

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75997

AT AUCKLAND

Before: B A Dingle (Member)

Representative for the Appellant: S Singh

Date of Decision: 28 March 2007

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of Immigration New Zealand (INZ), declining the grant of refugee status to the appellant, a national of the Republic of Fiji, of Indian ethnicity.

[2] The appellant claims to fear discrimination in Fiji on account of his Indian ethnicity. He also claims to fear the consequences of the ethnic tension in Fiji and does not believe that the Fiji army or police are able or willing to protect him from racially motivated attacks or criminal violence.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[3] In circumstances outlined in s129P(5) of the Immigration Act (“the Act”), the Authority has a discretion whether to offer the appellant the opportunity to attend an interview. The discretion to dispense with an interview arises where the appellant was interviewed by the RSB or, having been given an opportunity to be interviewed, failed to take that opportunity, and the Authority considers that the appeal is *prima facie* ‘manifestly unfounded or clearly abusive’. The Authority’s jurisdiction in this regard was examined in *Refugee Appeal No 70951/98* (5 August 1998).

[4] On 1 March 2007, the Authority, through its Secretariat, wrote to the appellant’s representative, advising that the Authority’s preliminary view of the appellant’s appeal was that it was *prima facie* ‘manifestly unfounded or clearly abusive’ and giving reasons in this regard. It was noted that his account appeared not to identify any basis upon which a finding that he would face a real chance of being persecuted for a Convention reason in the event that he returned to Fiji.

[5] The letter went on to specifically state:

“The appellant has claimed that he, as a young Indo-Fijian man, lives in fear of violence at the hands of indigenous Fijians after witnessing the events surrounding the May 2000 coup. During the coup, a group of indigenous Fijian’s entered the appellant’s street carrying knives. The appellant and his family were frightened and fled the street, taking refuge at a relative’s house for two days. On return to the house they found that windows had been broken, some household goods had been stolen and the message “we’ll kill you” had been sprayed on the wall of the appellant’s bedroom. About a month later, the appellant was punched by two indigenous Fijian’s after they demanded money from him. There was no link between the two incidents.

The appellant also fears that if he returned to Fiji he would suffer discrimination on account of his Indian race. Finally, he fears that he would not be protected by the Fijian law enforcement agencies against further possible violence because they too discriminate against Indo-Fijians.

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

Recent human rights reports indicate that although racial tensions in Fiji persist, there is no evidence that Indo-Fijians suffer persecution in Fiji, or that the Fiji state is unwilling or unable to provide protection to its Indo-Fijian citizens.

The United States Department of State Country Report on Human Rights Practices 2006: (March 8, 2006) (“the DOS report”) notes the existence of a constitution which prohibits discrimination based on race, place of origin, ethnicity, colour, primary language, or opinions or beliefs. The report also records the operation of an independent judiciary and the fact that the government generally respected this provision in practice. The DOS report records that a number of domestic and international human rights groups operate in Fiji without government restriction, investigating and publishing their findings on human rights cases including the actions of Fijian police. Ongoing reform of the police resulted in fewer complaints

of police abuse during the year. Government officials are noted as being generally cooperative and responsive to the views of the human rights groups. Although the DOS report notes some instances of inter-communal strife between indigenous Fijians and Indo-Fijians, these were primarily restricted to property damage at houses of worship.

While the recent military coup in December 2006 may have focused attention on continuing ethnic tensions in Fiji, the Authority is not aware of any credible information which indicates the situation for Indo-Fijians has, in fact, worsened as a result. Among other things, Military Commander Bainamarama has appointed a number of Indo-Fijian cabinet ministers and has expressed his intentions to terminate moves of the previous government to pass legislation discriminating against Indo-Fijians.

In any event, there is a presumption of state protection available in Fiji. It is a well-established principle of refugee law that nations should be presumed capable to protecting their citizens. Clear and convincing evidence is required to demonstrate a state's inability to protect its citizens; see *Refugee Appeal No 523/92* (17 March 1995). The Authority does not consider that the appellant has provided such evidence. Random acts of crime occur in all parts of the world, and the Convention was not intended to protect persons against any and all forms of even serious harm, but to restrict the recognition of refugee status to situations in which there is a risk of type of injury that is inconsistent with the basic duty of protection owed by a state to its citizens; see Hathaway, *The Law of Refugee Status* (1991) 103. The Authority is not aware of any credible source which identifies the Fijian state as being in breach of its duty to afford reasonable levels of protection to all of its citizens.

Accordingly, it is the Authority's preliminary view that the presumption of state protection applies to the appellant's circumstances in Fiji.

In relation to the discrimination the appellant fears because of his race, the Authority notes that there is no evidence before it to indicate that such difficulties would amount to persecution. The Authority reiterates that, in refugee law, persecution has been defined as "*the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection*" (*Refugee Appeal No 2039/93* (12 February 1996)). The appellant's stated fear of discrimination by some individuals in the indigenous Fijian population falls well short of the persecution threshold.

For these reasons, the Authority has formed the *prima facie* view that the appellant does not face a real chance of being persecuted in Fiji should he return there now."

[6] The Secretariat's letter also advised that the Authority has the jurisdiction to determine an appeal on the papers without offering an interview, pursuant to s129P(5) of the Act, in circumstances which, on a preliminary view, applied in the appellant's case. The appellant was provided with an opportunity to present submissions in support of his claim by 15 March 2007. Notice was given that, unless the Authority was persuaded otherwise by such submissions, it could consider and determine the appeal without giving the appellant an opportunity to attend a further interview. Reference was also made to *Refugee Appeal No 70951/98* (5 August 1998).

[7] The Secretariat's letter also advised that the responsibility for establishing

an appellant's refugee claim lay with the appellant, pursuant to ss129P(1) and 129P(2) of the Act (as referred to in *Refugee Appeal No 72668/01* (Minute No 2) (5 April 2002) and in *Anguo Jiao v Refugee Status Appeals Authority* [2003] NZAR 647,648 (CA)).

[8] Under cover of a letter dated 15 March 2007 the appellant's representative, S Singh, responded to some of the matters raised in the Secretariat's letter. That response is referred to in more detail below.

CONCLUSION AS TO WHETHER TO DISPENSE WITH AN INTERVIEW

[9] Having considered all relevant matters, the Authority is satisfied that the appellant's appeal is *prima facie* 'manifestly unfounded or clearly abusive' because his claim, as presented, does not disclose a basis upon which a finding of a well-founded fear of being persecuted in Fiji can be made.

[10] The Authority notes that the appellant was interviewed by a refugee status officer in the course of the determination of his refugee claim.

[11] The Authority will now proceed to determine the appeal on the papers pursuant to s129P(5) of the Act, without giving the appellant an opportunity to attend a further interview.

THE APPELLANT'S CASE

[12] From an examination of the papers held on the Authority's files concerning the appellant, the Authority understands that the appellant's case is as follows.

[13] The appellant was born and grew up in Fiji, being raised in the Hindu faith. He completed his secondary education in 1994 and thereafter was employed in a variety of positions until he took leave from his employment in 2006 to travel to New Zealand for a month. He had one period of voluntary unemployment during this time.

[14] In the mid-1980s, the appellant was confronted near his home by two indigenous Fijian men. When he (the appellant) refused their demand for money they punched him.

[15] In May 2000, the appellant, his mother and brother were at home one

evening when they heard the sound of knives scraping along the road and breaking bottles. They decided to flee the house and, once outside, they encountered a group of approximately 30 indigenous Fijian men from a nearby village. The appellant and his family ran off in the opposite direction and sought shelter in a nearby cave for the night. On returning home the next morning they found that windows in the house had been broken, various items stolen and "We'll kill you" was spray-painted on the appellant's bedroom wall. The family stayed with a relative while repairs were made to the house. The matter was investigated by the police.

[16] In June 2000, two indigenous Fijian men accosted the appellant outside his home and demanded money. They then took him to a nearby driveway and punched him several times. The assault was reported to the police and they arrived to take a statement which the appellant signed. The appellant was unable to identify the attackers and no arrests were made in relation to the incident.

[17] In April 2006, a friend of the appellant was confronted as he walked home and two Indigenous Fijian men demanded the beer he was carrying. In the course of the incident, the friend was hit over the head with a bottle. The appellant was not present or involved in the incident in any way.

[18] In May 2006, the appellant obtained a month's leave from his employment, secured a one month visitor's visa to New Zealand and departed Fiji legally. He arrived in New Zealand on 14 May 2006. His visitor's permit expired on 14 June 2006. On 27 June 2006, the RSB received his Confirmation of Claim form applying for refugee status.

[19] The matters raised in counsel's submissions are summarised as follows:

- (a) the appellant does not want to return to Fiji because of continuing discrimination and simmering discontent against Indo-Fijians;
- (b) the appellant has a fear of "things military" and has no faith in the ability or willingness of either the military or the police force to protect him; and
- (c) the December 2006 coup has not necessarily made things better for the Indo-Fijian population.

[20] The Authority notes that the representative's submissions do not directly address the question of whether the appellant's fear of the situation in Fiji is well-founded or whether it reaches the "being persecuted" threshold.

THE ISSUES

[21] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

“... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

[22] In terms of *Refugee Appeal No 70074/96* (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?

ASSESSMENT OF THE APPELLANT'S CASE

[23] As the Authority has determined not to interview the appellant, an assessment of his credibility will not be made. Accordingly, his account, as recorded above, is accepted for the purposes of determining his appeal.

[24] The issue of whether an appellant faces a real chance of being persecuted is a forward-looking assessment. The relevant determination is therefore whether or not the appellant faces a real chance of being persecuted for a Convention reason if he were to now return to Fiji.

[25] In refugee law, persecution has been defined as the “sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection”; see *Refugee Appeal No 2039/93* (12 February 1996).

[26] The appellant may face some discrimination from indigenous Fijians in Fiji on account of his Indian ethnicity. However, there is no evidence before the Authority to indicate that such discrimination would amount to a “sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection”; *Refugee Appeal No 2039/93* (12 February 1996). The Refugee Convention is only engaged where such discrimination can be characterised as a violation of an individual’s core human rights. In the present case, the risk of discrimination to which the appellant may be exposed falls well short of the persecution threshold.

[27] The appellant also claims to fear random criminal attacks. He has, in the past, experienced three such random incidents: one in 2000 in which he and his family were frightened by indigenous Fijians behaving in an intimidating manner in their street and two incidents (some 13 years apart) when he was assaulted by indigenous Fijians after refusing their demands for money. In the latest two incidents, the police have responded to reports of the criminal behaviour although no arrests have been made in relation thereto. The most recent incident involving the appellant occurred in 2000.

[28] The purpose of the Refugee Convention is not to protect individuals from all and every incident of undesirable or criminal behaviour in their home country. It is trite to recall that criminal offending occurs all over the world and many individuals in New Zealand are victim to random criminal events such as those experienced by the appellant in Fiji. There is no evidence to suggest that the risk of the appellant of experiencing further such incidents is anything more than speculative.

[29] In any event, it is a well-established principle of refugee law that nations are presumed capable of protecting their citizens. Clear and convincing evidence is required to demonstrate a state's inability to protect its citizens; see *Refugee Appeal No 523/92* (17 March 1995). This principle has particular application where a refugee claimant comes from a country, such as Fiji, with a developed legal system which makes serious efforts to protect its citizens from harm. While recent country information notes that the interim military government dismissed the Fijian police commissioner and his deputy, there is no credible information before the Authority that indicates any deterioration in the ability of the police force to adequately protect the population of Fiji; see United States Department of State *Country Reports on Human Rights Practices for 2006: Fiji* (6 March 2007).

[30] In the most recent two incidents experienced by the appellant (both in 2000), the police responded by investigating the incidents and either interviewing the appellant or taking a statement. Accordingly, it is the Authority's view that the presumption of state protection applies to this appellant's circumstances in Fiji and he has failed to rebut this presumption.

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

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

[33] For all of the reasons above, the Authority finds that the appellant does not have a well-founded fear of being persecuted in Fiji. The first issue framed for consideration is answered in the negative and therefore the second issue as framed does not arise.

CONCLUSION

[34] For the reasons mentioned above, the Authority finds that the appellant is not a refugee under Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

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B A Dingle
Member