

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76513

AT WELLINGTON

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

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) declining the grant of refugee status to the appellant, a national of Fiji.

INTRODUCTION

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

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

THE APPELLANT'S CASE

[4] The appellant was born in the mid-1980s. He is the youngest of three children born to his parents. His older brother came to New Zealand as a student 20 years ago and duly became a resident. His older sister remains in X.

[5] The appellant described his family background as being from the low to middle class. His father worked as a salesman in a shop, an occupation he had held ever since the appellant can remember. However the income his father generated from his job was insufficient to meet the family's needs and he therefore supplemented his income by doing particular jobs in their local neighbourhood. In addition, his parents ran a small business from their family home supplying various goods to their neighbourhood, in which indigenous Fijians formed a substantial majority. This canteen is open daily and there is a regular supply of customers throughout the day buying basic supplies of food and fuel.

[6] Throughout his life the appellant has encountered incidents of discrimination and abuse from indigenous Fijians because of his Indian ethnicity. During his school years, 1992-2003, the appellant, on a random but regular basis, encountered verbal abuse from local groups of indigenous Fijian youths who congregated in his neighbourhood. He understood the Fijian language sufficiently well to know when they made racist comments about him. From time to time he was pushed about by these youths. When this happened, the appellant ran home and his family reported these incidents to the police. While the police came to the house, no one was ever arrested or apprehended as a result of these complaints. This despite the appellant being able on some occasions to tell the police that he believed that the assailants came from a particular house in the area.

[7] Towards the end of his school years the appellant encountered discrimination at school. In particular, there was one trainee teacher who spoke harshly to the appellant and other Indian students, whereas he spoke respectfully to the indigenous Fijian students. On one occasion, this teacher threatened to assault both the appellant and another Indian friend for being late even though they had merely gone to the bathroom prior to the teacher's arrival to the class.

[8] The appellant's family has routinely been subjected to racial abuse from people in their area. His father was often verbally abused when seeking to recover moneys owed by indigenous Fijians for work that he had done without requiring payment in advance. Their failure to pay adding further pressure onto the family finances, his father has given up doing this sort of work as a result.

[9] The family has also been regularly intimidated by indigenous Fijians in operating their home canteen. During the ten or so years the appellant was at school (1992-2003) he recalls that about 20 or 30 times a year there would be an incident whereby an indigenous Fijian would come into the home and demand

goods for free. The appellant explained these people were themselves poor and, towards the end of the week, simply did not have the funds to pay for these basic supplies. When the appellant's parents refused these requests they were subjected to racial abuse and intimidated. Sometimes they were told "We will get you Indians out of here". On these occasions, his family tended out of fear to hand over the goods, which had a small monetary value but comprised an important part of their income.

[10] On two such occasions, however, matters were more serious. On one occasion during this period, some men actually broke through the front door and came into the appellant's family property and started taking goods. The appellant, who was a teenager at the time, knocked a jar out of one of the men's hands. This man attempted to throw a punch at the appellant but his mother stepped in between them and the appellant was not assaulted. Seeing other neighbours congregating outside, the men fled. On another occasion the appellant was at home with his mother one evening when a group of indigenous Fijian youths tried to break through the front door to steal items. The appellant tried to keep the door closed. As this was happening, his father arrived home and was manhandled and assaulted by the youths who then fled.

[11] The police were called but, on both occasions, they took about 45 minutes to arrive. When asked why they had not arrived earlier the family were told that there were no police cars available. The appellant believes that no real investigation was undertaken because the family were Indian.

[12] The appellant also recalls that, in about 1999 or 2000, his father came home very upset. The appellant noticed that his father's trousers were wet and asked him what had happened. His father told him that an indigenous Fijian had pushed him to the ground and kicked him while he was on the ground. The appellant himself was punched in the face by an indigenous Fijian in 2003 or 2004. This unprovoked assault occurred while the appellant was waiting to call a taxi.

[13] The appellant was educated to the Form 6 level. He obtained a pass mark to obtain his Form 6 Certificate, but fell short by a narrow margin of the number of points which had been set by the principal of the school to gain entry to the 7th Form. Despite the appellant requesting that he be allowed a chance to prove himself in the first term of the 7th Form the principal, who was an indigenous Fijian, refused to countenance this proposal. Subsequently, the appellant learned

that indigenous Fijian students who had received lower grades than him had been allowed entry into the 7th Form.

[14] After being refused permission to enter the 7th Form, the appellant began looking for work. He obtained contact-based employment with an American-based company with an office in X. He worked there for the next few months. At the conclusion of this contract he spent six or eight weeks looking for work and managed to secure employment at a restaurant. At around the same time he enrolled in a business-related course and began evening classes. After six months at the restaurant the appellant resigned and secured employment in another job for better pay. After one month in this position the appellant resigned and, at around the end of 2004/beginning of 2005, resumed employment with the American-based company on a full-time basis. He held this employment until he came to New Zealand at the end of 2009.

[15] During this time, the appellant encountered discrimination from his immediate supervisor who was an indigenous Fijian. While nothing was overt, he and the other ethnic Indians in the team noted that the way in which the supervisor interacted with them was different from how she interacted with the indigenous Fijians. Also, the appellant was passed over for promotion on two occasions, despite being the nominated back-up supervisor. He believes that management would have consulted with his supervisor whom he believes would not have spoken in his favour. However, in approximately 2006 he did gain promotion to the supervisor's role but this was only after the indigenous Fijian supervisor had left and been replaced by an Indian.

[16] After entering the workforce the appellant remained at the family home although his work and study commitments meant he was not at home as often as before. Nevertheless, from time to time he still heard reports from his mother and father that indigenous Fijians had intimidated them into letting them take small goods without paying for them and that, from time to time, minor items were stolen from the family home.

[17] After his marriage the appellant, his wife and parents moved to larger rented accommodation in another area of X. However this area was populated mostly by indigenous Fijians who came round demanding to know where they were from and why they were there. They all felt intimidated by this and felt like they were being monitored. His parents have since moved back to their previous house which they had rented out.

[18] These incidents have caused the appellant to feel very insecure in his life in Fiji. As ethnic Indians, they are always treated as second class and live in a climate of general insecurity and fear. He does not believe that the situation will be any different in the future.

THE ISSUES

[19] 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."

[20] 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

[21] The Authority accepts the appellant as a credible witness. His evidence was given candidly and openly. It was broadly consistent with what he had said before although greater detail was given than in his RSB interview. His account is accepted in its entirety.

A well-founded fear of being persecuted

[22] In *Refugee Appeal No 75612* (22 June 2010), the Authority noted:

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

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

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

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

imposes obligations to combat and eliminate racial discrimination leading to unequal enjoyment of a range of rights guaranteed under both the ICCPR and ICESCR in civil, political, economic, social, and cultural life.

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

- (a) In 2006, the armed forces commander, Commodore Voreqe (Frank) Bainimarama, overthrew the elected government in a bloodless *coup d'état*. In 2007 the interim military government was replaced by a nominally civilian interim government headed by Bainimarama as Prime Minister. On 9 April 2009, the Court of Appeal declared the coup and the interim government unlawful. On 10 April, the government abrogated the constitution, imposed a state of emergency, and began to rule by decree – see at [29] and [31].
- (b) There was no country information establishing that Fijians of Indian ethnic origin were being assaulted by the security or police forces on account of their ethnicity but that from time to time some have been subjected to assaults and home invasions by non-state actors – see [32] and [33].
- (c) Discrimination against Fijians of Indian ethnic origin exists in the social and economic spheres – see [34]-[41] and [45].
- (d) Fijians of Indian ethnic origin tend to be underrepresented in the legislature – see [44].

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

[46] ... while there is no specific targeting of Fijians of Indian ethnic origin for physical abuse on account of their ethnicity by state agents following the December 2006 coup, from time to time state agents may be slow or fail to adequately respond to instances of physical abuse and property violations perpetrated against them by private individuals. It is not clear on information

before the Authority, however, if any failure to adequately respond is a function of their ethnicity, lower socio-economic status, combination of both, or other factors.

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

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

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

While underpinned by anti-discrimination notions, the Refugee Convention requires something more than a future risk of suffering racial discrimination to be established to qualify a claimant for recognition as a refugee. It requires the establishment of the state of 'being persecuted', understood as serious harm plus the failure of state protection - see *Refugee Appeal No 71427/99* (16 August 2000) at [67]; *R v Immigration Appeal Tribunal; Ex Parte Shah* [1999] 2 AC 629, 653F; *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379, 403B. Thus, even if it is accepted that Fiji fails to protect some of its citizens against racial discrimination in terms of the standards imposed by the international community under CERD, this failure must nevertheless lead to a predicament for a claimant which reaches the threshold of being persecuted.

Application to the facts

[28] The Authority finds that the appellant has suffered isolated instances of discrimination in the past because of his Indian ethnicity. This has manifested itself in racial abuse, minor assaults in the form of pushing and shoving and, on one occasion around 2003 and 2004, a more serious (but still minor overall) assault. He has suffered no serious injury of any kind on any occasion. He has been discriminated against in his education. His home has been broken into and his family intimidated into handing over small goods from their home shop for free when customers could not pay for them

[29] These minor assaults occurred a number of years ago now. The Authority finds that, in more recent times, the appellant has suffered more generalised low-level discrimination adding to a feeling of insecurity. The Authority accepts that

this is likely to be the situation in Fiji to which the appellant will return. However, despite this discrimination the appellant has, in the past, nevertheless managed to find secure employment. He has managed to find accommodation. There is no reason to suppose that, while difficult, he will not find adequate accommodation and employment in the future.

[30] In summary, while it can be expected that the appellant will encounter sporadic, occasional instances of racial discrimination on some occasions on return to Fiji, there is no real chance that any discrimination that he may encounter will result in him suffering serious harm, even when those instances are viewed cumulatively.

[31] For these reasons the Authority finds the appellant does not have a well-founded fear of being persecuted in Fiji in the future. The first principal issue is therefore answered in the negative. The need to consider the second does not, therefore, arise.

CONCLUSION

[32] For the reasons mentioned above, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"B L Burson"

B L Burson
Member