Wellington, stated that he and AA did not disclose who he was or anything about his background.

[52] Thus, to the Chinese authorities, the appellant is a ship-jumper who entered New Zealand many years ago on a valid Chinese passport, with other valid Chinese documentation. Clearly he is an over-stayer in this country. INZ have not advised the Chinese authorities he has claimed refugee status. Any immigration breaches by him, under Chinese law, by his actions in over-staying for such a lengthy period are matters of prosecution (not persecution) and possible minor punishment by the Chinese authorities, that may take place on his return. They are not matters that would put him at risk of being persecuted or seriously maltreated.

Conclusion on claim to refugee status

[53] As the Tribunal does not consider there is a real chance of the appellant being persecuted on return to China, the first issue in relation to the assessment of refugee status is answered in the negative. It is therefore unnecessary to go on to the second issue relating to the refugee reason.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[54] Section 130(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[55] Here the issue for the Tribunal is whether there are substantial grounds for believing the appellant would be in danger of being subjected to torture if deported from New Zealand to his country of nationality, or a nominated third country.

Assessment of the claim under the Convention Against Torture

[56] Section 130(5) of the Act provides that torture has the same meaning as in the Convention against Torture, Article 1(1) of which states that torture is:

> "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him

> or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Conclusion on claim under Convention Against Torture

[57] On the same fact analysis and findings as set out above in respect of the refugee appeal, the Tribunal is satisfied that this appellant has not established there are substantial grounds for believing that he would be in danger of being subjected to torture if deported to China. Accordingly, he is not found to be a protected person within the meaning of section 130(1) of the Act.

THE ICCPR – THE ISSUES

[58] Section 131(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

[59] That issue is now addressed.

Assessment of the claim under the ICCPR

[60] Pursuant to section 131(6) of the Act, "cruel treatment" means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards; and

(b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

Conclusion on claim under ICCPR

[61] Based on the same fact analysis and consideration of the country

information set out in relation to the refugee appeal, the Tribunal is satisfied the appellant has not established substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported to China. The discrimination risks themselves for the appellant are found to be minor only. They are speculative and remote risks. This discrimination, of itself, would not constitute cruel treatment as set out in section 131(1), and as further defined in section 131(6) of the Act.

[62] Accordingly, the appellant is not found to be a protected person within section 131(1) of the Act.

CONCLUSION

[63] Assessed in the round, the appellant's refugee appeal and the protected person claims fall considerably short of the requirements for recognition.

[64] For the foregoing reasons, the Tribunal finds that the appellant:

(a) is not a refugee within the meaning of the Refugee Convention;

(b) is not a protected person within the meaning of the Convention Against Torture; and

(c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[65] The appeal is dismissed on all grounds.

"A R Mackey"
A R Mackey
Chair

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A R Mackey
Chair