

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75953

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AT AUCKLAND

<u>Before:</u>	A N Molloy (Member)
<u>Representing the Appellants:</u>	The appellants represented themselves
<u>Appearing for INZ:</u>	No Appearance
<u>Dates of Hearing:</u>	3 July 2007
<u>Date of Decision:</u>	10 September 2007

DECISION

[1] The appellants are a family of Indian nationals comprising the husband, the wife and the child. They appeal against the decisions of a refugee status officer of the Department of Labour (DOL) declining their applications for refugee status.

[2] These are their second appeals to this Authority. They have been heard together as they are intertwined, relating to the predicament of the husband. The Authority (differently constituted) dismissed their appeals in respect of their first applications in its decision *Refugee Appeal Nos 75579-81* (9 March 2006). It found that the appellants' first claims were not well-founded.

[3] The appellants lodged their second applications for refugee status with the DOL only nine weeks later, on 16 May 2006. The DOL dismissed those applications on the basis that it had no jurisdiction to accept the appellants' second claims.

[4] The appellants' claim that since the final determination of their first appeals in March 2006, the husband's former political rivals have renewed their search for him and have demonstrated that they will seek him anywhere in India. He also claims that following the election in West Bengal in April 2006, the Communist Party India (Marxist) (CPI(M)) now has nationwide influence, whereas previously it had been restricted to two or three states across India.

[5] The child, an infant, is too young to give evidence. His parents are appointed responsible adults for the purposes of s141B of the Immigration Act 1987 ("the Act").

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[6] Because this is the second occasion on which the appellants have appealed to this Authority, the Authority must first determine whether it has jurisdiction to hear their appeals.

[7] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a first claim has been finally determined. Section 129J(1) of the Act is headed "Limitation on subsequent claims for refugee status" and sets out the circumstances in which a refugee status officer may receive and determine a second or subsequent claim for refugee status:

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

[8] Where the refugee status officer declines a subsequent claim, or finds that there is no jurisdiction to consider the claim on the basis that the statutory criteria are not met, the claimant has a right of appeal to the Authority. Section 129O(1) of the Act provides that:

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

[9] The Authority will therefore compare the appellants' first claims with their second claims to determine whether it has jurisdiction to consider their second appeals. If jurisdiction exists, the Authority will then determine whether the appellants are refugees within the meaning of Article 1A(2) of the Refugee Convention.

The appellants' first refugee claim

[10] The husband arrived in New Zealand in mid-2003. The wife and child followed him about six months later. All three lodged applications for refugee status in May 2004. Their applications were declined by the Refugee Status Branch of Immigration New Zealand (INZ) in April 2005 and their first appeals to this Authority were heard in July 2005.

[11] The husband is in his late 30s and is of Bengali ethnicity. He comes from X in West Bengal, close to the Bangladeshi border. He claimed to be a foundation member of the Trinamul Congress Party (TCP), established during the mid-1990s.

[12] The husband experienced ongoing difficulties with the CPI(M) which was (and is) the ruling party in West Bengal. He was arrested several times by the police when attending various political rallies. He campaigned for the successful TCP candidate for the West Bengal Legislative Assembly in 2001. Later that year, members of the CPI(M) shot at the husband and his uncle, DD, as they were leaving a Hindu celebration at a club in X. DD was killed, but the husband was unharmed.

[13] Following the death of DD the appellants left X. They spent the next 15 months living with relatives outside West Bengal. In early 2002 strangers made enquiries about the husband in Assam, where they were staying with relatives. The family became concerned and moved to Bilaspur.

[14] The husband obtained a New Zealand student visa in early 2003 and left India, alone. The wife and child returned to X. In July 2003, several members of the CPI(M) came to the house looking for the husband. They threatened to kidnap the child. The wife and child then joined the husband in New Zealand.

[15] In late 2004, the wife's brother was arrested and falsely accused of drug offences. The appellants claimed that this was a device aimed at harassing the husband.

[16] The husband claimed that if he returned to India, he would be killed by the CPI(M).

The Authority's decision with regard to the first appeals

[17] The Authority accepted that the husband was politically involved with the TCP but rejected his claim to have been a founding member of that party. The Authority also found that the husband had exaggerated and overstated his evidence with a view to inflating the degree of risk which he faced upon returning to India. It found that he had a much less significant political role than he had claimed, and that his "business interests have always taken priority over those of politics".

[18] The Authority accepted the wife's evidence that she had been approached by members of the CPI(M) after she returned to X in mid-2003. It accepted that this indicated that the husband remained of interest to his political enemies in X. The Authority did not accept that the problems experienced by the wife's brother had any connection with the husband's political activity.

[19] The Authority found that the appellants had a well-founded fear of being persecuted for a Convention reason within the confines of the state of West Bengal, where violent political attacks instigated by the CPI(M) continued to be a feature of local politics.

[20] However, the Authority found that the risk to the appellants was confined to West Bengal. It noted that the husband and his family had lived without difficulty in other parts of India from November 2001 until mid-2003. The husband had visited Kolkatta several times during that period, without difficulty. He was able to continue to work and support his family and he was never harmed. The Authority therefore found that there was an internal protection alternative within India which meant that the appellants were not in need of the surrogate protection conferred by the Refugee Convention.

The appellants' second refugee claims

[21] The husband said that following its success in the elections in West Bengal in April 2006, the CPI(M) has become the third largest party in the Indian General Legislative Assembly. He says that it now has aspirations to be a nationwide party, and that it is able to harm its political opponents anywhere in India.

[22] He also says that almost immediately after the election in April 2006, CPI(M) members attacked his home in Habra, West Bengal. The home of the wife's parents was also attacked, and their shop ransacked.

[23] In August and September 2006 members of the husband's family who live outside West Bengal were attacked by CPI(M) members who were trying to find the husband.

FINDINGS WITH REGARD TO JURISDICTION

[24] The appellants' second claim is based upon election results in April 2006. They also rely upon acts of violence carried out against members of their families, since the final determination of those appeals, outside the state of West Bengal. In the context of the claims as asserted, that is a significant change in circumstances and accordingly, the Authority finds that the jurisdictional criteria stipulated by s129O(1) of the Act are satisfied. The Authority finds that it has jurisdiction to hear these appeals.

[25] The appellants' second claims are summarised below. Their credibility is assessed subsequently.

The appellants' second account

[26] The husband said that the significant change of circumstances in India arises out of the election in West Bengal in April 2006. The husband asserts that the CPI(M) has become the third largest party in the Indian General Legislative Assembly. He says that it aspires to be a genuine nationwide party and will seek out and kill political opponents anywhere in India.

[27] The appellants claim that at the end of April 2006, CPI(M) members attacked and set light to their home in Habra. The wife's grandmother, who was staying in the house at the time, died in the fire. Within a few hours of that incident the wife's parents were also attacked and their shop was ransacked by CPI(M) members.

[28] Two other members of the appellants' extended family were subsequently attacked. In mid-August 2006, members of the CPI(M) assaulted the uncle with whom the husband had stayed in Assam in 2001, when he had first left West Bengal. Later that same month CPI(M) activists located one of the husband's

brothers-in-law, with whom he had stayed when hiding from the CPI(M) in 2002-2003. AB was assaulted and beaten for two days until he revealed to his captors that the husband was still in New Zealand.

[29] The wife was unable, for health-related reasons, to attend the second appeal interview on the date upon which it was first scheduled. The husband alone was interviewed on that day. The matter was then adjourned to a further date in August 2007, when the wife was to have a further opportunity to give evidence if she so wished. In the alternative, the Authority had informed the husband in person that it was content to receive the wife's evidence in writing.

[30] The wife wrote to the Authority on 27 August 2007. She stated that she was unable to attend the interview the following day, due to the ill-health of her child. Her letter stated that she had nothing to add to her husband's evidence in any event. The secretariat of the Authority replied to the appellants by letter dated 28 August 2007. That letter indicated that a further date for an oral interview would be arranged if the appellants requested this in writing within seven days. No further information or requests have been received by the Authority.

Material provided to the Authority

[31] Prior to the interview in connection with the second appeals, the husband lodged a lengthy letter dated 27 September 2006. Additional correspondence dated 7 June 2007, 29 June 2007 and 30 July 2007 has also been received.

THE ISSUES

[32] 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."

[33] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant

being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANTS' CASE

Credibility assessment

[34] For reasons set out below, the Authority does not believe the appellants' evidence with regard to the attacks on their family members since the final determination of their first appeals. The Authority finds that this evidence has been fabricated in order to provide a false basis for the making of a further application for refugee status.

[35] In coming to that conclusion the Authority has taken into account the context in which the appellants made their second claims for refugee status. They were lodged only a matter of weeks after the final determination of the appellants' first appeals by the Authority in March 2006. The second applications were accompanied by a covering letter dated 14 May 2006, signed by the husband. It is apparent from that letter that the second claims were made at least in part out of a sense of grievance that the first appeals had not succeeded. The letter stated that, in respect of the first appeals, the Authority had "got a sharply incorrect picture of the whole background", and continued:

"The Authority has erred in not distinguishing two types of Indians: the ordinary, non-political person and the political animal, an example of which is myself in India".

[36] However, for reasons set out in *Refugee Appeal No 75139* (18 November 2004), the Authority does not have jurisdiction to sit as an appellate body in respect of its previous decisions (at [44]-[47]). The Authority also noted in that decision that it does not have a "miscarriage of justice" jurisdiction and cannot rehear an appeal already determined as if it were an appellate authority (at [55]).

[37] Nor is it open to an appellant in a second or subsequent appeal to challenge any finding of credibility or fact made by the Authority in relation to a previous claim. In that context s129P(9) of the Act provides that :

"In any appeal involving a subsequent claim, the claimant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim, and the Authority may rely on any such finding."

[38] Having considered all of the evidence available to it, the Authority relies upon the findings of credibility and fact made in respect of the appellants' first appeals for the purposes of determining these second appeals. In particular, the Authority relies upon the findings that the husband had a low-level involvement in politics, which was subordinate to his interests in business; that he could avoid any risk of serious harm by living outside the state of West Bengal, and that he had given evidence before the Authority which was exaggerated and overstated.

[39] Turning to the appellants' second appeals, the Authority rejects the appellants' evidence that their relatives have been the subject of attention from the CPI(M) in April and August 2006 because of their link to the husband.

[40] The husband's first application involved a claim that he left Assam because CPI(M) associates were looking for him in 2001/2002. The husband has not lived in West Bengal, or been politically active there, since 2001. The Authority does not accept that his relatives would have been singled out for such attention after such a long period. The sudden resumption, indeed escalation, of the pursuit of the husband after four and a half years, is out of keeping with the husband's past political profile.

[41] In reaching that view, the Authority notes the findings of the Authority in *Refugee Appeal Nos 75579-81* (9 March 2006) with respect to the low-level involvement of the husband in political matters, and his propensity for exaggeration. It also notes that, apart from a single extract from a Bengali language newspaper, the appellants offered no corroborative evidence of the problems which had befallen their family members in India since March 2006. The husband gave anecdotal evidence about telephone calls which he received in respect of the injuries to his family and his wife's family in April and August 2006. He knows no other details.

[42] If the husband had truly been a person of significant influence and profile within the TCP, it is inevitable that he would have been in a position to obtain some additional evidence through his political contacts. No such information has been supplied.

[43] The Authority has previously noted that findings as to the reliability of documents will usually follow findings with regard to the credibility of witnesses: *Refugee Appeal No 72570* (11 November 2002) and *Refugee Appeal No 75794* (23 May 2006) at [56]. This is because of the ease with which certain types of

documentary evidence can be obtained in order to support refugee claims. In the circumstances, the article referred to can be given no weight.

[44] The husband's claims that the influence of the CPI(M) has become nation-wide are also self-serving and, in the context of these appeals, without foundation.

[45] The husband asserts that the increased influence is demonstrated by the fact that the Speaker of the Indian Parliament is now a member of the CPI(M). He claims that the position of Speaker is of great importance in the Indian parliament, second only to the head of state.

[46] However, according to the husband's own letter dated 14 May 2006, the current speaker (Somnath Chatterjee) was appointed following the general election in 2004. That predated the final determination of the appellants' first appeals by about two years. Accordingly, his appointment is not evidence of a significant change in circumstances since the final determination of those appeals.

[47] When this was put to the husband, he changed the emphasis of his evidence and claimed that in fact the real turning point occurred not in 2004, but following the landslide victory of the CPI(M) in West Bengal in 2006. He claimed that after that election the CPI(M) held 43 seats (with 5.66 percent of the national vote). It is now the third largest party in India, and part of the ruling coalition.

[48] These statistics are confirmed in an article "Exploring New Ground" *India Today*, 30 October 2006, which was provided to the appellant for his comment. However it also appears from that article that the influence of the CPI(M) is significant in only three states in the whole of India:

"Elections to the West Bengal Assembly early this year saw the CPI(M) alone commanding a vote share of over 50 per cent. Yet, the party's presence in states outside its traditional bastions continues to embarrass its members. Barring West Bengal, Kerala and Tripura, the CPI(M) representation in legislatures is often as low as a single seat. In Tamil Nadu, the figure is more respectful at nine. Reaching its zenith in three states has made the CPI(M) the third largest party in the current Lok Sabha with 43 members and a national vote share of 5.66% recorded during the 2004 general elections.

However, at a time when regional parties are no longer confined to their states of origin, the CPI(M) statistics do not exactly exhibit a robust pan-India image. 'The growth of the CPI(M) as an organisation does not always get reflected in election results,' argues Politburo member Sitaram Yechury. ...

...What's troubling the CPI(M) command is that the rise in numbers is attributed mainly to the Red states, bringing into question the party's electoral fortunes elsewhere."

[49] This is quite contrary to the husband's assertion that the CPI(M) is a party

with political influence throughout India, capable of killing its enemies anywhere in the country.

[50] The husband also claims that the CPI(M) began to search for him with “renewed vigour” after their success in the election in West Bengal in April 2006. However, the CPI(M) has been in power in West Bengal for around three decades. After such a period it is inevitable that the CPI(M) would have an expectation of electoral success. The Authority does not accept that their (entirely predictable) victory at the polls provides an explanation for the supposedly new campaign to target the husband some four or five years after he left the region. The appellants’ evidence in support of their second claims is not credible.

CONCLUSION

[51] The Authority finds that it has jurisdiction to consider the appellants’ second appeals. The Authority finds further that the appellants can genuinely access state protection which is meaningful by living in any part of India outside the X area. The appellants are not refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. Their appeals are dismissed.

“A N Molloy
A N Molloy
Member