

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76155

AT AUCKLAND

Before: A N Molloy (Member)

Representative for the Appellant: S Singh

Appearing for the Department of Labour: No appearance

Date of Decision: 25 January 2008

DECISION

[1] This is an appeal against a 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 citizen of Fiji.

[2] This is the second time the appellant has appealed to this Authority. The Authority (differently constituted) dismissed his appeal in respect of his first refugee claim on 28 March 2007. His second refugee application was lodged with the RSB on 10 April 2007. It was declined by the RSB, which found that it had no jurisdiction to accept the appellant's second claim.

[3] This appeal turns upon whether the Authority has jurisdiction to determine the appellant's second claim for refugee status.

JURISDICTION: SECOND CLAIMS FOR REFUGEE STATUS

[4] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a first claim has been finally determined.

[5] Section 129J(1) of the Immigration Act 1987 (the Act) sets out the circumstances in which a refugee status officer may receive and determine a second or subsequent claim for refugee status:

“A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant’s home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.”

[6] Section 129O(1) of the Act provides a right of appeal from a decision made by a refugee status officer under s129J(1):

“A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant’s home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer’s decision.”

[7] The Authority considered its statutory jurisdiction to hear and determine second and subsequent refugee claims in *Refugee Appeal No 75139* (18 November 2004). It held that in the absence of significantly different grounds in the respective claims, the Authority simply has no jurisdiction to consider the merits of the subsequent appeal.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[8] In circumstances outlined in s129P(5) of the Act, the Authority has a discretion about whether to offer the appellant the opportunity to attend an interview. The discretion arises where, as in this case, the appellant was interviewed by the RSB and if the Authority considers that the appeal is *prima facie* ‘manifestly unfounded or clearly abusive’. The Authority’s jurisdiction in this regard was examined in *Refugee Appeal No 70951/98* (5 August 1998).

[9] After setting out the procedural history of the appellant’s case, the Authority will briefly outline the appellant’s current claim for refugee status. That claim will then be assessed in light of ss129J(1) and 129O(1) and a conclusion reached about whether to dispense with an interview under s129P(5) of the Act.

PROCEDURAL HISTORY OF THE APPELLANT'S CASE

First claim for refugee status

[10] The appellant arrived in New Zealand on 14 May 2006. His first claim for refugee status was set out in his written application lodged on 27 June 2006. He was interviewed by a refugee status officer of the RSB in September 2006.

[11] The RSB issued a decision, dated 23 November 2006, declining the appellant's first application for refugee status. The Authority wrote to the appellant on 1 March 2007 to advise that the appellant's first appeal appeared to be "manifestly unfounded or clearly abusive", and inviting him to make submissions in support of his claim. For the purposes of his first claim for refugee status, the appellant claimed that he had a well-founded fear of being persecuted in Fiji because of his Indian ethnicity.

[12] The appellant claimed that he had been a supporter of the Fijian Labour Party since 1999. He also said that one night in May 2000, members of his village, including the appellant, were accosted by 30 ethnic Fijians from a nearby village. After hiding in the jungle, the appellant returned home the following day to find that his house had been burgled and that threatening graffiti had been painted on the outside.

[13] The appellant claimed that the Fijian state would not be willing or able to protect him from racially motivated attacks or from criminal violence.

[14] The Authority published a decision dismissing the appellant's appeal in *Refugee Appeal No 75997* (28 March 2007).

[15] The Authority found that the appellant's first claim was manifestly unfounded or clearly abusive because there was no evidence that Fijians of Indian ethnicity were at risk of being persecuted in Fiji. The appellant was not in need of the surrogate protection offered by the Refugee Convention. In short, he was not a refugee. His claim was not well-founded and his appeal was dismissed.

Second claim for refugee status

[16] On 10 April 2007, less than two weeks after his first appeal to the Authority was finally determined, the appellant lodged a second claim for refugee status with

the RSB. The appellant was interviewed by a different refugee status officer on 19 September 2007.

[17] The appellant's second claim is also based upon his claim that general conditions in Fiji had deteriorated since the final determination of his claim on 28 March 2007; that ethnic tensions had increased between ethnic Fijians and Fijians of Indian ethnicity during that time; and that unemployment in Fiji had become worse.

[18] The RSB issued a further decision dated 31 October 2007, in which it found that it had no jurisdiction to accept the appellant's second claim. The RSB was not satisfied that circumstances in Fiji had changed to such an extent that the appellant's further claim was based upon significantly different grounds to his previous claim. Accordingly, refugee status was declined. The appellant has appealed against that decision.

Whether to dispense with an interview: communications between the Authority and the appellant

[19] The Authority formed the preliminary view that the appellant's second appeal is *prima facie* "manifestly unfounded or clearly abusive" because it did not meet the jurisdictional threshold for second or subsequent claims. That view, and the basis upon which it had been formed, was set out in a letter from the Authority's Secretariat to the appellant, dated 21 December 2007. The letter noted that the appellant had been interviewed by the RSB in respect of his current application for refugee status, and continued:

"First claim

For the purposes of his first claim, the appellant said that he had a well-founded fear of being persecuted in Fiji because of his Indian ethnicity. He claimed that the Fijian state would not be willing or able to provide protection from racially motivated attacks or from criminal violence.

The appellant claimed that he had begun to support the Fijian Labour Party in 1999, and had lobbied on its behalf. He also said that one night in early May 2000 approximately 30 ethnic Fijians from a nearby village accosted and chased the appellant and other members of his village. After hiding in the local jungle overnight, the appellant returned home to find that his family home had been burgled and that threatening graffiti had been painted on the outside.

He was assaulted by two other ethnic Fijian men later in 2000.

The appellant also claimed that a friend of his was robbed and assaulted near the appellant's house in early 2006.

The appellant's first claim was declined by the RSB on 23 November 2006 and his subsequent appeal to the Authority was declined on 28 March 2007.

The Authority found that the appellant's first claim was manifestly unfounded or clearly abusive because there was no evidence that Fijians of Indian ethnicity were at risk of being persecuted in Fiji. The appellant's claim was not well-founded and his appeal was dismissed.

Second claim

The appellant completed his second claim for refugee status on 4 April 2007, less than a week after the delivery of the Authority's decision in respect of his first appeal. It was received by the RSB on 10 April 2007.

For the purposes of his second claim, the appellant asserted that general conditions in Fiji had deteriorated since the final determination of his claim on 28 March 2007; that ethnic tensions had increased between ethnic Fijians and Fijians of Indian ethnicity during that time, and that unemployment had become worse.

Preliminary view

The Authority's preliminary view is that the appellant does not satisfy the statutory criteria for the acceptance for consideration of his second refugee claim.

The appellant has not provided any country information or evidence which establishes that, since the final determination of his first appeal on 28 March 2007, circumstances in Fiji have changed to such an extent that the appellant's further claim is based upon significantly different grounds to his first claim.

Nor has the Authority been able to find any such information through its own research.

The Authority's preliminary view is therefore that the appellant is unable to satisfy the jurisdictional criteria for second and subsequent refugee claims under sections 129J and 129O of the Act. The appeal therefore appears to be manifestly unfounded and clearly abusive."

[20] The Secretariat's letter reminded the appellant that he bears the responsibility for establishing his refugee claim pursuant to ss129P(1) and 129P(2) of the Act (as referred to in *Refugee Appeal No 72668/01* (Minute No 2) (5 April 2002) and in *Anguo Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA)).

[21] Notice was also given that, unless the Authority was persuaded otherwise, it could consider and determine the appeal pursuant to ss129P(5)(a) and 129P(5)(b) of the Act, without giving the appellant an opportunity of attending a further interview. Reference was also made to *Refugee Appeal No 70951* (5 August 1998).

[22] The appellant was invited to provide the Authority with submissions and/or evidence to address these issues by Monday 21 January 2008.

[23] He responded in writing through Mr Singh's office on 21 January 2008. Mr Singh submits that circumstances in Fiji have changed significantly since the final determination of his first claim on 28 March 2007. He relies upon the following factors:

- (a) that the regime of Commodore Frank Bainimarama is brutal and has no regard for the rule of law in Fiji as shown by the manner in which a New Zealand-based businessman, Ballu Khan, has been mistreated after being accused of threatening to kill Commodore Bainimarama;
- (b) that Commodore Bainimarama's regime has been intimidating opponents of the coup as witnessed by draconian measures taken against protesters; and
- (c) that the appellant does not feel safe in Fiji and has no confidence in the ability of the security apparatus of Fiji to protect him.

[24] The appellant submitted that the Authority has continually refused to accept appellants from Fiji as refugees, "despite the atrocities and abuse of human rights against the citizens of that country", and suggests that the Authority organise a fact-finding mission to determine the true situation in Fiji.

[25] The appellant's response comprised a single page. He did not provide any information in support of his submissions.

Conclusion as to whether to dispense with an interview

[26] Taking into account all relevant material available to it, the Authority finds that the appellant's second appeal is *prima facie* "manifestly unfounded or clearly abusive".

[27] As the appellant was interviewed by a refugee status officer on 19 September 2007 in the course of the determination of his second refugee claim, the Authority determines this appeal on the papers pursuant to ss129P(5)(a) and 129P(5)(b) of the Act, without giving the appellant an opportunity to attend a further interview.

THE JURISDICTIONAL THRESHOLD

Comparison of claims made

[28] Comparing the appellant's first and second claims, and taking into account all of the material available to it, the Authority finds that there is no evidence that since the determination of the appellant's first claim for refugee status on 28 March 2007, circumstances in Fiji have changed to such an extent that his subsequent claim is based on significantly different grounds to his previous claim.

[29] The appellant's claims have already been the subject of a hearing before the Authority *Refugee Appeal No 75997* (28 March 2007). In submissions lodged in support of his first appeal the appellant's representative stated that following the coup led by Commodore Bainimarama in December 2005:

"[the appellant] ... has a deep-seated fear of things military and that Fiji has now become a country where the rule of the gun will always prevail and says that Indians have no faith in either the military or the Fiji Police Force."

[30] The submissions continued to the effect that the appellant "felt unsafe and fears for his life in a country where the military has made a habit of staging coups".

[31] In dealing with the appellant's submissions the Authority found that:

"[31] There is no evidence before the Authority which indicates that the appellant faces a real chance of being persecuted in Fiji should he return there now. His experiences there in the past do not constitute persecution and there is no basis for any fear of being persecuted there in the future.

[32] The Authority has also considered recent country information with regard to the situation of Indo-Fijians subsequent to the December 2006 military takeover of the Fijian government. There is no credible evidence before the Authority which indicates that the situation for Indo-Fijians has changed such that there is any increased likelihood of the Refugee Convention being engaged.

[33] ... the Authority finds that the appellant does not have a well-founded fear of being persecuted in Fiji."

[32] The appellant's further claim is based upon a series of assertions which essentially mirror the issues raised in respect of his first appeal. In his submissions to the Authority he has made further assertions about the activities of the current regime under Commodore Bainimarama, but has not provided any evidence or country information which supports or substantiates those assertions.

[33] The Authority acknowledges that a New Zealand-based businessman, Ballu Khan, was arrested in Fiji in November 2007 for supposedly being involved with an

alleged plot to assassinate Fiji coup leader Commodore Frank Bainimarama. Allegations have been made that Mr Khan was mistreated while in custody. However, recent reports indicate that Mr Khan was granted bail in a special hearing in the Suva magistrates court in Fiji on 8 January 2008, despite opposition from the Director of Public Prosecutions Office; "Ballu Khan granted bail in Suva court", *New Zealand Herald*, www.nzherald.co.nz (9 January 2008).

[34] In any event this, in isolation, does not amount to a change in circumstances such that the appellant's further claim is based upon significantly different grounds.

[35] In addition, the appellant's suggestion that the Authority undertake a "fact-finding mission" to Fiji is misplaced. It is not logistically practical for the Authority to embark upon an exercise of the nature proposed, and nor is it the responsibility of the Authority to undertake such a function. The Act clearly places responsibility upon an appellant for establishing the claim:

"It is the responsibility of an appellant to establish the claim, and the appellant must ensure that all information, evidence, and submissions that the appellant wishes to have considered in support of the appeal are provided to the Authority before it makes its decision on the appeal." [Section 129P(1)]

CONCLUSION

[36] The appellant has not presented any evidence that, since the final determination of his first claim on 27 March 2007, circumstances in Fiji have changed to such an extent that his second claim is based on significantly different grounds to his first claim.

[37] The appellant does not satisfy the requirements of ss129J and 129O(1) of the Act. It follows that the Authority has no jurisdiction to consider the appellant's second claim to be recognised as a refugee in New Zealand. The appeal is therefore dismissed.

"A N Molloy"
A N Molloy
Member