

**DECISION RECORD\**

**RRT CASE NUMBER:** 071823443

**DIAC REFERENCE(S):** CLF2004/57145

**COUNTRY OF REFERENCE:** Fiji

**TRIBUNAL MEMBER:** T Delofski

**DATE DECISION SIGNED:** 11 March 2008

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependants respectively of the first named applicant.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

The applicants, who are citizens of Fiji, arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decisions and their review rights.

*[Information deleted in accordance with s.431 of the Migration Act as it may identify the applicant]*

The delegate refused the visa application on the basis that the first named applicant (hereafter referred to as ‘the applicant’) is not a person to whom Australia has protection obligations under the Refugees Convention.

The matter is now before the Tribunal.

### **RELEVANT LAW**

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

#### **Definition of ‘refugee’**

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

The Tribunal has before it the Department's and the Tribunal's case files relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources. A hearing was held.

The applicant arrived (with his wife and family) in Australia and applied for a permanent visa. This application was refused by the Department. The applicant applied for a Protection visa.

In written and oral submissions to the Tribunal and the Department, the applicant has set out his claims and reasons for being a person to whom Australia has protection obligations under the Refugees Convention. These claims and reasons may be summarised as follows:

- The applicant is part European and part Fijian.
- He claims he has been persecuted by native Fijians (including members of the Taukei Movement) because of his part European origin and because he supported the Fijian Labour Party (FLP).
- He was very concerned about the treatment of the Indian population in Fiji and the attitude of the police and army in not protecting them adequately. He also feared similar treatment because of his part European background.
- From the late 80s there were "incidents" which made the applicant concerned about his family's future in Fiji but he did not feel compelled to flee.
- Shortly after assisting some Indo-Fijians who were being racially abused by native Fijians, the applicant was pulled out of a vehicle by a group of men who attacked him and called him names such as Indian lover and Kailoma (also spelt Kyloma), meaning half-caste. He suffered injuries to his whole body. The incident was reported to the police who took no action.
- While supporting the FLP, the applicant was assaulted by a couple of native Fijian youths, inflicting multiple injuries to his body. The youths shouted "Fiji is for the Fijians" while assaulting the applicant. The applicant reported this assault to the police. An officer called the applicant a Kyloma and asked him why he was helping 'Kaindiya' (Indo-Fijians) who should all go back to India.
- The applicant was hit by an object while investigating an intrusion into his home. The intruders also smashed the applicant's homewares and were heard by neighbours to say that the "Indian lover" should be taught a lesson.

- The applicant was verbally abused by members of the Taukei Movement (an extreme nationalist Fiji movement), one of whom shouted “People like you Kailoma have no country of your own, you are intruders.”
- The applicant was coerced into attending a meeting of the Taukei Movement (TM) He was subject to further pressure to join the movement even though he opposed their hatred of Indo-Fijians and their supporters.
- The applicant is afraid to return to Fiji because he fears the TM and other nationalist extremists will make his life miserable.
- The applicant did not apply for a Protection visa on his arrival in Australia as he was advised by migration agents and others that it was almost impossible for Fijians to get refugee status.

At the hearing, the applicant affirmed that he feared persecution in Fiji for the Convention reasons of his race and political opinion. The applicant’s representative added that the applicant also feared persecution as a member of a particular social group, namely ‘people of native Fijian origin who openly sympathise with Indian Fijians.’ The representative said that the applicant did not attach significant weight to his race, *per se*, as a reason for his fear of persecution; the key reasons were his political opinion and his being a (part) native Fijian who openly supported the plight of Indo-Fijians. The applicant concurred with the representative’s statement, observing that his mixed race was not a significant problem of itself.

The applicant affirmed his written accounts of the incidents which led him and his family to flee Fiji He said that he had left because his life had become filled with fear and he believed his life was in danger: he had been threatened “many times” by extremists from the Taukei Movement, particularly when he was supporting the FLP He said that extremists had verbally threatened to kill him while he was being physically assaulted.

On the current political situation, the applicant said that he felt that Commodore Bainimarama was a good man and the interim government had been good for Indo-Fijians. The Tribunal observed that the applicant’s assessment implied that he would face less risk of persecution and more State protection from extremist nationalist Fijians if he returned now. The applicant responded that he felt the threat to him was as great now as when he left. He said that TM extremists were currently “lying low” but that the political situation was very fluid, adding that “anything could happen at any time” and “Bainimarama has a lot of enemies.” The representative said that Bainimarama was hated by indigenous Fijians, including the tribal chiefs, and that his future was highly uncertain. He said that Fijians such as the applicant who supported Indo-Fijians were the object of particular hatred by nationalist Fijians and were seen as traitors to the native Fijian cause

The Tribunal noted that it had been a considerable time since the applicant left Fiji; was it not likely that extremist Fijians who had previously threatened him may have forgotten about him? The applicant responded that his relatives were still receiving threats directed at him by TM extremists and other nationalist Fijians.

The applicant said that if he is forced to return to Fiji he would still feel committed to the plight of Indo-Fijians and would continue to work politically on their behalf, despite his belief that his life would be in danger if he did so. The representative emphasised the

uncertainties in the political outlook; even if Bainimarama carried out his promise to hold an election next year, the current likelihood was that an SDL government would assume power, with attendant heightened risks of persecution to Fijians like the applicant.

## **Country information**

### **Current Political Situation**

DFAT has stated that following the military coup in December 2006 the political situation remains unresolved and there has been a deterioration in the rule of law. Since the coup Commodore Josaia Voreqe (Frank) Bainimarama has remained in control. In January 2007 an interim government was announced with Bainimarama the interim prime minister. Individuals in the cabinet were appointed by him and included members of the Fiji Labour Party (FLP). At the October 2007 Pacific Islands Leaders Forum held in Tonga Bainimarama announced that he would go to the polls in the first quarter of 2009. A thirty-day emergency rule was announced in September 2007 which has now lapsed. In November 2007 there were said to be plans to assassinate Bainimarama, senior military officers and members of the interim government. Although it has been reported that since the coup in December 2006 many people detained by the army were subject to physical and mental intimidation, no information was found in the sources consulted on the treatment of Fiji Labour Party (FLP) members and supporters, either by the government or the Taukei movement. The Taukei movement is an indigenous Fijian movement established in 1987 and associated with the coups of 1987 and 2000.

On 17 October 2007, Bainimarama made an undertaking to the Pacific Islands Leaders Forum in Tonga that Fiji would go to the polls in the first quarter of 2009 and that the military would accept the outcome of the general election. On 3 November 2007, he announced that he would allow members of his interim government to contest the 2009 national election. However, the FLP does not support an early election until the electoral process is “overhauled” (Burese, Maria 2007, ‘Interim PM: Polls in 2009’, *Fiji Times*, 18 October).

No information was found in the sources consulted on the treatment of known FLP sympathisers. However, within the interim government there are FLP members. Mahendra Chaudhry, the leader of the FLP and a former prime minister, was appointed the Finance, Sugar Reform and National Planning Minister. Another appointee, Lekh Ram Vayeshnoi, described as a “long-time Fiji Labour Party stalwart”, was appointed Youth and Sports Minister (‘Profile of Fiji’s interim cabinet members’ 2007, *Fiji Times*, 9 January).

In March 2007 DFAT advised, in the context of a person being a member of the *Soqosoqo Duavata Ni Lewenivanua* (SDL) [the main political party for native Fijians]:

A1. There are numerous members of the *Soqosoqo Duavata ni Lewenivanua* (SDL) Party and there were also many individuals who worked as polling officials during the May 2006 elections. Post has no information to suggest, however, that SDL members or election officials are being, or have been, specifically targeted by the Republic of Fiji Military Forces (RFMF). There have been many instances of harassment, threats, intimidation and abuse by the RFMF, but these have been primarily targeted at individuals who publicly expressed opposition to the 2006 coup and/or the formation and actions of the interim Government, rather than people who were simply SDL members or election officials. In response, the interim Government stated recently that it would take measures to ensure there were no further human rights abuses. Despite this, Post notes there continues to be allegations of the

RFMF and police committing human rights abuses particularly in relation to RFMF involvement in standard policing issues (for example, narcotics, illegal gambling) as well as against those critical of the RFMF and the interim Government. There would however, appear to be limited risk at present to SDL members or polling officials who do not speak out publicly against the interim Government or the RFMF.

### **The future prospects of the Bainimarama interim government**

DFAT has noted that the political situation in Fiji remains unresolved and there has been a deterioration in the rule of law. It has received “credible information “ that the unresolved political situation in the country could result, without warning, into outbreaks of violence and in civil unrest particularly around Suva (DFAT 2007, *Travel Advice – Fiji*, 7 October (current for 15 November 2007) <http://www.smartraveller.gov.au/zw-cgi/view/Advice/Fiji> – Accessed 15 November 2007 – [Attachment 5](#)).

On Bainimarama and the situation in Fiji a November 2007 article cites Associate Professor John Henderson, a Pacific police expert from Canterbury University in New Zealand as follows:

Bainimarama may have enjoyed the role of the only statesman in Fiji who counts, but that doesn't mean he is not genuine in his stated objectives, says associate professor John Henderson, a Pacific politics expert from Canterbury University.

There is speculation the assassination plot allegations may be a diversion to buy more time before Fiji holds elections. Bainimarama may have felt pressured into confirming at the recent Pacific Forum that elections would be held early in 2009 a year earlier than originally intended.

That may be insufficient time to fulfil his intentions of instituting a one-person one-vote electoral system and replacing a culture of graft for one of service.

While Fijians wait for evidence to support charges of an assassination plot, Bainimarama would be wise to keep a constant eye on his own. If a threat to his interim government comes, it is most likely from within the military, says Henderson.

“I wouldn't be surprised if a real attempt is made at running a counter- coup. The military is a very Fijian institution and not necessarily very happy with Bainimarama's commitment to multi-racial Fiji” (Bainimarama puts patience of Fiji people to test' 2007, *New Zealand Herald*, 10 November – [Attachment 18](#)).

Lal writes the following in his August 2007 critique:

The question is: will general election be held within the time frame stipulated by the EU?

There are those who are optimistic, but I have deep doubts. The Fiji Labour Party has stated that holding general election should not be the country's priority; getting the essential electoral infrastructure right should be: conducting a census, drawing up electoral boundaries, educating the voters. Accomplishing these before 2009 may not be feasible.

The interim Prime Minister has said on various occasions that the timing of the next general election is a matter for Fiji to decide, not for the international community to dictate. The 'clean-up campaign' should be seen through to completion. Then there is the so-called 'President's Mandate' whose fulfilment forms a critical justification of the interim administration's existence. The deeply fraught proposed charter to build a better Fiji with the

assistance of the civil society is another story, possibly another delaying tactic. But there is a deeper fear that drives the interim administration.

That is that if elections were held today, or in 2009, the SDL will be returned to power with a thumping Fijian majority. In this assessment, they are correct. Fijian support for the SDL has strengthened, not lessened, in the last six months. And it will not diminish any time soon. The more the Fijians feel marginalised and excluded, the greater the support for the SDL will be.

‘Qarase is not coming back,’ Commodore Bainimarama and others in the military have said over and over again. Delaying the election would hopefully achieve that goal, given the former prime minister’s advancing years.

...

Every issue, every challenge, is viewed through the prism of race. Predominantly Indian trade unions struck an early deal with the interim administration while predominantly Fijian ones struck, I am told. It is not as simple as that, for support for or against the interim administration is divided across the communities. Not all Indians support the coup, nor all Fijians oppose it. But perceptions, right or wrong, do matter. And the omens do not look good.

...

Repairing or in some instances rebuilding bridges of understanding and tolerance between the two main communities is an urgent challenge for the interim administration.

Preoccupied with its own survival amidst unrelenting international pressure unlikely to end any time soon, it has adopted an ad-hoc, fire-containing, approach to the challenges facing it: an enquiry here, a raid there, a plea for aid and assistance and skilled personnel from this country or that. All this points to one inescapable truth: Fiji is a part of the international community; it is an island, yes, but an island in the physical sense alone. We cannot afford to thumb our noses at the international community and then expect to escape retribution. Sooner rather than later, the larger challenges of the proper way to build a multi-ethnic nation will return to haunt the nation.

The revocation of the suspension of the GCC augurs well for the future of the country. One hopes that the currents underneath are as calm as the surface upon which the duck treads water. Any other scenario is simply too terrible to contemplate (Lal, Brij 2007, ‘Fiji: Like a duck treading water’, *Fiji Times*, 11 August <http://www.fijitimes.com/story.aspx?id=68300> – Accessed 2 November 2007 – Attachment 25).

## **FINDINGS AND REASONS**

The applicant claims that he fears persecution by indigenous Fijian nationalists because of his political opinion and membership of a particular social group. In particular, he fears persecution because he has supported politically the FLP and the plight of Indo-Fijians more generally and because many native Fijians have a particular hatred for other native (and part native) Fijians who actively support Indo-Fijians: such people are seen as traitors to the native Fijian cause.

In support of his claims, the applicant has cited a number of incidents that occurred in the 2 years prior to his departure from Fiji in which he was physically assaulted and abused by native Fijians who were opposed to his links with, and efforts on behalf of, Indo-Fijians. The Tribunal has considered the oral and written evidence and accepts that the applicant has been seriously assaulted by native Fijians on the cited occasions and for the reasons claimed by the applicant.



A central issue is whether the applicant has a well-founded fear of persecution should he return to Fiji in the reasonably foreseeable future. Country information indicates, and the applicant agrees, that the current interim government headed by Commodore Frank Bainimarama is sympathetic to the plight of Indo-Fijians. It follows that, for the period that the Bainimarama government remains in power, the applicant would face a reduced risk of harm by indigenous Fijian nationalists and enjoy a higher level of State protection if he were to return. However country information also indicates that the political situation in Fiji is highly fluid and the likelihood of Bainimarama remaining in power, even in the period leading up to the election Bainimarama has promised in 2009, is by no means certain. Were Bainimarama to be ousted, either by coup or in the election, the applicant's risk of serious harm by indigenous Fijian nationalists is likely to increase and the level of state protection from such harm afforded to him is likely to decrease. This is particularly the case if, as would seem likely given the nature and extent of the forces opposing Bainimarama, a change of government leads to a significant rise in the influence of nationalist indigenous Fijians and a concomitant diminution in the influence and equitable treatment of the Indo-Fijian community. The Tribunal also accepts that native Fijians such as the applicant who are seen to be sympathetic to, and actively supportive of, the Indo-Fijian community would face a heightened risk of persecution should there be such a change of government.

There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).

Having considered the evidence as a whole, the Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.

No specific claims were made by or on behalf of the other applicants. The Tribunal is satisfied that they are the spouse and dependent children of the first named applicant for the purposes of s.36(2)(b)(i). The fate of their application therefore depends upon the outcome of the first named applicant's application. They will be entitled to protection visas provided they satisfy the criterion set out in s.36(2)(b)(ii) and the remaining criteria for the visa.

## **DECISION**

The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention.

The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and

- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependent children of the first named applicant.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to s440 of the *Migration Act 1958*

Sealing Officer's ID: PREMSE