

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76309**

**AT AUCKLAND**

**Before:** C M Treadwell (Member)

**Counsel for the Appellant:** The appellant represented himself

**Appearing for the Department of Labour:** No appearance

**Date of Hearing:** 11 March 2009

**Date of Decision:** 4 May 2009

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**DECISION**

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**INTRODUCTION**

[1] This is an appeal against a decision of a refugee status officer declining the grant of refugee status to the appellant, a 28 year-old national of Malaysia.

[2] The crux of the claim is that the appellant says he faces a real chance of being persecuted in Malaysia on account of both his Christian religion and his Chinese ethnicity. The central issues are his credibility and the well-foundedness of the claim.

**THE APPELLANT'S CASE**

[3] The account which follows is a summary of the evidence given by the appellant on appeal. It is assessed later.

[4] According to the appellant, he was born in Kota Kinabalu, the capital of Sabah province, to parents of Chinese ethnicity and Malaysian nationality. He has one sibling and two step-siblings. His father, sibling and step-siblings continue to reside in Malaysia. His mother is presently in New Zealand (having come here

with the appellant) and is in a relationship with a New Zealand citizen. She and the appellant are estranged.

[5] The appellant became a Christian in the mid-1980s, when he was a young child. He went to school but stopped after two years of secondary school, as a result of harassment from other students who belonged to youth gangs.

[6] In 1997, the family moved to the smaller, nearby town of X, where the appellant briefly attended two colleges, without obtaining any qualification. He then moved to the state of Selangor in 1999, where he successfully completed a three month course in computing.

[7] In Selangor, the appellant experienced discrimination and harassment on account of his ethnicity and his religion. He would find, for example, that banks would decline him a loan because Muslims were given priority.

[8] The appellant had a history of being argumentative and had fought with a teacher while at school, and with Malay people in the street (resulting in him spending two days in custody). In 1999, he fought with his father, who had him committed to a mental institution for three days. He was prescribed medication but stopped taking it because of unpleasant side effects.

[9] On getting his computing qualification, the appellant found work as a sales person but he resigned after one month in order to take up another position elsewhere. He then gave that up in late 2000, in order to enrol at another college. He pulled out of that course, however, after eight months, because he had run out of money and the banks would not give him a loan.

[10] In order to earn a living, the appellant turned to driving a taxi. He found, however, that many Muslims refused to travel with a Christian and he would lose fares as a result.

[11] In early 2003, the appellant quarrelled with a Malay passenger, who had refused to pay the fare. The appellant drove him to the police station but the police detained the appellant, not the passenger and he was kept in the cells overnight.

[12] In mid-2003, the appellant's taxi was stopped and searched by the police for drugs. He was detained for two days, even though no drugs were found. A few weeks later, he suffered a repetition of this incident and, while in custody, saw

the police beating other detainees. In total, he recalls being detained by the police on four occasions during his time as a taxi driver. On one of those four occasions, he witnessed a man being killed by the police. The appellant had been talking to the man – a Chinese – in their cell, shortly beforehand and had learned that he was without family and alone in the world. When the police came and took the man out of the cell, one officer tortured him and the other then put him in a large plastic bag. The appellant, seeing this, went to cry out in fear but another inmate put his hand over the appellant's mouth and kept him silent. The appellant has never reported this incident to the Malaysian (or any other) authorities.

[13] In mid-2003, the appellant visited a government-sponsored investment company in Kuala Lumpur. He had designed an automotive steering and navigation system which he wanted to patent and develop but the staff of the investment company were rude and dismissive of him.

[14] In October 2003, the investment company contacted the appellant by email and there followed a promising exchange, which led the appellant to put together a 'design team' of five people, enabling him to present the company with a business plan and approximately 40 per cent of the details of the design. It came to an end, however, when the company requested that the appellant provide all of the design details, which he refused to do.

[15] Unable to develop his idea further, the appellant returned to X town and opened a small cyber-café with money borrowed from his mother's partner.

[16] In July 2004, the police began to harass the appellant at his cyber-café. They made him shut his shop for 24 hours, during which time it was burgled and four computers stolen. The police promised to investigate but, in spite of there being many fingerprints, nothing further happened. Thereafter, however, they visited the cyber-café occasionally, demanding bribes, which he paid.

[17] Eventually, the demands by the police caused the appellant to sell his business in October 2005 and he took up work as a salesman for another company.

[18] Four months later, in February 2006, the appellant was detained by the police after neighbours complained about noise from his flat. He was not mistreated in custody and was simply held overnight.

[19] In April 2006, the appellant and his mother left Malaysia for New Zealand, where they were issued visitors' permits. The appellant overstayed his permit but had a falling-out with his mother's new partner in late 2006. Thereafter, he was issued a limited purpose visa because he was an intended witness in a prosecution. Shortly afterwards, he had further arguments with his mother's partner. The appellant's complaints to both the police and to the Malaysian High Commission proved fruitless.

[20] In February 2008, the appellant spoke by telephone with a friend in Malaysia, one AA. AA told the appellant that the United Malay National Organisation ("UNMO") government discriminated against non-Muslims, who were treated poorly. AA also told the appellant that one BB, a UNMO Member of Parliament from Y province, wanted to kill the appellant. According to BB, the appellant's name was on a list of people to be killed by the UNMO because of his steering and navigational invention which he had refused to hand over to the investment company.

[21] In September 2008, the appellant's fears for his safety in Malaysia were exacerbated by comments made by Ahmed Ismail, another UNMO Member of Parliament, who publicly likened the Chinese community to "Jews" and said that they were second class citizens.

[22] On 26 September 2008, the appellant lodged a claim for refugee status in New Zealand. He was interviewed by a refugee status officer on 30 October 2008 and his application was declined on 22 December 2008, giving rise to the present appeal.

[23] The appellant says that, if he returns to Malaysia, he is at risk of serious harm at the hands of Islamic fundamentalists, such as *Jemaah Islamiah* or *Al Qaeda*, who will be recruited by the pro-Islamic government to kill or harm him for failing to divulge his automotive steering and navigation designs. He points to the early release of fundamentalists from prison in Malaysia as indicative of the government's attitude.

### **Documentary evidence**

[24] The Authority and the appellant have been provided with the files of the Refugee Status Branch, including copies of all documents submitted by the appellant at first instance.

[25] On appeal, the appellant also submits the following:

- (a) Undated statement, received 6 March 2009;
- (b) Further statement, dated 28 October 2008, with a large bundle of country information, including many duplicates of documents already provided at first instance, a sketch by the appellant of Sir Edmund Hillary which he has had various Auckland City Councillors sign, two *Amnesty International Malaysia* articles, one dated 23 January 2009, "Government Must Investigate Police Torture Claims" and the other 31 May 2007, "Human Rights & Policing Action: Implement the Recommendations of the Royal Police Commission", a *CBC News* article dated 20 December 2003, "Malaysia Postpones Deportation of Alleged Terrorist" and an article dated 15 January 2009 from [www.themalaysianinsider.com](http://www.themalaysianinsider.com) "Malaysia frees JI terrorists";
- (c) Further articles tendered during the hearing, including:
  - i) "Malaysia Police 'brutal, corrupt'" – *BBC News*, 10 August 2004;
  - ii) "Hired Guns Take Out Businessman at Tea Stall"; *AsiaOne*, 19 September 2008;
  - iii) 11 page printout from an unidentified website, calling for, *inter alia*, an end to the "islamisation" of Europe and support for Geert Wilders' film "Fitna".

[26] At the conclusion of the appeal interview, the appellant was given a copy of the United States Department of State *Country Reports on Human Rights Practices: Malaysia* (25 February 2009) by the Authority and was invited to comment thereon. His response, dated 3 April 2009, was accompanied by a further bundle of country information, including lengthy printouts from private Internet "blogs". The quantity is such that no useful purpose would be served by reciting it here. It has all been read and, where relevant, is taken into account.

[27] Most recently, the appellant submitted on 28 April 2009 an Internet article from [www.xmedialab.com](http://www.xmedialab.com), entitled "Commercialising Ideas", highlighting an impending conference on funding and developing "the best local ideas". The appellant's accompanying note stated:

"It's very clear that the Malaysia won't protect me as a citizen no matter what sense, so if you could just let me though this for having NZ residence then I can perform God's will to create economic accelerator and CO<sup>2</sup> repelling substance as well!

Look somebody already start their terrible ambition by releasing swine flu if I am not performing heavenly father's will ASAP there will be no flesh to remain!"

[28] For the record, the Authority reminds the appellant (as it did at the appeal hearing) that its jurisdiction does not encompass immigration matters such as the granting of residence, nor humanitarian concerns beyond the scope of the Refugee Convention. See s129U of the Immigration Act 1987. Whether the appellant is a person whose ideas might be an "economic accelerator" (a claim untested, unproven and likely untrue) and thus of benefit to New Zealand is irrelevant to this enquiry.

### **THE ISSUES**

[29] 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."

[30] 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 APPELLANTS' CASE**

[31] Before considering the issues raised by the Convention, however, it is necessary to address the question of the credibility of the appellant's account.

[32] While the Authority accepts that the appellant is a Malaysian national of Chinese ethnicity who was raised as a Christian, nothing else of the core of his account of being at risk of serious harm at the hands of Islamic fundamentalists is accepted as truthful. In reaching that conclusion, regard is had to the following concerns.

*Name on death list*

[33] Central to the appellant's claim to be at risk of serious harm is his assertion that a friend, AA, told him in early 2008 that his name is on a government death list. Asked how AA knew this, the appellant claimed that AA had close friends in a government agency, though the appellant knew neither which agency nor the friends (and they did not know him). In spite of the appellant being a total stranger to AA's friends, they had happened to mention to AA one day, while taking tea, that his name was on a death list they had seen.

[34] The coincidence that AA's friends should happen to mention to AA (for no discernable reason) the name of a person unknown to them, fortuitously enabling AA to warn the appellant, is so strained as to be unbelievable.

[35] The reality that the appellant's name is not on any death list is reinforced by his inability to sensibly explain why he was not killed (or harmed at all) during his two years in Malaysia after refusing to give the investment company his designs. Invited to explain this, he could only claim that he had been monitored by the authorities by the tactic of regularly putting him in jail. The flaws in that, however, are manifold. First, his claimed detentions are said to have begun in early 2003, well before he first went to the investment company. Second, the claim that his detentions were linked to his refusal to surrender his designs is one that had never been advanced by the appellant at any time prior to the appeal hearing. If, in fact, such a link existed, there is no doubt that he would have been quick to mention it. Finally, he could offer no sensible explanation for the fact that, after two years of surveillance, including having a clear opportunity several times to harm him while he was in custody, the authorities should suddenly decide to kill him only after he had gone overseas.

*Discrimination as a taxi driver*

[36] The appellant claims that, as a taxi driver in Selangor, Muslims would decline his services because he was a Christian. As to how they would know he

was not Muslim, he asserted that “they would come to know” through their social circles. That response is inherently implausible. As the appellant acknowledged, the population of Selangor province is many millions (5,000,000, according to the 2008 census, of which 52.9% are Malay and 27.8% Chinese). The notion that, in such a vast population, Muslim social circles would discuss the ethnicity of one particular taxi driver among the many thousands, is disbelieved.

[37] It may be that some Malay customers would decline the appellant’s services because he is visibly Chinese, but the suggestion that such discrimination would arise because of his (non-visible) religion, is fanciful.

*Witnessing a detainee beaten to death*

[38] The appellant’s evidence on this point was confused and contradictory. To the Refugee Status Branch, he claimed that this incident occurred when he had been detained one night in early 2006, for creating excessive noise in his flat. To the Authority, however, he was clear that it occurred during one of his four detentions while working in Selangor as a taxi driver. He expressly confirmed that it had happened in 2003-2004. Further, he stated that he had not seen anyone else mistreated when he was detained in 2006 for making excessive noise.

[39] The accounts are not reconcilable. It is not overlooked that persons can become forgetful about the date of an event, but it is less likely for the order of events to be confused, particularly where, as here, one version of events places the incident in one location (Selangor) and the other in another (X town), on a wholly different island over 1,500km away.

*The appellant’s steering and navigation invention*

[40] It is not possible for the Authority to know whether or not the appellant did, in fact, invent some novel steering and navigation device, because he has not disclosed the design (indeed, he says that he burned his plans and drawings in 2006). When asked, however, he was able to give the particulars of a patent attorney to whom he says he has spoken in New Zealand and to state a realistic figure which, he says, he was quoted for getting a patent registered.

[41] On balance, it appears that the appellant does believe that he has invented such a device. His claim, however, that the Malaysian authorities are seeking to harm him because he has not handed it over, is specious. A degree of reality



needs to be brought to bear. The appellant has no science or engineering qualifications and no relevant experience beyond that of an average person. His computing knowledge is derived from a three month course and could not be considered in-depth. If he has devised such a device, its difference must rest on its novelty of concept, not on any scientific breakthrough or its technical specifications. Indeed, he conceded that it requires “technology no-one has invented yet” and that he would need designers and manufacturers to actually create it.

[42] In spite of this, the appellant says that when he was asked by the investment company to explain the design to them, he declined to do so. The only reason he had for suddenly not cooperating with the very organisation he had approached, was that he did not trust them because they were an arm of the government and thus anti-Chinese and anti-Christian. He feared they would steal his idea. Yet he had known of the company’s government backing from the outset. Further, at his very first visit he had heard, he says, employees speaking in a derogatory way about his ethnicity. If he did not trust the company, then that lack of trust must have existed from the outset and it is surprising that he would have continued to deal with it over a period of many months, to the point of submitting a business plan.

[43] The short point is that the appellant claims that the authorities want to harm him because he has refused to hand over his designs. The Authority does not accept that such a refusal ever occurred.

#### *Conclusion on credibility*

[44] Taken cumulatively, the foregoing concerns lead the Authority to conclude that the appellant’s claim of being at risk of serious harm at the hands of the Malaysian authorities, or their agents, is untrue. The claim that his name is on a death list is disbelieved, as is the reason that he says gave rise to it, namely his refusal to hand over his invention.

[45] It is accepted that the appellant is a Chinese Christian from Malaysia, who has suffered incidents of discrimination from time to time. His claim falls to be assessed on that basis.

[46] As to his Christianity, there are aspects of it which are less than orthodox. His florid statements in support of his refugee claim illustrate his unwillingness to

distinguish between Christianity and Judaism, to which he says he has leanings. Thus:

“Examine why are this happened to me? It’s because I am exalted with the omnipotent/science of Israel.”

and:

“Favor the God of Israel thing would be much better. I said this in Jesus’ name Amen!”

[47] Ultimately, however, the Authority’s assessment is less concerned with the nature of the appellant’s personal view of Christianity as it is with the Malaysian authorities’ perception of whether he is a Christian (or, more aptly, a non-Muslim).

**Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Malaysia?**

[48] “Being persecuted” comprises two elements – serious harm and the failure of state protection. See *Refugee Appeal No 71427/99* (16 August 2000) at [67]. Further, the appropriate standard for persecution is a sustained or systemic violation of core human rights. See in this regard J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1993) at p108 and *Refugee Appeal No 2039/93* (12 February 1996).

*Country information*

[49] The appellant has adduced a substantial quantity of country information, much of it of only tangential relevance and much of it from sources best described as either non-expert (such as comments by unidentified persons on Internet blog sites) or partisan (such as the Australia Israel & Jewish Affairs Council, various Christian websites and anti-Islamic sources such as the “Western Resistance” movement. It has all been read and considered. It is more helpful, however, in assessing country conditions, to have regard to the reports of non-partisan, international, human rights monitors and government agencies from liberal western democracies charged with monitoring human rights observance in foreign countries. Such commentators, while sometimes imperfect, are generally regarded as having expertise and as being impartial and objective.

[50] In this category falls the United States Department of State *Country Reports on Human Rights Practices: Malaysia* (February 2009), a copy of which was

provided to the appellant and on which he has commented at length. It is a 29 page report, the relevant parts of which can be summarised as follows.

[51] Malaysia is a federal constitutional monarchy, with a multiparty parliamentary system of government. Elections are regarded by observers as generally transparent, the last time showing a significant gain by opposition parties. The majority of the population of 27 million is Muslim. Christians comprise approximately 25 per cent.

[52] The Malaysian government generally respects human rights but there are issues with the abuse of detainees (including the deaths of 82 people in police custody or while being apprehended), the abuse of arrest and detention procedures, excessive force and intimidation by the People's Volunteer Corps, a district-level militia (known as "RELA") and widespread government corruption at the level of petty officials. In terms of religion and ethnicity, the government overly promoted and protected Islamic interests at the expense of other religions, including in the allocation of funding for places of worship, and undertook significant "positive discrimination" plans in favour of the indigenous Malay population, the "*bumiputra*", who are generally Muslim. Generally, however, non-Muslims are free to practice their religion with few restrictions.

[53] The appellant has sought to highlight numerous instances of individuals being detained, or physically harmed, or otherwise restricted by the various state security forces. Examples include a 10 year-old boy assaulted by police while being questioned over a theft, the looting of a Burmese refugee camp by RELA militia, the arrest of bloggers for posting material considered a threat to national security and the detention of a Member of Parliament who called for a reduction in volume of the Muslim call for prayers. There are numerous such examples to hand. They are consistent with what is understood from the country information – that while Malaysia is an open and democratic society, the authorities do sometimes act to restrict personal freedoms where those are considered inconsistent with the aims of the government to promote Islam and to protect and promote the interests of the *bumiputra*, the ethnic Malays. Further, security personnel do sometimes exceed their authority.

[54] It is against this overview of Malaysia that any risk of serious harm to the appellant must be assessed.

*Application of the country information to the facts as found*

[55] The appellant is not a person of any interest to the Malaysian authorities. He is not politically active. Any past encounters he has had with the police have been isolated incidents arising from his own conduct (such as making excessive noise) or have been isolated incidents of malpractice by individual officers (such as demanding bribes), for which there is no expectation of recurrence, except perhaps at a random level. On no occasion did he suffer serious physical harm and any detention was for a matter of a few days at most. Further, some incidents were linked to particular employment which he no longer undertakes (taxi driving in Selangor and running a cyber café in X town). Those circumstances are now well in the past and do not constitute evidence of any future risk.

[56] In terms of his religious beliefs, the appellant is best described as a private Christian worshipper who neither proselytises nor draws attention to himself. There are no significant restrictions placed on the observance of private Christian worship (of whichever creed or variety) in Malaysia. It is accepted that there are instances of state-condoned discrimination against Christians generally, such as disproportionately low funding, restrictions against proselytising to Muslims, the promotion of Islam in the school curriculum and a propensity to favour Muslims in state employment. Such discrimination is egregious and regrettable but it does not constitute persecution in the context of the Refugee Convention. The appellant is not at any risk of serious harm because of his Christianity.

[57] As to his Chinese ethnicity, there is no evidence to suggest that it puts the appellant at any risk of harm. Granted, there is positive discrimination in favour of the ethnic Malay population, but the country information does not disclose state practices against the vast ethnic Chinese population, numbering in the millions, which could remotely be called "serious harm". At most, the appellant might experience occasional instances of discrimination or modest levels of abuse by bigoted individuals (such as the derogatory remarks he says he overheard at the investment company office). Such prejudice is unfortunate and to be denounced. It is not, however, serious harm.

[58] Any future risk of serious harm to the appellant in Malaysia is speculative only. The chance of it occurring is no more than remote. It falls short of constituting a real chance by a considerable margin. The Authority is satisfied that the appellant does not have a well-founded fear of being persecuted in Malaysia.

[59] The first issue raised by the Convention being answered in the negative, the second issue (that of a Convention reason) does not arise.

### **CONCLUSION**

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

"C M Treadwell"

C M Treadwell  
Member