

AT WELLINGTON

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| Appellant: | AB (Fiji) |
| Before: | A R Mackey (Chairman) M A Poole (Member) |
| Representative for the appellant: | The appellant represented himself |
| Date of hearing: | 14 February 2011 |
| Date of decision: | 4 March 2011 |

DECISION

INTRODUCTION

[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) which declined an application for recognition as a refugee by the appellant. The appellant is a national of Fiji. He is a single man, aged 24.

[2] This appeal was lodged with the Refugee Status Appeals Authority ("the RSAA") on 17 November 2010 but had not been determined by that body as at the date of disestablishment of the RSAA on 29 November 2010. Accordingly, it is now to be determined by the Immigration and Protection Tribunal ("the IPT"); see section 448(1) and (2) of the Immigration Act 2009 ("the Act"). This appeal was unallocated to any member of the RSAA before it was dissolved and has now been allocated to the panel set out above.

[3] Pursuant to section 448(2), the appeal is to be determined as if it is an appeal under section 194(1) of the Act.

[4] Section 198(1)(b) of the Act directs the Tribunal to determine whether a

person is, today:

- (a) a refugee under the Refugee Convention (section 129); and
- (b) a protected person under the Convention Against Torture (section 130); and
- (c) a protected person under the International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[5] The appellant was supported at the hearing by his father, AA, and a younger brother, BB. His father gave brief evidence in support of the appellant, which is set out below.

[6] The appellant arrived in New Zealand on a student visa, on 26 September 2009. He lodged his confirmation of claim for refugee status in New Zealand with the RSB on 18 August 2010, when his student visa/permit had expired. He was interviewed by the RSB on 6 October 2010 and a decision refusing to recognise him as a refugee was published on 8 November 2010. It is against that decision the appellant now appeals.

[7] The nub of the appellant’s case is whether the accepted facts of his claim, as presented, go beyond discriminatory behaviour against Fijian Indians by ethnic Fijians or the Fijian government, to the extent that engages any one or more of the three international Conventions involved here.

[8] Given that the same claim is relied upon in respect of all three limbs of the appeal, it is appropriate to record it first as “The Appellant’s Case”.

THE TRANSITION PROCESS

[9] As part of the transition process from the RSAA to this Tribunal, the appellant was asked whether he wished to make a “protected person” claim, pursuant to the grounds in the Act and if so, whether he wished to have such a claim determined by this Tribunal solely, or to have the protected person claim considered by the RSB. This appellant stated that he did not wish to pursue a protected person claim. However, as noted under the provisions of section 198(1)(b) of the Act above, the Tribunal is directed to consider all three issues as to whether the appellant is a refugee, or a protected person either under the

Convention Against Torture (“CAT”), or under the International Covenant on Civil and Political Rights (“the ICCPR”).

[10] The full obligations on the Tribunal pursuant to section 198(1)(b) were explained to the appellant at the outset.

JURISPRUDENCE OF THE RSAA

[11] This Tribunal came into being on 29 November 2010, by virtue of section 217 of the Act. As noted in AA (Iran) [2010] NZIPT 800056 (22 December 2010), the Tribunal has inherited (subject to certain modifications by the Act) the jurisdictions of four former appeal bodies, including the RSAA. The RSAA determined all refugee appeals from the Department of Labour over the period 1991 to 2010. The development of New Zealand’s refugee law jurisprudence is substantially the product of the decisions of the RSAA’s decisions, and jurisprudence from the higher courts which arose from judicial review proceedings of RSAA decisions in that period. The Tribunal intends to rely upon the jurisprudence so developed in determinations of appeals and matters before it subject, of course, to rulings by the superior New Zealand courts, and ongoing developments in international refugee and protection law.

THE APPELLANT’S CASE

[12] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[13] The appellant completed his education at the age of 19. He was then working in the building industry for two or three years, between 2004 and 2008. After consultation with his father, who had moved to New Zealand in 2007, he decided that he should come to New Zealand to further his life.

[14] He obtained a passport in 2008 and, after being declined an application for a work visa, was successful in obtaining a student visa to travel to New Zealand to study with the Z College in Auckland for a one-year certificate in building. He arrived in New Zealand without difficulty in late September 2009 and took up the course. Unfortunately, after four or five months, the college closed down and the appellant, and his brother who attended with him, were unable to complete their

qualifications or get a refund of unused fees. The appellant then moved to Wellington to be with his parents and his three brothers. Since that time, he has been working, either in pursuance with the terms of his student permit, or on a work visa/permit, which he appears to have obtained since claiming refugee status in this country. The appellant is now working as a builder/painter, employed by a relative in Y.

Events in Fiji

[15] The appellant claimed that he had a fear of returning to Fiji because the police and military law and the continuing discrimination against Fijian Indians he and his family had encountered, made it unsafe for them to return.

[16] In 2006, while walking on the street in Suva, he was stopped by three ethnic Fijian men who physically restrained him and then robbed him of the money he had on him, along with his wallet and mobile telephone. The Fijians then ran off. There was no physical attack beyond restraining him while the robbery took place.

[17] The appellant then borrowed a telephone from a passerby and rang the police to lodge a complaint. He then went to the police and recorded the details. He was advised that they would call back but he has never heard anything further.

[18] The appellant had no other problems or attacks while he was in Fiji, nor did he know of any other problems that family members had had, either before or since that date.

[19] He keeps in touch with friends in Fiji who tell him that Fiji gets worse day by day and that there is more and more criminal activity.

Appellant's comments on relevant law and country conditions

[20] The gist of the definitions of being a "refugee" and/or "protected person" were explained to the appellant. The appellant confirmed that he had read through the decision and reasoning of the RSB which set out some of the jurisprudence of the former RSAA in relation to the differences between discrimination and "being persecuted" in terms of the Refugee Convention. He had no comments on these matters.

[21] The appellant was also asked whether there were substantial grounds for considering he would be in danger of being subjected to torture or cruel, inhuman

or degrading treatment or punishment in terms of the provision of the CAT or the ICCPR (sections 130 and 131 of Act were brought to his attention).

[22] The appellant considered that Fijian men would see him and attack him once they found out that he had been living in New Zealand. He was not able to point to any objective evidence of this happening to any other Fijian Indian. He stated:

“Fijian guys hate the Indian guys and therefore attack them.”

Evidence of the father

[23] The appellant’s father came to New Zealand in 2007 as a tourist and had then been able to obtain a job, and a work permit, as a bus driver. That work permit/visa had been renewed on a few occasions and was now current until 2012, when he hoped it would be renewed again. All of his family were now with him in X. He had paid \$38,000 to enable two of his sons, including the appellant, to undertake a course at the college in Auckland.

[24] He and his wife desperately wanted to have all their family with them in New Zealand and his wife had become ill when the two elder sons could not join the rest of the family. In particular, if the appellant returned to Fiji, he considered there would be nobody to look after him and that would cause distress to the family.

[25] He explained that his own personal problems in Fiji had consisted of being robbed a number of times while he was a taxi driver and damage to his taxi on occasions. He did not think that his son would be at a serious risk of harm on return, although the risk “could be anything”. Primarily, however, he considered there was no-one to look after his son in Fiji.

THE REFUGEE CONVENTION – THE ISSUES

[26] 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.”

[27] The Tribunal is required to address two issues in this regard. 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 CLAIM UNDER THE REFUGEE CONVENTION

[28] To establish the “facts as found”, it is necessary to assess the appellant’s credibility. The Tribunal accepts the credibility of both the appellant and his father, who gave evidence in his support. Their evidence was open, sincere and candidly given. They were broadly consistent with previous evidence they had given before the RSB and it was generally in accord with the country information that was before both the RSB and this Tribunal.

[29] The appellant’s profile, therefore, on return to Fiji is that of a Fijian national of Indian ethnicity who has experienced some minor discrimination against him carried out by indigenous Fijians and one incident where a small criminal gang of Fijians robbed him after physically restraining him. The Tribunal accepts that he faces a risk of occasional, random acts of discrimination by ethnic Fijians.

[30] It is against the above profile that his predicament must be assessed on return.

A “real chance” of being persecuted?

[31] In *Refugee Appeal No 76512* (22 June 2010), *Refugee Appeal No 76513* (24 June 2010) and *Refugee Appeal No 76156* (14 January 2008), the RSAA has recently analysed the predicament of Indo-Fijians in similar situations to the appellant in this case and has set out how issues of racial discrimination should be considered in the refugee context.

[32] In *Refugee Appeal No 76156* at [23] – [24], the RSAA relevantly noted that:

“[23] In refugee law, persecution has been defined as the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of

state protection; Hathaway, *The Law of Refugee Status* (1991) 104 to 108, as [24] adopted in *Refugee Appeal No 2039/93* (12 February 1996) at [15].

The Authority has previously noted that discrimination, in itself, is not sufficient to establish refugee status, nor does every breach of a claimant's human rights amount to being persecuted; *Refugee Appeal No 71404/99* (29 October 1999) [65] to [67]. In that regard, the Refugee Convention was not intended to protect persons against all or any forms of harm, but confers protection where there is a real risk of serious harm that is inconsistent with the basic duty of protection owed by the state to its citizens."

[33] In that same decision, at [26] - [30], it was found that:

"[26] The focus of the Refugee Convention is a prospective one, looking forward at risks that may be encountered by individual applicant on return.

[27] As the Authority found in *Refugee Appeal No 75780* and the other subsequent appeals in *Refugee Appeal Nos 76039* and *76082*, the December 2006 coup was notable for the absence of violence against Indo-Fijians in contrast to the earlier coups of 1987 and 2000. The Authority is satisfied that the country information available shows that, to date, the political environment following the December 2006 coup has not led to deterioration in the security of the Indo-Fijian community beyond the level of the occasional discriminatory event.

[28] In addition, it is a well-established principle of refugee law that nations are presumed capable of protecting their citizens. Clear and convincing evidence to the contrary is required to demonstrate a state's inability to protect its citizens; see *Refugee Appeal No 523/92* (17 March 1995). It is noted that the Authority's preliminary view, that the presumption of state protection applies in the appellant's case, was put to him and his representatives for comment in the Authority's letter of 13 December 2007. There was no reply received.

[29] The Authority is satisfied that even were the appellant to experience any discrimination or harassment on return to Fiji, he has not presented any evidence that he would be denied basic or core human rights by the Fijian authorities, demonstrative of a failure of state protection. This is particularly significant given that the appellant bears the responsibility for establishing his claim for refugee status; ss129P(1) and 129P(2) Immigration Act 1987.

[30] The Authority therefore finds that the appellant does not have a well-founded fear of being persecuted on return to Fiji."

[34] In *Refugee Appeal No 76512*, at [17] - [28], the RSAA considered the principle of non-discrimination being fundamental to the enjoyment of fundamental rights guaranteed by both the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the standards set by the international community under the International Convention on the Elimination of all forms of Racial Discrimination, 1966 ("CERD"). The RSAA 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.

[35] In *Refugee Appeal No 76512*, the RSAA then went on, at [29] - [45], to examine recent country information regarding discrimination against Fijian Indians and noted that 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 had been subjected to assaults and home invasions by non-state actors (at [32] and [33]). It was also acknowledged that discrimination against Fijians of Indian ethnic origin exists in the social and economic spheres (see [34] – [41]) and that they were under represented in the Fijian legislature [44].

[36] The RSAA in *76512* found that the country information available established that there remained some degree of institutionalised discrimination against Fijians of Indian ethnic origin in Fiji and that tensions existed between Fijian and Fijian Indian communities such that Fiji was stratified along ethnic lines with indigenous Fijians tending to dominate the public sector employment.

[37] *Refugee Appeal No 76512* at [48], stated:

“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.”

[38] Referring to this paragraph, the RSAA in *Refugee Appeal No 76513* noted at [27]:

“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.”

[39] In *Refugee Appeal No 76513*, the Authority then went on to apply the findings from *76512* to the facts of the case and found that the appellant in that case had suffered isolated instances of discrimination in the past because of his Indian ethnicity and that this has manifested itself in racial abuse, minor assaults and one more serious assault. They noted that he had suffered no serious injury of any kind on any occasion. It was also noted he had been discriminated against in his education and that his home has been broken into and his family intimidated and robbed. The Authority accepted that it was likely that this situation would prevail in Fiji when the appellant returned. However, noting this discrimination in

that case, it was observed that the appellant had been able to secure employment and find accommodation.

[40] Similar findings were made in 76513 where it was concluded that there was no reason to suppose the appellant would not find accommodation and employment in the future and that, while he would be at risk of encountering occasional instances of racial discrimination, there was no real chance that any discrimination he may encounter would result in him suffering serious harm, even when those instances were viewed cumulatively, to the extent that the appellant did not have a well-founded fear of being persecuted in Fiji in the future. His appeal therefore failed.

Application to the facts

[41] The Tribunal adopts the findings as set out in [32] to [40] above as applicable and highly relevant to this appellant's predicament. Additionally, there is no evidence presented of major deterioration in the human rights situation in Fiji since the analysis in the cases discussed above was carried out.

[42] This appellant has suffered some possible minor discrimination in the past in Fiji and one incident when he was restrained and robbed by a small gang on ethnic Fijians. While the Tribunal accepts that the appellant may experience episodic, low level instances of racial discrimination on his return, the risk of serious breaches of core human rights on return is remote and, at most, speculative.

[43] In summary therefore, assessing the appellant's predicament "in the round", the Tribunal does not consider that there is a real chance of the appellant being persecuted on his return. Accordingly, the first issue in relation to the assessment of refugee status is answered in the negative. It is therefore unnecessary to go on to consider the second issue relating to Convention reason.

THE CONVENTION AGAINST TORTURE

[44] 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."

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

ASSESSMENT OF THE CLAIM UNDER THE CONVENTION AGAINST TORTURE

[46] On the same fact analysis and consideration of country information, the Tribunal is satisfied that this appellant has not established that there are substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand to Fiji. Accordingly, he is found not to be a protected person within the meaning of section 130(1) of the Act.

THE INTERNATIONAL COVENANT AGAINST CIVIL AND POLITICAL RIGHTS

[47] 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.”

[48] Section 131(6) provides that “cruel treatment” means cruel, inhuman or degrading treatment or punishment.

[49] The issue arising from these two subsections of the Act is whether objectively, on the facts as found, there are substantial grounds for believing that the appellant would be in danger of being subjected to arbitrary deprivation or cruel treatment if deported to the appellant’s country of nationality or a nominated third country.

ASSESSMENT OF THE CLAIM UNDER THE INTERNATIONAL COVENANT AGAINST CIVIL AND POLITICAL RIGHTS

[50] Again, based on the same fact analysis and consideration of the country information, 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 from New Zealand. The discrimination risks themselves for the appellant are found to be only at the level of remote or speculative risks. The discrimination, of itself, would not constitute cruel treatment as set out in section 131(1) or as further defined in section 131(6) of the Act.

CONCLUSION

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

[52] 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;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[53] The appeal is dismissed on all grounds.

"A R Mackey"
A R Mackey
Chairman

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