REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 71404/99

AT AUCKLAND

Before:	RPG Haines QC (Chairperson) P Millar (Member)
Counsel for the Appellant:	Simon Laurent
Appearing for the NZIS:	No appearance
Date of Hearing:	22 July 1999; 23 September 1999
Date of Decision	29 October 1999

DECISION

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[1] This is an appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a citizen of the Republic of Indonesia who is also Chinese by race.

INTRODUCTION

[2] This appeal and *Refugee Appeal No. 71365/99* heard on 23 July 1999 were regarded as test cases and the Authority is grateful to counsel for his careful and detailed submissions. Subsequent to the hearing, the Authority's own researches uncovered further country information and relevant case law. This new material has been disclosed to counsel and an opportunity given for further evidence and submissions to be tendered. The Minutes issued on 8 September 1999 and 21 September 1999 refer.

[3] The setting in which the hearing of this appeal took place should be noted. The hearing occurred some two weeks after the general election was held in Indonesia on 7 June 1999 but before the election results were declared by President Habibie on 3 August 1999. It subsequently turned out that no party won a majority of the 452 seats at stake (38 of the 500 seats being occupied by appointees of the military). Control of the 500-member Parliament will depend upon the ability of one or more of the parties to form an effective coalition. Those 500 parliamentary members plus a further 200 appointed officials constituting the People's Consultative Assembly on 20 October 1999 elected Abdurrahman Wahid as Indonesia's next President: Atika Shubert, "Historic vote springs surprise", *NZ Herald*, Thursday, October 21, 1999, p B1. The election of President Wahid was welcomed by Human Rights Watch. See Human Rights Watch, "Indonesia: A Human Rights Agenda for President Wahid" (21 October 1999) (<http://www.hrw.org/press/1999/oct/etimor1020.htm>). On the following day, 21 October 1999 the People's Consultative Assembly elected Megawati Sukarnoputri Vice-President: Reuters, "Megawati elected deputy", *NZ Herald*, Friday, October 22, 1999, p B1. Earlier reviews have been positive, emphasizing President Wahid's

support for Chinese, Christians and other minorities in Indonesia. See Nisid, Hajari, "A New Day Dawns", *Time*, November 1, 1999, pp 17-23; John Aglionby & John Gittings, "Wahid Vows to Rule for All", *Guardian Weekly*, October 28, 1999, p 1.

THE APPELLANT'S CASE

[4] The appellant is a 34 year old single man who was born in Jakarta and who has lived most of his life in that city. He comes from a large family comprising his mother, father and six sisters.

[5] The appellant's father arrived in Indonesia from China when 14 years of age, but the appellant's mother, also Chinese, was born in Indonesia.

[6] Although brought up as a Buddhist, the appellant received his primary and secondary education at private Roman Catholic schools. Thereafter he attended a private university where he obtained a Diploma of Computer Studies, Level 3. He then embarked on a degree in Computer Studies but was unable to graduate as he did not complete his thesis. By this stage (February 1990) he had already started working in the private sector as a computer programmer. In the period February 1990 to July 1998 he worked for a total of three companies, but only felt discriminated against at the third company where the manager discouraged Chinese from speaking a language other than Bahasa Indonesian. This did not appear to have greatly inconvenienced the appellant as Bahasa Indonesian is his first language and he admits to speaking only a little Chinese. Nevertheless, he felt discriminated against because of the prohibition.

[7] Other difficulties mentioned by the appellant included the looting and burning of his father's shop in 1974 during a riot and an assault on his uncle in 1987 during an election campaign. The uncle was beaten because he is Chinese. Although hospitalized, he did recover. The appellant also recalls an incident in primary school in which his teacher insulted him by telling him that he (the appellant) was Chinese.

He also mentioned his inability to enter a state university but accepts that he was required to sit an examination and that the results were not disclosed. He could not tell whether his race played a part in the refusal of admission. Also mentioned by the appellant was an incident in 1997 in which he lost his wallet containing his identity card. On reporting to the loss to the police he was asked for a bribe before they (the police) became interested in his case. On another occasion he was stopped by police when driving a friend's car, but without the ownership papers in his possession. He was told that the vehicle would be impounded but with no guarantee as to its security. The police suggested that he overcome the problem by paying them a bribe, a course of action which the appellant took. Also mentioned in evidence was the fact that while attending university the appellant was robbed about three to four times. He said that only Chinese were robbed. These incidents were not reported to the police as they would have to be bribed to take an interest in the case.

[8] The appellant, his parents and youngest sister lived together in a predominantly Chinese neighbourhood. Because it will be relevant later in this decision, it is as well to mention also the personal circumstances of his siblings. His eldest sister is married and lives with her husband in South Sumatra where the husband owns a shop selling building materials and the like. The second eldest sister is also married, lives in South Jakarta and is the branch manager of an optometrist's shop. Her husband is in sales marketing. The third eldest sister lives in South Jakarta and is married to a professional photographer. She does not work as she has a child to look after. The fourth sister who lives in North Jakarta is a housewife with two children to look after and is married to the owner of a shop which sells light fittings. The fifth sister has a bachelors degree in economics, lives in West Jakarta and works as an accountant, as does her husband. The appellant's youngest sister is unmarried and helps to administer a shop operated by a relative in a shopping mall.

[9] On 13, 14 & 15 May 1998 riots occurred in Jakarta following student demonstrations which culminated in the shooting of four students at Trisakti

University in West Jakarta on 12 May 1998.

[10] On 13 May 1998 the appellant was at work when he learnt of the rioting. As a result he did not return home until after nightfall. He did not personally encounter any problems even though he diverted from his journey home in order to give a lift to a colleague. Though the appellant's neighbourhood is predominantly Chinese, it was not directly affected during the riots. On 14 May 1998, however, some large buildings nearby were set on fire and ash fell on the appellant's home, causing great concern not only that the house would catch fire, but also that rioters would reach the family's street. However, neither of these fears eventuated. It should be mentioned also that none of the appellant's sisters or their families were harmed during the riots, nor were any of the businesses they or their husbands operated attacked, looted or damaged.

[11] Some three to four days after 14 May 1998 the appellant returned to work and encountered no problems there. He did notice, however, a considerable increase in activity on the streets and on three occasions while waiting at traffic lights was robbed. He observed that the criminal element tended to target motor vehicles containing Chinese as they safely assumed that the Chinese would not fight back if attacked. As an indication of the new hostility faced by Chinese at that time the appellant mentioned an incident in which a *pribumi* (indigenous Indonesian) parking warden had demanded a higher fee than usual. When the appellant declined to pay, he was assaulted. In the circumstances, he did not dare fight back and drove off. As he left, the parking warden shouted that he was going to kill the appellant.

[12] The appellant also mentioned that prior to the riots he had attended church every Sunday but after the riots his attendance dropped to approximately once a month as he had heard that the churches could be attacked and he felt unsafe leaving his home.

[13] Immediately after the riots the appellant resolved to leave Indonesia and to this end, on 20 July 1998 obtained a passport. Asked why his youngest sister who lives at home did not also leave Indonesia, the appellant explained that due to her youth and

lack of life experience it was decided that he (the appellant) was better equipped to deal with the difficulties inherent in arriving in a strange country. If he was successful in obtaining residence in New Zealand he would bring his sister to this country. Since his own arrival here on 30 July 1998, the appellant has been unable to find work and is currently in receipt of a benefit.

[14] The appellant said that should he return to Indonesia, he would not be safe as the *pribumi* Indonesian people do not like Chinese. In this regard he was asked to comment on the fact that attacks against Chinese appear to be cyclical and that only a small number of Chinese Indonesians suffer serious harm in these attacks compared to the proportion of Chinese in the population as a whole. It was pointed out to him that no member of his immediate family had been hurt during the riots, even though family members had been spread widely in Jakarta. To this the appellant said that there was always the possibility that he could suffer harm in the future and no-one could guarantee that such harm would not occur.

[15] The appellant emphasized the insecurity which he and other Chinese Indonesians now feel as a result of the May 1998 events, occurring as they did against a background of pervasive discrimination against Chinese and a history of attacks against the Chinese community. He said that while the lead-up to the 7 June poll had been without violence, as had been the protracted counting process which followed, his fear related not so much to the government, but to the *pribumi*. He feared that one day he, or a member of his family, would become a victim to violence.

[16] In his submissions counsel pointed out that the pre and post-election calm was not necessarily indicative of what would happen in the future and emphasized the evidence that the security forces had, in many instances, stood by during the riots and had failed to intervene and protect persons and property, particularly Chinese and their property. Counsel accepted that there was nothing specific to the appellant on which a finding of a well-founded fear of persecution could rest other than the fact that he is a

Chinese Indonesian. That is, it was accepted that he faced no greater risk of harm in the future than any other Chinese Indonesian. Put simply, the case for the appellant is that ***because*** he is Chinese Indonesian, ***therefore*** he has a well-founded fear of persecution. When this issue was returned to in his closing submissions, counsel was invited to identify the specific evidence which showed that the level of risk faced by all Chinese Indonesians reached the level of a real, as opposed to an insubstantial chance of serious harm. Arising out of this discussion, and perhaps in recognition of the paucity of such evidence, counsel advanced an alternative argument to the effect that even if the evidence did not establish that the anticipated harm was of a physical kind, it would be sufficient were the appellant to establish a real chance of psychological harm. It was submitted that the appellant had a right to peace of mind and that his peace of mind was subjected to continual erosion by the low level discrimination suffered by Chinese, the robberies to which they were subjected, the ban on the use of Chinese characters, the hate mail sent to them and finally, the May riots themselves. These and other acts of discrimination, coupled with the historical resentment of the *pribumi* meant that Chinese Indonesians did not know what the future held. This inhibited them from living a normal life. It was therefore submitted that to satisfy the Refugee Convention, it was not necessary that the refugee claimant him or herself face a real risk of harm, it was sufficient if they have an awareness of hatred towards his or her own race. Counsel concluded by submitting that while there may not be a real chance of actual harm, it was sufficient for the purposes of Article 1A(2) of the Convention that there be a real chance of psychological harm.

[17] Counsel frankly accepted that this latter submission had been formulated by him somewhat *ex improviso* during the course of the hearing and was to a degree inchoate. In these circumstances the Authority granted leave for further submissions to be filed on this point and on any other country developments on which the appellant wished to rely. The submissions were to be filed by 20 August 1999. No such submissions having been filed, the Authority on 8 September 1999 issued a Minute asking counsel for the appellant to confirm the non-filing of submissions. On 14 September 1999

written submissions were finally received. It was submitted that the concept of persecution is wide enough to admit of the concept of psychological harm through creation of fear alone, even if no physical harm is administered. That is, the harm is the fear itself, rather than any actual consequence. In later submissions dated 8 October 1999 it was submitted that:

> "As already adumbrated in the second set of Submissions put before the members, the persecution claimed for the Appellants is the creation of a climate of fear and insecurity. It is not asserted on their behalf that any material consequences will flow from the threats of ethnic Indonesians, or the past looting and raping, or even the historical discrimination entrenched in national laws. It is not necessary to do so. The atmosphere of fear *in itself* is persecutory. The fear of persecution is a "fear of fear itself", and as already noted by Counsel, it is founded in one of the most fundamental rights, that of personal security, set out in Article 3 of the UDHR. [emphasis in original]

[18] It should be noted that on the psychological harm point no supporting evidence was tendered. That is, the Authority was not assisted to find that the situation in which Chinese Indonesians presently find themselves can lead to psychological harm which reaches the level of persecutory harm. Nor did the appellant's own evidence come anywhere near establishing that his own fear of insecurity reached the level of persecution.

[19] On the issue of internal protection counsel pointed to the ineffectiveness of the military and the police in stopping the destruction of property, assaults and killings which took place in Jakarta and in other parts of the country in early to mid-1998. He also pointed to the fact that in decisions delivered by the Authority to date only three places had ever been named as possible sites of internal protection, namely the islands of Bintan, Batam and Bali.

[20] Before going further, it is necessary to briefly address the decision made by the refugee status officer at first instance.

THE DECISION TO DECLINE AT FIRST INSTANCE

[21] The refugee status officer found the appellant to be a credible witness and his account was accepted without reservation. The decline decision of 18 March 1999 was based on the following findings:

(a) There was no real chance of all Chinese Indonesians being persecuted in Jakarta because of their race;

(b) In the alternative, the appellant could relocate to another area of Indonesia as "the Indonesian government since May has not given any indication that it is not prepared to protect its citizens and as many areas are providing safe havens for the Chinese Indonesians it would appear that [the appellant] could access genuine protection, which is meaningful." Furthermore, it was reasonable to expect the appellant to relocate elsewhere in Indonesia;

(c) While Chinese Indonesians face discrimination because of their race, such discrimination does not reach the level of persecution.

ASSESSMENT OF THE APPELLANT'S CASE

[22] The appellant is a credible witness and his account of events in Indonesia is accepted. It is also accepted that he has given an honest statement of his reasons for not wishing to return to Indonesia. The issue which the Authority has to decide, however, is whether the appellant's fear of persecution is a ***well-founded*** one. In view of the submission that fear of harm alone satisfies the refugee definition, some fundamental principles of refugee law must be emphasized.

OBJECTIVE TEST FOR REFUGEE STATUS

[23] Article 1A(2) of the Refugee Convention speaks not of a fear of being persecuted, but of a ***well-founded*** fear. Thus, the definition decisively introduces an overriding objective test for determining refugee status. The focus of the Convention is not on the facts as subjectively perceived by the refugee claimant, but on the objective facts as found by the decision-maker. See further *Refugee Appeal No. 523/92 Re RS* (17 March 1995) at 23-26 and *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996) at 11-15. In the latter case the Authority stated:

> "Before the Convention criteria can be satisfied, there must be a ***well-founded*** fear of persecution. As explained by Lord Keith in *R v Secretary of State for the Home Department, Ex Parte Sivakumaran* [1988] AC 958, 992G (HL):
>
> > "... the question whether the fear of persecution held by an applicant for refugee status is well-founded is likewise intended to be objectively determined by reference to the circumstances at the time prevailing in the country of the applicant's nationality. This inference is fortified by the reflection that the general purpose of the Convention is surely to afford protection and fair treatment to those for whom neither is available in their own country, and does not extend to the allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question."
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> Lord Goff made the same point at 1000D :
>
> > "In truth, once it is recognized that the expression "well-founded" entitles the Secretary of State to have regard to facts unknown to the applicant for refugee status, the expression cannot be read simply as "qualifying" the subjective fear of the applicant - it must, in my opinion, require that an enquiry should be made whether the subjective fear of the applicant is objectively justified. For the true object of the Convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people whose fear of persecution is in reality well-founded."
>
> Lord Templeman at 996D concurred:
>
> > " ... in order for a "fear" of "persecution" to be "well-founded" there must exist a danger that if the claimant for refugee status is returned to his country of origin he will meet with persecution. The Convention does not enable the claimant to decide whether the danger of persecution exists. The Convention allows that decision to be taken by the country in which the claimant seeks asylum."

> The significance of *Sivakumaran* lies in the paramount importance given to the objective element of the definition. The subjective element, in the view of the House of Lords, is of marginal relevance.
>
> In so holding the House of Lords expressly rejected the suggestion in paras 37 and 42 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) that determination of refugee status primarily requires an evaluation of the applicant's statements rather than a judgment on the situation prevailing in the country of origin. As noted by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 429 (Mason J at 385 agreeing):
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> > "In *Sivakumaran* the House of Lords, correctly in my view, held that the objective facts to be considered are not confined to those which induced the applicant's fear. The contrary conclusion would mean that a person could have a "well-founded" fear of persecution even though every one else was aware of facts which destroyed the basis of his or her fear."
>
> We are of the view that the *Sivakumaran* decision should be followed in New Zealand on the issue of the objective component of the refugee definition. We are fortified in this view by the fact that the primacy of the objective element has also been recognized by the Supreme Court of the United States in *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 94 L Ed 2d 434 and by the High Court of Australia in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.
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> The only qualification we need add is that on the issue of the standard of proof of the well-founded fear, we have preferred the "real chance" test adopted by the High Court of Australia in *Chan* to the "reasonable possibility" test of *Cardoza-Fonseca* and the "reasonable likelihood" test of *Sivakumaran*. See further in this regard the Authority's decision in *Refugee Appeal No. 523/92* (17 March 1995) 23-26. A helpful discussion of the issues is to be found in James C Hathaway, *The Law of Refugee Status* (1991) 75-80."

[24] It should also be remembered that it is a fundamental principle of refugee law in New Zealand that the relevant date for the assessment of refugee status is the date of determination: *Refugee Appeal No. 70366/96 Re C* (22 September 1997) at 33-39. The point also made in this decision is that Article 1A(2) of the Refugee Convention mandates an anticipatory assessment of risk. That is, the inquiry into refugee status is concerned only with the prospective assessment of the risk of persecution: Professor James C Hathaway, *The Law of Refugee Status* (1991) 69, 75, 87-88. That is why past persecution is not a prerequisite to refugee status. But that is not to say, however, that past persecution is not relevant to the assessment of the risk of future persecution. See further *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 574-576; (1997) 144 ALR 567, 578-579 (HCA) (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, Kirby J agreeing).

WHEN IS A FEAR OF PERSECUTION WELL-FOUNDED?

[25] None of these principles, however, directly address the question of when a fear of persecution can be said to be well-founded.

[26] Atle Grahl-Madsen in *The Status of Refugees in International Law* Vol 1 (1966) at 180 postulates the following example:

> "Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote 'labour camp', or that people are arrested and detained for an indefinite period on the slightest suspicion of political non-conformity."

[27] The question posed by this example is whether a one in ten risk, or to express the issue in percentage terms, a ten per cent chance of persecution will qualify as a "well-founded" fear. In answering this question in the affirmative, Grahl-Madsen goes on to state at *op cit* 180:

> "In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return. It cannot - and should not - be required that an applicant shall prove that the police have already knocked on his door."

[28] In further addressing this risk, Grahl-Madsen at *op cit* 181 goes on to state:

> "If the risk is not so clear for all to see as in the above-mentioned example, the determination as to whether there exists 'well-founded fear' will be more difficult. But the real test is the assessment of the likelihood of the applicant's becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded'."

[29] The possible tests of "likelihood" and "real chance" can be seen in this last paragraph.

[30] The test of when a fear of persecution is well-founded was considered by the Supreme Court of the United States of America in *Immigration and Naturalization*

Service v Cardoza-Fonseca (1987) 94 L Ed 2d 434, 447. Stevens J, delivering the majority opinion, rejected a balance of probability standard for ascertaining the well-foundedness of a fear of persecution. In specifically referring to the Grahl-Madsen illustration, he stated:

> "That the fear must be 'well-founded' does not ... transform the standard into a 'more likely than not' one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."

[31] And at 453 he pointed out that there is no room in the definition for concluding that because an applicant only has a ten per cent chance of being shot, tortured, or otherwise persecuted, that he or she has no well-founded fear of the event happening. He then went on to adopt the "reasonable possibility" standard:

> "... so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."

[32] By specifically referring to the Grahl-Madsen illustration the Supreme Court clearly accepted that even a one-in-ten chance of anticipated persecution occurring will suffice under the well-founded fear standard.

[33] When the issue was considered by the House of Lords in the following year in *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958 (HL) their Lordships preferred to formulate the test as one requiring the establishment of "a reasonable degree of likelihood" of persecution. See Lord Keith at 994 (Lords Bridge, Griffiths and Goff agreeing).

[34] Almost immediately thereafter the issue was considered by the High Court of Australia in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA). The High Court, having considered *Cardoza-Fonseca* and *Sivakumaran*, held that an applicant for refugee status would satisfy the definition if he or she showed a genuine fear founded on "a real chance" of persecution for a Convention reason,

applying the formulation suggested by Grahl-Madsen. See Mason CJ at 388-389:

> "... I prefer the expression 'a real chance' because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 per cent chance of persecution occurring."

[35] Toohey J, after referring to the passage from Grahl-Madsen's text cited above, stated at 407:

> "The test suggested by Grahl-Madsen, 'a real chance', gives effect to the language of the Convention and to its humanitarian intendment. It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial. It is a test that can be comprehended and applied. That is not to say that its application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgments will have to be made from time to time."

[36] In New Zealand, the "real chance" has been adopted by this Authority because, in its experience, it is a test which is more readily comprehended and applied (the point made by Toohey J in *Chan*) and because of its clarity in conveying the notion of a substantial, as distinct from a remote chance, of persecution occurring (the point made by Mason CJ in *Chan*). While it may be true in one sense to say that the "reasonable possibility" (USA), the "reasonable degree of likelihood" (UK) and the "real chance" (Australia, New Zealand) tests amount to the same thing, we remain of the view that the real chance test is to be preferred. The dangers inherent in formulating "possibilities" and "likelihoods" are illustrated by the following passage taken from *R v Gough* [1993] AC 646 (HL) in which the administrative law test for bias was considered. Lord Goff (with whom Lords Ackner, Mustill, Slynn and Woolf agreed) stated at 670E:

> "I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias."

[37] It must be remembered, however, that the words used in Article 1A(2) of the Refugee Convention are "well-founded" and that to use the real chance test as a substitute for the Convention term is to invite error. This is the point made in *Minister*

for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559, 572; (1997) 144 ALR 567, 576 (HCA). In that case the High Court of Australia (Brennan CJ, Dawson, Toohey, Gaudron, McHugh & Gummow JJ, Kirby J agreeing) made helpful observations as to when a fear of persecution is well-founded. The point stressed was that conjecture or surmise has no part to play in determining whether a fear is well-founded. The majority stated that:

> "No doubt in most, perhaps all, cases ... the application of the real chance test, properly understood as the clarification of the phrase 'well-founded', leads to the same result as a direct application of that phrase... Nevertheless, it is always dangerous to treat a particular word or phrase as synonymous with a statutory term, no matter how helpful the use of that word or phrase may be in understanding the statutory term. In the present case, for example, Einfeld J thought that the 'real chance' test invited speculation and that the tribunal had erred because it 'has shunned speculation'. If, by speculation, His Honour meant making a finding as to whether or not an event might or might not occur in the future, no criticism could be made of his use of the term. But it seems likely, having regard to the context and his Honour's conclusions concerning the tribunal's reasoning process, that he was using the term in its primary dictionary meaning of conjecture or surmise. If he was, he fell into error. Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is 'well-founded' when there is a real substantial basis for it. As *Chan* shows, a substantial basis for a fear may exist even though there is far less than a 50% chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. In this and other cases, the tribunal and the Federal Court have used the term 'real chance' not as epexegetic of 'well-founded', but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate."

[38] With this statement we respectfully agree.

[39] We have found it necessary to emphasize these well established fundamentals because the submissions for the appellant at times appeared to invite the Authority to engage not in an assessment whether there is a real substantial basis for the appellant's fear of persecution, but rather to engage in conjecture or surmise. Furthermore, the submission that a feeling of insecurity without a real risk of persecution is sufficient to satisfy the Refugee Convention would have the effect of turning an objective test into one which rests on the subjective perceptions and feelings of the individual refugee claimant. This the Authority cannot accept in the face of the firmly entrenched

principle that the focus of the Convention is not on the facts as subjectively perceived by the claimant, but on the objective facts as found by the decision-maker: *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958, 993A-E (HL).

[40] The Authority accordingly affirms that in terms of *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996) the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

2. If the answer is Yes, is there a Convention reason for that persecution?

[41] We turn now to the issue whether, on the facts, there is a well-founded fear of persecution. The appellant's case was advanced on two general grounds. First, that because he is a Chinese Indonesian, he is at risk of serious harm. We understood this to mean that simply because he is Chinese, he has a well-founded fear of being harmed in anti-Chinese violence. Second, that in any event, he faces a risk of generalized anti-Chinese discrimination which on its own amounts to persecution. We will deal with each element of the claim separately before turning to the issue of psychological harm.

ANTI- CHINESE VIOLENCE - WHETHER FEAR WELL-FOUNDED

[42] The first limb of the appellant's case is that he has a well-founded fear of coming to serious harm in anti-Chinese violence (as experienced in May 1998), should such violence break out again. We do not accept that this contention is made out on the facts. To explain our conclusion, it will be necessary to first make some general points about Chinese in Indonesia before examining the causes of anti-Chinese violence and the circumstances in which such violence could occur in the future.

General

[43] The very general, if not over-simplistic, nature of the appellant's submission invites general observations in reply. First, as remarked upon by Damien Kingsbury in *The Politics of Indonesia* (Oxford University Press, 1998) 6, internally, Indonesia is characterised by a complex, often contradictory, and potentially explosive political mix. The tensions are various and, in most cases, long-standing: between devout and nominal Muslims; between Javanese and outer islanders; between the country's 200-plus separate cultures; between the government (backed by the armed forces) and pro-democracy groups; between the various factions within both the armed forces and the government; and, not least, between rich and poor. These tensions have been subsumed by the official Indonesian concept of "unity in diversity". This notion reflects both a syncretic Javanese approach to resolving contradictions and the Javanese notion of *halus* (smoothness, refinement), in which appearances are everything and reality is of secondary importance. Yet this form of idealised behaviour (typical of Javanese high culture) is riven by barely suppressed tensions, which in the last years of the twentieth century have increasingly found violent expression. In our view the complexity of the social, economic and political forces at work in Indonesia precludes an approach based on the simple proposition that all Chinese in Indonesia are at real risk of harm because of their race.

[44] Second, the position of the Chinese population in Indonesia is not unique. The study by Dr Charles A Coppel and Hugh and Ping-ching Mabbett published by the Minority Rights Group under the title, *The Chinese in Indonesia, The Philippines and Malaysia* (Revised 1982 ed) concludes at pp 2-4 that hostility to Chinese is found in Malaysia, Indonesia and the Philippines. In each of these three countries, Chinese success in the economic field has been so great that their economic roles is quite disproportionate to their numbers. Such success has aroused the envy and antagonism

of many Malays, Indonesians and Filipinos who feel themselves to be economically deprived in their own countries. In Southeast Asia, economic nationalism has been directed as much against the Chinese as it has against Western capital (p 3, col 2). Whereas in the Philippines the Chinese population is, by comparison with others, small both absolutely and in relation to the total population, both Indonesia and Malaysia have large Chinese populations. In Indonesia they form only a small percentage of the total population whereas in Malaysia they constitute more than one third of the total (p 2, col 2). In Malaysia the percentage of Chinese to the total population as at 1981 was 34.5%, for Indonesia the figure was 2.6% and the Philippines 1.5% (p 3, col 1). The point being made is that the very breadth of the submission for the appellant that he is at risk simply because he is a Chinese Indonesian proves too much. The discrimination he faces in Indonesia is also encountered, to a greater or lesser degree by Chinese in both Malaysia and the Philippines. It cannot be said that all such persons are therefore Convention refugees. Some sense of proportion must be kept.

[45] That having been said, however, it is accepted that Chinese Indonesians have from time to time been the focus of attacks and even rioting: Damien Kingsbury, *The Politics of Indonesia* (Oxford University Press, 1998) 12. These attacks usually occur in periods of upheaval: Michael R J Vatikiotis, *Indonesian Politics Under Suharto: The Rise and Fall of the New Order* (3rd ed, Routledge 1998) 50, 157. One of the most often cited of such attacks occurred in 1965-1966 at the time of the coup which led to the overthrow of the government of President Sukarno and its replacement by a government under the command of (then) General Suharto. Conflicting accounts are given of the coup but one popular (and probably mistaken) view is that the coup began with an attempt by the Indonesian Communist Party (PKI) to take over the government. In the counter-coup the military set about crushing the PKI and in the terror which followed in the period 1965-1966, a large number of persons were killed. Estimates range from 100,000 persons to over 1,000,000, although Damien Kingsbury, in *The Politics of Indonesia* at 63 suggests that a figure of 300,000 to

400,000 "seems realistic". Not all, or even most, of those killed were, in his view, communists. Many were suspected communists or sympathisers, members of organizations linked to the PKI, or simply victims of old grudges and score settling. But as he points out, whatever the truth, the terror of the time has remained with Indonesians old enough to remember it, and it continues to sit, like "some horrific nightmare", as a backdrop to contemporary events. It is often said that Chinese Indonesians were specifically targeted during this period. But this is not the opinion of Dr Charles A Coppel, the author of the Minority Rights Group report *The Position of the Chinese in Indonesia, the Philippines and Malaysia* at 7 (Revised 1982 ed). His view at 7 is that contrary to widespread belief outside Indonesia, the Chinese were probably under-represented in the massacres which followed the coup. Similarly, the number of Chinese among the many Indonesians who were imprisoned after the coup was not disproportionately large. Many of the Chinese who were imprisoned were jailed not because they were Chinese, but because they were members of an organization, Baperki, (which the Indonesian government regarded as leftist). In this respect their situation was no different from that of non-Chinese political prisoners who were members of communist mass organizations. The Appendix to the Minority Rights Group report is by Hugh Mabbett and Ping-ching Mabbett and entitled "The Chinese Community in Indonesia". At p 11, col 2 a very similar opinion is expressed:

> "The massacres of late 1965 and early 1966 found their victims overwhelmingly among ethnic Indonesians and it is responsibly held in Djakarta that the Chinese suffered less, in proportion to their total numbers, than did ethnic Indonesians. Similarly, there is no reason to believe that the Chinese community suffered more than any other in widespread political unrest, or that Chinese figure disproportionately among Indonesia's now rapidly falling numbers of political prisoners."

[46] The authors do go on to observe at p 11, col 2, that the Chinese did suffer economically in the sense that great numbers literally bought their way out of trouble, more and more easily as the hyper-inflation following the attempted coup brought the value of official and military salaries down to derisory levels. That is, the economic strength which has always been a major cause of Chinese unpopularity also helped them soften its blows, and corrupt relationships developed which endure strongly to

this day. The conclusion we draw is that looked at objectively, reports of the scale of violence against Chinese are at times exaggerated.

[47] A third point which needs to be made in response to the appellant's very general submission is that while antagonism is at times directed against Chinese, it would be a mistake to say that ethnicity *per se* is the crux of the problem. In the opinion of A Schwartz, author of *A Nation in Waiting: Indonesia in the 1990s* (Allen & Unwin, 1994) at 127, Indonesia is, after all, home to hundreds of ethnic and cultural sub-groups; while the Chinese community's history is unique, its members have been broadly accepted in Indonesia as equal citizens. A similar point is made by Hugh Mabbett and Ping-Ching Mabbett in "The Chinese Community in Indonesia" which is the Appendix to the Minority Rights Group report, *The Chinese in Indonesia, the Philippines and Malaysia* at pp 12 and 13. The real difficulty of the Chinese is that their economic strength leads to distinctiveness.

Examples of Anti-Chinese Violence

[48] The dangers of over-simplifying the causes of anti-Chinese violence are illustrated by the 1965-1966 events discussed in para [45] above and by the *Malari* riots of 1974. The account of the latter given by Damien Kingsbury in *The Politics of Indonesia* (Oxford University Press 1998) at 103-105 is that in the early 1970s, the New Order government began to split within itself and President Suharto began to employ financial patronage extensively as a means of achieving loyalty. This caused divisions between those generals in the military who were happy to benefit financially from their association with, or support for, Suharto and those who either were not included in his largesse or opposed it on the grounds that it compromised the professionalism of ABRI (the Indonesian armed forces). By 1973 issues of corruption, patronage and the benefits perceived to be accruing to Indonesia's Chinese minority spilled over, and there were anti-Chinese riots in Bandung. Concern revolving around the government's failure to eliminate corruption, including corruption among the

"financial generals" and a small group of ethnic Chinese business people was the trigger for the *Malari* riots of 1974:

> "Like so much in Indonesian political life, the reasons for the riots remain at least partly obscured. But it is now widely accepted that the riots - ostensibly against the Japanese prime minister, Kakuei Tanaka, and excessive foreign ownership, and less directly against corrupt senior officials - were the result of this power struggle within Indonesia's top military ranks. The prevailing view, in part encouraged by Sumitro himself, is that in 1973 Sumitro and a number of other generals believed that Suharto should step down from the presidency, and it was assumed that Sumitro envisaged himself in that role.
>
> ...
>
> The affair started in 1973 with public discontent over favouritism shown to Chinese businesspeople and foreign corporations at the expense of indigenous businesses, a position that gained considerable sympathy within sections of the army. Muslims were also concerned about proposed uniform marriage and divorce laws, which were proposed by the head of the intelligence network Opsus....
>
> ... The protests, while specifically against Tanaka, were in fact against the "financial generals", who, in effect, included Suharto. After two days, the riots were quelled, and Sumitro was sacked as Kopkamtib head and forced to resign as deputy head of the army...."

[49] In early 1995 tens of thousands of workers took to the streets in Medan, Indonesia's third largest city, and other towns in North Sumatra, demanding higher wages, improved benefits and freedom of association. The demonstrations were notable for their sheer size, at one point involving an estimated 30,000 workers in Medan alone, and for the fact that one demonstration on April 15 degenerated into anti-Chinese violence, resulting in the death of a Chinese and injuries to two others. According to the analysis in Human Rights Watch, *Indonesia: The Medan Demonstrations and Beyond* (May 16, 1994) the riots were not a sudden, unexpected outburst. Labour unrest had been building throughout the country, but particularly in Java and Sumatra, for several years. According to this report at 10-12, it was widely thought that the violence was instigated by the military who used it as a useful pretext to crack down on the labour movement.

[50] The point we are making is that historically, anti-Chinese violence on a large scale does not occur on its own. It surfaces only when large and powerful political, economic and social circumstances come together in a particular way. There is

nothing inevitable about the factors which result in anti-Chinese violence. The element of happenstance is considerable, and the ability to predict such violence occurring in the future is more than problematical.

[51] Similarly the 1998 riots were not in origin anti-Chinese riots. In a report published just a few months before the riots, Amnesty International in *Indonesia: Paying the Price for 'Stability'* (AI Index: ASA 21/12/98 25 February 1998) at p 1 observed that as at February 1998 Indonesia was experiencing its most serious political and economic crisis since the Suharto government came to power in 1966. The approach of presidential elections in early March 1998 in which President Suharto was seeking his seventh consecutive term fuelled concerns about the future political leadership of the country. Political tensions were, in turn, intensified by a severe economic crisis which had resulted in the dramatic fall in the value of the Indonesian currency - the rupiah - and by a crippling drought in many areas of the country. Riots and demonstrations had become an almost daily occurrence. Further economic background is provided by Damien Kingsbury in *The Politics of Indonesia* (Oxford University Press, 1998). He notes at p 88 that Indonesia had managed to record an average growth rate of about five per cent up until 1997. Average growth rates had been around or just above seven per cent from 1990 to 1996, rising to eight per cent by 1996-1997, but slumping to near zero in 1997-1998 following the collapse of the currency. Serious inflation of about 20 per cent per month set in from early 1998, hinting at future hyperinflation. The Amnesty International report, *Indonesia: Paying the Price for 'Stability'* (AI Index: ASA 21/12/98 25 February 1998) at p 4, in addressing the issue of unemployment, notes that as at the beginning of 1998 government figures, thought by many observers to be overly conservative, estimated that unemployment would reach 13.5 million and under employment would reach 48.6 million, with 2.5 million people entering the labour market every year and hundreds of thousands of Indonesian workers returning from other countries affected by Asia's economic crisis, such as Malaysia and South Korea. The cost of basic commodities rose sharply, in some cases by more than 100 per cent. The report, speaking but a few

months prior to the riots stated:

> "With economic hardship there are fears of increased social unrest. The expected rise in the number of unemployed will inevitably add to the dissatisfied millions having to work harder for less financial gain. In the absence of channels for peaceful expression, discontent has already spilt over into violence. Riots protesting at the deteriorating economic situation have increased in scale and spread to outer islands of the Indonesian archipelago. The economic situation has further shaken confidence in the political system. Demands for political reform are becoming more widespread and vocal and there are mounting direct challenges to President Suharto's leadership."

[52] We believe that this analysis provides a more rational explanation for the events which unfolded in May 1998. The riots were not in origin anti-Chinese. They took place during what Michael R J Vatikiotis in his Introduction to the third edition of his *Indonesian Politics Under Suharto: The Rise and Fall of the New Order* (3rd ed, Routledge 1998) at xv calls "the most important political change in Indonesia since 1965". The singular nature of these events significantly reduces the chance of similar violence on this scale occurring in the foreseeable future.

Causes of the May 1998 Anti-Chinese Violence

[53] If there were a number of complex reasons to the May 1998 riots, how did the course of events take an anti-Chinese turn? Damien Kingsbury in *The Politics of Indonesia* (Oxford University Press, 1998) 248 opines that the riots reflected economic desperation as much as a desire for basic political change. While at p 250 he specifically acknowledges that ethnic Chinese were a favourite target of the rioting, he adds that anyone with property was, it seemed, fair game. The more detailed account given by Michael R J Vatikiotis in *Indonesian Politics Under Suharto: The Rise and Fall of the New Order* (3rd ed, Routledge 1998) at 226-227 is in similar terms. The quotation which follows is possibly over-long, but nevertheless serves to draw together the various economic, social and political elements earlier referred to and to provide an explanation for the anti-Chinese aspect of the riots:

> "Meanwhile, sporadic social unrest was already breaking out in towns and cities outside Jakarta and almost daily the chants on campuses around the country were for Suharto to go.

Suharto insisted that the political reform demanded by students would not be considered until after his current term expired in 2003. His officials bungled attempts to mediate with the students ... Political as well as economic pressure was building up.

Then, Suharto blinked. No-one quite knows what moved him to increase the price of premium gasoline by 70 per cent by removing subsidies on 4 May. The IMF was certainly in no hurry to do so. The IMF team was afraid of sparking further unrest. On cue, that's just what happened. The subsequent rioting in the North Sumatran capital of Medan on 4 and 5 May brought the simmering level of public discontent to the surface. It galvanized international opinion against Suharto and pushed the demonstrating students beyond the gates of their campuses and into direct clashes with the military and police, culminating in the shooting of four students at Trisakti University in West Jakarta on 12 May. ...
The Jakarta rioting was sparked by the Trisakti shootings. Both events essentially drained Suharto of what remaining legitimacy he had left, and both are widely believed to have been instigated by elements within the armed forces, so it is important to accurately describe what happened. The initial rioting and looting that broke out on 13 May in the vicinity of Trisakti University was probably a genuine popular expression of anger over the student shootings. The four students were shot by snipers aiming from above over a period of time that suggested this was no accidental use of live ammunition. There was an emotional burial of the dead, followed by a commemorative rally on campus where the students taunted and insulted the armed forces and police. Then the rioting began. Led by the urban poor and not students, the mob fanned out from the Grogol area where Trisakti was situated. Shops and banks were smashed open and looted, cars were stopped on the toll-way and some of their occupants dragged out and beaten if they were Chinese. By nightfall, large parts of Glodok, the mainly Chinese area of North Jakarta, were ransacked. The security forces hung back, seemingly allowing the looting to proceed.

The following day, 14 May, the rioters start burning shopping malls. By now the rioting had spread as far as Tangerang and Bekasi on the outskirts of Jakarta. Neighbourhood patrols were mounted and barricades went up in most residential areas of the city. Outside Jakarta, large areas of Solo in central Java were also ransacked and burned. Surabaya and Semarang were also affected, and in many of these towns the seat of local government or provincial assembly was occupied. In Jakarta, worried employees trapped in their offices abandoned expensive clothes and luxury cars. 'Executives are starting to take off their ties', e-mailed a young journalist working for one of Suharto's family firms. Not necessarily Chinese, they sensed anger being directed at the rich of any ethnic stripe. Then, stories began to filter through of men being dropped in trucks at key flashpoints and rallying people to burn down Chinese shops. There were stories of Chinese being pulled out of cars and reports of as many as 100 incidents of rape. The city resembled a war zone with columns of smoke rising from burned out shops and malls...

... Later it emerged that close to half a billion dollars' worth of damage had been done: 4,000 businesses, 1,000 homes and 1,000 vehicles had been burned."

[54] This account is largely supported by that published by Human Rights Watch, *Indonesia: The Damaging Debate of Rapes of Ethnic Chinese Women* (September 1998). The assessment at p 2 is that:

"The violence of May 13-15 in Jakarta and some other cities such as Solo, Central Java, and Palembang, South Sumatra, was almost certainly orchestrated, with anti-Chinese sentiment manipulated by mob leaders. The majority of the more than 1,200 who died may not have been Chinese (many of the victims were residents of poor neighborhoods who joined in the looting and died while trapped in burning shopping centres) but it is clear that Chinese-owned shops and homes were targeted, and hundreds of Chinese were physically attacked."

[55] The statistics given by this report at p 4 is that the best estimate of the human and property toll in Jakarta over a period of less than two days is 1,198 dead, including twenty-seven deaths from gunfire; untold numbers injured, widespread rape, 4,083 shops and 1,026 private homes burned, and 40 shopping malls destroyed. To place these figures in context we should add that the population of Jakarta is approximately 8.2 million: Banks, Day & Muller eds, *Political Handbook of the World: 1997* (CSA Publications 1997) 378.

[56] The Human Rights Watch report also notes that anti-Chinese sentiment was based on resentment by *pribumi*, or indigenous Indonesians, of perceived control of the economy by ethnic Chinese and a sense that the loyalties of ethnic Chinese lie more with China and the overseas Chinese community than with the Indonesian nation. We add by way of amplification of this point that about seven million ethnic Chinese live in Indonesia. Many have become phenomenally wealthy. It is usually said that while Indonesia's Chinese presently comprise only 3.5% of the population, they control more than 70% of the nonland, corporate wealth. The social implications of such an imbalance are obvious: Michael Backman, "Blame Indonesia's Chinese?" *Far Eastern Economic Review* (March 5, 1998). Michael R J Vatikiotis in *Indonesian Politics Under Suharto: The Rise and Fall of the New Order* (3rd ed, Routledge 1998) at 177 points out that the larger and mainly Indonesian Chinese-owned conglomerates are held up as symbols of greed and rapacity, widely seen as feeding off the people and ploughing their profits overseas. The reasons why these conglomerates have been so successful need not be entered into in any great detail. It is sufficient to note that the explanation given by Vatikiotis at *op cit* 50 is that after the events of 1965-1966, Indonesian Chinese businessmen, feeling vulnerable after the anti-Chinese sentiment, were in a position to have their capital exploited in return for protection. Under Suharto, the army patronized a small circle of mostly Chinese businessmen who in turn, gave economic support to Suharto. By the end of the 1980s, economic liberalization highlighted the wealth and success of the Chinese business community

to such an extent that it was becoming a sensitive political issue. The threat this posed to Suharto's position forced him to distance himself publicly from the Chinese. A more detailed account of this phenomenon is to be found in A Schwartz, *A Nation in Waiting: Indonesia in the 1990s* (Allen & Unwin, 1994) at 105-132.

General Conclusions

[57] From all this two general conclusions can be drawn:

(a) The disturbances and riots experienced in Indonesia in 1998 were the product of deep seated political, economic and social problems;

(b) Once the riots began, they were manipulated by elements in the ruling elite and anti-Chinese sentiment became a conspicuous feature of the looting, destruction of property and attacks on individuals and this in large measure because of the conspicuous economic position held by wealthy Chinese.

[58] Our task is not, however, to dwell on the past. Rather, it is to make an assessment whether the appellant faces a real chance of persecution in the future. In making this assessment we must necessarily draw on the events in the past. We have not, of course, made reference to all of the information placed before us by the appellant, or by the Refugee Status Branch in its detailed decision which runs to some 24 pages.

Chinese Indonesians - Assessment of Future Risk of Harm

[59] Our view is that the political, economic and social conditions which gave rise to the 1998 riots largely remain, in one form or another. It is true the June parliamentary elections passed without violence and are widely regarded as both free and fair. It is also true that the presidential elections similarly passed without significant violence. But the underlying problems of social unrest, continuing military abuses and

corruption remain, as do the economic problems. There must, at the very least, be a real possibility of further violence in Indonesia generally. None of this violence, however, is likely to be Chinese-directed. There is the possibility of continuing violence between Muslims and Christians in different parts of Indonesia, as described by Human Rights Watch in *Indonesia: The Violence in Ambon* (March 1999). While we accept that many Chinese are Christians and that for this reason some Chinese will suffer in the Muslim-Christian violence, the evidence does not suggest that Chinese are specifically at risk because they are Chinese Christians.

[60] Our specific conclusions in relation to Chinese Indonesians under this limb of the appellant's case are as follows:

(b) Chinese are not at risk of persecution *per se* because of their race or economic status;

(c) Chinese will, from time to time be at such risk because of their race or economic status, but only if there is a break down of civil order and the perpetrators of the violence choose to direct their violence against Chinese;

(d) The chance of this violence reaching a large scale, either across Indonesia itself or city-wide in places like Jakarta is remote. The risk of harm faced by any individual Chinese is at its highest, a random risk, best expressed by the phrase of being in the wrong place at the wrong time. Statistically, the chance of any individual Chinese suffering harm is remote. As the facts of the appellant's case show, not all Chinese living in Jakarta suffered injury in 1998, nor did all Chinese lose their homes or businesses. Indeed, the number of those who did suffer injury or loss is small. According to the Refugee Status Branch decision the Indonesian Chinese population of Jakarta is approximately 10 per cent. Allowing for a generous estimate of 4,000 Chinese who in that city were either killed, injured or lost homes or businesses, such persons would amount to no

more than 0.05 per cent of a population of 8.2 million. Alternatively, 4,000 as a percentage of 800,000 increases the risk factor to about 0.5%. Even if there was massive under-reporting by Chinese due to their lack of confidence in the Indonesian authorities, a figure of 8,000 only brings the risk factor to 1%. While we are of the opinion that it is not always appropriate to speak of well-foundedness in terms of percentages, the point made by the Refugee Status Branch is nevertheless helpful.

Appellant's Fear of Persecution - Assessment of Future Risk of Harm

[61] Returning then to the assessment of the well-foundedness of the appellant's fear of persecution in the context of anti-Chinese violence, our finding is that he will be only be at risk of harm if:

(a) Severe political, economic or social problems lead to disturbances or riots; and

(b) Those disturbances or riots take on an anti-Chinese character; and

(c) In the course of the violence, the appellant is unfortunate enough to be in the wrong place at the wrong time.

[62] These cumulative prerequisites underline the remote and speculative nature of the appellant's fear of persecution under this limb of his case. The absence of evidence to establish any higher risk of harm to the appellant precludes a finding of well-foundedness. As the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572; (1997) 144 ALR 567, 577 stressed, a fear is well-founded when there is a real substantial basis for it. But a fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. We are of the view that even conceding for present purposes that there is a real chance of further anti-Chinese violence in Indonesia, and in Jakarta in particular, there is no more than a

highly speculative risk of the present appellant coming to harm in such violence.

[63] In the result, the claim by the appellant that there is a real chance of his suffering serious harm should he return to Indonesia must fail.

[64] This leaves for consideration the alternative claim that even if the appellant does not have a well-founded fear of suffering serious harm in anti-Chinese violence, he nonetheless has a well-founded fear of persecution in the sense of suffering day to day from serious discriminatory acts.

DISCRIMINATION AS PERSECUTION

[65] It is important to bear in mind that discrimination *per se* is not enough to establish a case for refugee status. A distinction must be drawn between a breach of human rights and persecution, a distinction the Authority has repeatedly emphasized in its jurisprudence. See for example *Refugee Appeal No. 30/92 Re SM* (26 November 1992) 22; *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 15-16 and *Refugee Appeal No. 70618/97* (30 June 1998) 22.

[66] Not every breach of a claimant's human rights constitutes persecution: UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 54:

> "Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, eg, serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities."

[67] New Zealand refugee jurisprudence accepts that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard: *Refugee Appeal No.*

1039/93 Re HBS and LBY (13 February 1995) 19-20 and *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 14-16, adopting the formulation of Professor James C Hathaway in *The Law of Refugee Status* (Butterworths, 1991) at 104 and 108. The same approach was earlier adopted by the Supreme Court of Canada in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 733 (SC:Can). Two other features of the New Zealand jurisprudence should be noted:

(a) It is recognized that various threats to human rights, in their cumulative effect, can deny human dignity in key ways and should properly be recognized as persecution for the purposes of the Convention: *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 16;

(b) The determination whether the treatment feared in any particular case amounts to persecution will involve normative judgments going beyond mere fact finding: *Damouni v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 87 ALR 97, 101 (French J) adopted and applied in *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) at 15.

[68] On the evidence we have heard, it is clear that Chinese in Indonesia are discriminated against. The report by Human Rights Watch, *Indonesia: The Damaging Debate on Rapes of Ethnic Chinese Women* (September 1998) at 7 makes the point that more than twenty discriminatory laws and regulations are still in force, some of them dating from the Dutch colonial administration, many of them from the early years of Suharto's New Order government. They include laws prohibiting the use of Chinese characters and banning Chinese language publications to a regulation obliging all ethnic Chinese to take "Indonesian" names. Some of the others listed in the report include the following:

- "Policy for Resolving the Chinese Issue", Cabinet Presidium Instruction No. 37/U/IN/6/1967, which states, among other things, that no further residency or work permits will be issued to new Chinese immigrants, their wives, or children; any capital

raised by "foreigners" in Indonesia cannot be transferred abroad; no "foreign" schools will be permitted except for the use of the diplomatic corps and their families; in any national school, the number of Indonesian pupils must exceed that of "foreigners"; and that implementation of the "Chinese issue" will henceforth be the responsibility of the Minister for Political Affairs;

- "Presidential Instruction No. 14/1967 on Chinese Religion, Beliefs, and Traditions", which states that manifestations of Chinese religion and belief can have an "undesirable psychological, mental and moral influence on Indonesian citizens as well as obstruct the process of assimilation". It bans celebration of Chinese religious festivals in public and states that religious practice and observation of Chinese traditions must be kept indoors or within the household. The Minister of Religion and the Attorney-General are charged with enforcing the act;

- "Home Affairs Ministry No. 455.2-360/1988 on Regulation of Temples" forbids any land from being acquired for the construction of Chinese temples, building any new temples, expanding or renovating existing temples, or using any other building as a temple;

- "Circular of the Director General for Press and Graphics Guidance in the Ministry of Information No. 02/SE/Ditjen-PPGK/1988 on Banning the Publication and Printing of Writings and Advertisements in Chinese Characters or the Chinese Language" restricts any use of Chinese to a single newspaper called *Harian Indonesia* on the ground that dissemination of materials in Chinese or Chinese characters will obstruct the goal of national unity and the process of assimilation of ethnic Chinese. As a result, any use of Chinese in books, calendars, almanacs, food labels, medicines, greeting cards, clothing, declarations, or other logos and signs is banned;

- "Instruction of the Ministry of Home Affairs No. X01/1977 on Implementing Instructions for Population Registration" and the Confidential Instructions No. 3.462/1.755.6 of the Jakarta government dated January 28, 1980 both authorize special codes to be put on identification cards indicating ethnic Chinese origin;

- "Cabinet Presidium Circular SE-06/Pres-Cab/6/1967 on Changing the Term China and Chinese" obliges Indonesians to drop the use of the term "*Tionghoa*" (as ethnic Chinese refer to themselves) and replace it with the term "*Cina*" (then a

> derogatory term). One of the consequences of the May 1998 violence is that ethnic Chinese are demanding that they be referred to as "*Tionghoa*" akin to "Javanese" or any other ethnicity as opposed to the more common "Indonesia citizens of foreign descent" often just abbreviated "descent" (*keturunan*) or simply as "*Cina*".

[69] This institutionalized discrimination is not, however, of a serious nature or degree. Whether the elements are taken singly or regarded cumulatively, we find that they do not amount to the denial of human dignity in any key way. The standard of a sustained or systemic denial of core human rights is simply not met.

[70] The restrictions on the use of Chinese characters and the banning of Chinese-language publications must be seen against the fact that assimilation is not just an official goal, it is also the goal espoused overwhelmingly by Chinese prominent in Indonesian public life: Hugh and Ping-Ching Mabbett, "The Chinese Community in Indonesia", Minority Rights Group, *The Chinese in Indonesia, the Philippines and Malaysia* (Revised 1982 ed) p 14, col 1. As far as education is concerned, Chinese are accepted in Indonesian medium schools or they have the choice of enrolling in private schools. The fact that a high proportion of pupils is in private schools reflects both the Chinese community's higher living standards and a continuing interest in education both for its own sake and as a kind of social security. While entry to state universities may be difficult, there are private universities which offer a high standard of education: Hugh and Ping-Ching Mabbett, "The Chinese Community in Indonesia", Minority Rights Group, *The Chinese in Indonesia, the Philippines and Malaysia* (Revised 1982 ed) p 15, col 1. The same authors point out that while there is a highly visible lack of Chinese in some government departments and the armed forces, Chinese do have many employment choices in the private sector and in some circumstances there is discrimination in favour of the Chinese due to their reputation for honesty and hard work. The negligible impact of the discriminatory measures as to education, work and language can be seen from the fact that Chinese Indonesians, a mere 3.5% of the country's 202 million people, control much of the country's wealth.

See, for example, Salil Tripathi, "Economic Linchpin", *Far Eastern Economic Review* (July 30, 1998) 13:

> "From small towns on remote islands to commercial towers in central Jakarta, the Indonesian economy moves to the beat of the ethnic-Chinese minority. Indonesian-Chinese own 68% of the top 300 conglomerates, which in turn control 80% of the country's corporate assets. Their business interests cover the economic spectrum, from primary commodities to manufacturing, property and finance.
>
> Yet only a handful of Indonesian-Chinese are tycoons heading business empires. Most are small businessmen, traders and middlemen, who dominate the distribution network that links commerce in this country of 17,000 islands. Without them, there would be few agents to clear cargo or shippers to load it at port. And there would be few transport companies to take goods to markets or wholesalers to distribute the goods."

[71] On the issue of religion Hugh and Ping-Ching Mabbett in "The Chinese Community in Indonesia", Minority Rights Group, *The Chinese in Indonesia, the Philippines and Malaysia* (Revised 1982 ed) note at p 15, col 2 that though many Chinese have become Christians and some have become Muslims, Chinese religious organizations, benefiting from Indonesia's considerable religious tolerance, continue to thrive. They point out that virtually every town has its well maintained Chinese temple - Confucianist, Taoist and Buddhist and every amalgam in between. This assessment is borne out by the Department of State, *Country Reports on Human Rights Practices for 1998 - Indonesia* Vol 1 (April 1999) 903, 920 & 931. Overall, our very clear assessment is that the level of discrimination experienced by Chinese Indonesians, assessed cumulatively, falls well short of the persecution standard, namely a sustained or systemic denial of core human rights. Put shortly, the discrimination that they encounter definitely does not rise to the level of persecution. The less, therefore can the appellant establish a well-founded fear of persecution on this limb of his case. Both his personal circumstances and those of his family members demonstrate the minimal impact of the low level discrimination experienced by Chinese Indonesians.

[72] It is now possible to turn to the alternative submission that if there is no well-founded fear of persecution in the physical sense, the persecution claimed for the

appellant is the climate of fear and insecurity.

APPELLANT'S ALTERNATIVE GROUND: ATMOSPHERE OF INSECURITY AS PERSECUTION

[73] The alternative submission by the appellant is that persecution is not limited to physical harm. It can include psychological harm, through creation of fear alone, even if no physical harm is administered. It is said that:

> "It is not asserted on their behalf that any material consequences will flow from the threats of ethnic Indonesians, or the past looting and raping, or even the historical discrimination entrenched in national laws. It is not necessary to do so. The atmosphere of fear *in itself* is persecutory. The fear of persecution is a "fear of fear itself", and as already noted by Counsel, it is founded in one of the most fundamental rights, that of personal security, set out in Article 3 of the UDHR. [emphasis in original]"

[74] In *Refugee Appeal No. 4/91 Re SDJ* (11 July 1991) the Authority accepted that persecution is not restricted to "physical" acts, such as loss of life or liberty. In doing so it referred to what was said by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 430-431 (HCA):

> "Other forms of harm short of interference with life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol. Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution....
>
> Hence the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason...."

As earlier mentioned in para 67 above, the Authority is of the view that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard.

[75] As to psychological harm, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 1(1) explicitly recognizes that torture includes severe mental pain or suffering:

> "For the purposes of this Convention 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ...."

While it is clear that forms of psychological or mental harm are included in the concept of persecution (see further Deborah Anker, *Law of Asylum in the United States* 3rd ed (1999) 214-218), not all forms of such harm are so included, a point which the very general submissions for the appellant appear to overlook.

[76] The appellant also relied on Article 3 of the Universal Declaration of Human Rights 1948 (UDHR) and Article 9 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

Article 3 of the UDHR provides:

> "Everyone has the right to life, liberty and security of person."

Article 9(1) of the ICCPR provides:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

It was submitted that the atmosphere of fear in which Chinese Indonesians are said to live is in itself persecutory and a violation of the right to personal security. No authority was cited in support of this submission.

[77] The significance of the right to security of person is the subject of controversy: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, N P Engel, Publisher, 1993) at 162.

Article 5(1) of the European Convention on Human Rights also provides that everyone has the right to liberty *and security* of person. However, the italicized words have not, as yet, been given a separate meaning. The European Court of Human Rights in *Bozano v France* (1987) 9 EHRR 297 (ECHR) indicated that the primary focus of Article 5 is the deprivation of liberty and in *East African Asians v United Kingdom* (1973) 3 EHRR 76 (ECHR) it was held that security of person must be understood in the context of physical liberty. See further Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) 103; Jacobs & White, *The European Convention on Human Rights* 2d ed (Clarendon Press, Oxford, 1996) 80; van Dijk & van Hoof, *Theory and Practice of the European Convention on Human Rights* 3rd ed (Kluwer International, 1998) 344. None of this is of help to the appellant.

[78] A contrary view is expressed by Manfred Nowak in his *UN Covenant on Civil and Political Rights: CCPR Commentary* at 162-163. Notwithstanding the Strasbourg jurisprudence and the fact that the *travaux préparatoires* are of little assistance, he is of the opinion that:

> "A systematic interpretation reveals that security of person provides the individual with legal claims that are independent of liberty of person. In keeping with the ordinary meaning of this word (Art. 31(1) of the VCLT), these claims are directed primarily against interference with personal integrity by private persons."

He cites in support the decision of the Human Rights Committee in *Delgado Paéz v Colombia* (No. 195/1985, 12 July 1990). The facts of that case, as narrated in the Nowak text are that Mr Delgado, a Colombian teacher of religion and ethics, received death threats as a consequence of complaints he had submitted against the Apostolic

Prefect and the education authorities in his country. After a work colleague was shot to death by unknown killers and he was himself attacked, he left the country and obtained political asylum in France. He claimed that he had found it absolutely essential to leave the country, as the Colombian Government had violated its obligation to protect his rights to equality, justice and life. The Committee found a violation of Article 9(1) on the ground that the State Party had not taken, or had been unable to take, appropriate measures to ensure Mr Delgado's right to security of his person. It based this holding on the following general considerations:

> "Although in the Covenant the only reference to the right to security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction just because he or she is not arrested or otherwise detained. States are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant".

Nowak concludes at 163 that:

> "In this decision the Committee not only developed an independent meaning of the right to personal security, but also clearly defined it as a right with horizontal effects."

General Comment 8 of 27 July 1982 (Liberty and Security of Person) takes the issue no further, nor does Article 1 of the American Declaration of the Rights and Duties of Man 1948 which is materially identical to Article 3 of the UDHR. Interestingly, Article 5(1) of the American Convention on Human Rights 1969 specifically provides that every person has the right "to have his physical, mental and moral integrity respected". It is not clear whether there has been any judicial interpretation of this article by the Inter-American Commission and Court of Human Rights. In the short time available for research none could be found in Harris & Livingstone, *The Inter-American System of Human Rights* (Clarendon Press, Oxford, 1998).

[79] It is not, however, necessary for the Authority in this decision to reach any concluded view as to the proper interpretation and application of Article 9(1) of the

ICCPR. The reason is that on any view of the law, the appellant's case must fail on the facts. The Authority has found that:

(a) Chinese are not at risk of persecution *per se* because of their race or economic status;

(b) Chinese will, from time to time be at such risk because of their race or economic status, but only if there is a break down of civil order and the perpetrators of the violence choose to direct their violence against Chinese;

(c) The chance of this violence reaching a large scale, either across Indonesia itself or city-wide in places like Jakarta is remote.

(e) These cumulative pre-requisites underline the remote and speculative nature of the appellant's fears;

(f) The discrimination faced by the appellant and other Chinese Indonesians is not of a serious nature or degree.

In the face of these findings the appellant's fear of persecution in the form of living in an atmosphere of fear is a fear without foundation. To allow a baseless but subjectively perceived fear of harm to pass as a "well-founded fear" of persecution would be to violate the fundamental principle that well-foundedness is to be assessed objectively. Reference should be made to the earlier section of this decision entitled "Objective Test for Refugee Status".

[80] As this case must fail because the fear of persecution is not well-founded, it is probably unnecessary to address the issue of relocation. However, as the issue received some prominence in the decision of the refugee status officer and in the appellant's submissions to this Authority, it would be as well for this panel to make

some observations on the issue, particularly given the unusual geography of the Indonesian archipelago.

INTERNAL PROTECTION ALTERNATIVE

[81] The relevant legal test is formulated in *Refugee Appeal No. 71684/99* (29 October 1999).

[82] Indonesia is an archipelago of over 13,500 islands. Among the largest are Sumatra, Java, Kalimantan and Sulawesi. According to the 1990 census, the population of Indonesia is approximately 179.4 million persons, of whom some 3.5 to 4.0 million are Chinese: Banks, Day & Muller eds, *Political Handbook of the World: 1997* (CSA Publications 1997) 378. These geographical and demographic factors must be borne in mind when considering the issue of internal protection. In particular, the fact that a small group of minor islands in the archipelago might be persecution-free will not necessarily allow the finding of an internal protection alternative for a large number of persons without a careful examination of the economic, social and ethnic tensions which such a transfer of population would create. Those tensions could themselves lead to violence and persecution of the new settlers. The utility of the first two limbs of the internal protection test is that they emphasize the need for such an inquiry, centred as it is on the issue of meaningful protection.

[83] We make this point because it is to be recalled that the appellant advanced his case on two alternative bases. First, that there is a real chance of anti-Chinese violence occurring in the future and that all Chinese Indonesians therefore hold a well-

founded fear of persecution. Secondly, that even in the absence of such violence, all Chinese Indonesians experience discrimination of a nature and degree which can properly be called persecutory.

[84] If it was the case that, contrary to the Authority's findings, there was in most parts of Indonesia large scale anti-Chinese violence or discrimination at the level of persecution, the application of the internal protection alternative would be problematical. If one was to require that a good proportion of the 3.5 to 4.0 million Chinese Indonesians to move to Bali for example, it would be almost inevitable that such a large influx would soon give rise to anti-Chinese violence, if not persecution. In these very unusual circumstances, the internal protection issue would, at the very least, fail on the first two limbs of the test.

[85] But short of persecution on this scale, there is no reason why the internal protection alternative should not apply in the Indonesian context. Indeed, the events of May 1998 bear this out. During this period both Bali and the Riau remained safe for Chinese Indonesians. Indeed, because Chinese living on these islands cannot show a well-founded fear of persecution, their claims for refugee status have uniformaly failed. See in particular *Refugee Appeal No. 70989/98* (27 November 1998); *Refugee Appeal No. 71060/98* (27 November 1998); *Refugee Appeal No. 70988/98* (17 December 1998); *Refugee Appeal No. 71188/98* (27 January 1999); *Refugee Appeal No. 71230/98* (11 February 1999); *Refugee Appeal No. 71229/98* (18 February 1999)*; Refugee Appeal No. 71166/98* (11 March 1999); *Refugee Appeal No. 71237/98* (25 March 1999); *Refugee Appeal No. 71223/98* (28 March 1999); *Refugee Appeal No. 71174/98* (15 April 1999) and *Refugee Appeal No. 71184/98* (15 April 1999). All of these cases involved appellants from the Riau group. For a discussion of the country information relating to Bali, see *Refugee Appeal No. 71060/98* (27 November 1998) 8-10 and *Refugee Appeal No. 71400/99* (12 August 1999) 7-8. Generally speaking, therefore, if, outside of a situation of mass persecution of Chinese in Indonesia, any individual Chinese claimant can demonstrate a well-founded fear of

persecution in some part of Indonesia, his or her case will fall to be assessed according to the standard internal protection alternative principles earlier identified. Account would, for the reasons stated in the preceding paragraph, have to be taken of the geographical size of the proposed site of internal protection along with the anticipated number of other persons who could be realistically expected to access the same site given the potential relevance of these factors to the internal protection assessment.

CONCLUSION

[86] We return to the basic formulation of the issues mandated by *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996), namely:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

2. If the answer is Yes, is there a Convention reason for that persecution?

[87] It is our finding that the appellant does not personally face a real risk of harm in Indonesia, nor does he face a real risk of harm simply because he is Chinese. Any risk of harm he faces is so remote as to be entirely speculative. His fear of persecution is therefore not a well-founded one. As to his claim that the discrimination he and other Chinese encounter in their day to day lives amounts to persecution, this contention must fail convincingly on the facts and in this respect too, we find that there is no well-founded fear of persecution. In the face of these findings the argument based on persecution as psychological harm must similarly fail on the facts.

[88] In the result, there being no well-founded fear of persecution, we find that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

....

[Rodger Haines QC]

Chairperson