

AT AUCKLAND

Appellant: **AC (Malaysia)**

Before: S A Aitchison
(Member)

Counsel for the appellant: S You

Counsel/representative for the respondent: No Appearance

Date of hearing: 20 June 2011

Date of decision: 22 August 2011

DECISION

INTRODUCTION

[1] This is an appeal under section 194(1)(c) of the Immigration Act 2009 (“the Act”) against a decision of a refugee and protection officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining to grant either refugee status or protection to the appellant, a citizen of Malaysia.

[2] Pursuant to section 198 of the Act, the Tribunal must determine whether to recognise the appellant as:

- a) a refugee under the Refugee Convention (section 129); and/or
- b) as a protected person under the Convention Against Torture (section 130); and/or
- c) as a protected person under the International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[3] The appellant fears he will be attacked by members of the No 36 gang in Malaysia because he is a member of a particular social group consisting of former

rival gang members, and a family member of someone whom the gang seeks to kill. He claims that the police in Malaysia are corrupt and will not protect him.

[4] Given that the same account is relied upon in respect of all three limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[5] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[6] The appellant was born in Perak, Malaysia. He is a Tamil of Hindu faith. He attended school, but left after three years of high school because his parents could not afford his education. His father is deceased and his mother has remarried. He has seven siblings: three brothers, two sisters and two stepsisters. They live, variously, in Perak, Kuala Lumpur and Johor, in Malaysia.

[7] While attending school the appellant worked in a rubber and palm oil farm. Upon leaving school, he worked as a welder for a Chinese company in Kelantan for approximately four years. He then worked in Singapore as a material handler, whilst living in Johor.

Appellant Joins No 4 Gang

[8] At approximately 18 years of age, while living in Johor and working in Singapore, the appellant joined an Indian gang in Johor known as No 4. He joined the gang because he needed protection from a rival Indian gang known as No 36. No 36 gang members damaged his motorcycle, and would often congregate at the ground level of his apartment building and encourage him to fight. He fought with them on two or three occasions before he joined the No 4 gang. He considered that the No 36 gang troubled him, in particular, because he had prestige, and while others would flee when bullied, he would stand up against them.

[9] As a result of these difficulties the appellant's brother, with whom he was living in Johor, moved to Singapore for six months. The No 4 gang had approximately 50 members in Johor, and a network in other parts of the country, including Kuala Lumpur and Perak. The No 4 gang fought with the No 36 gang. It

was also engaged in crimes such as drug trafficking and robbery. While rival gangs, there were also friendships between certain rival gang members.

[10] While the appellant fought with the No 36 gang, and used weapons such as rods and pipes, he never engaged in crimes such as drug trafficking and robbery. He was asked by the leader of the No 4 gang to participate in such crimes, but made excuses that he was unavailable because of shift work requirements in Singapore. He also claimed that he could not participate in these crimes because he might lose his job if arrested by the police. Gang members told him that if he left his employment he could make a lot of money through committing robberies, but he refused. He heard that several members of police at a station in Johor supported gang No 4's drug trafficking activities. While he generally did not carry knives with him, he took these from rival gang members, and used them, in the midst of a fight.

Arrests by Police

[11] The appellant was first arrested in approximately 1999 because he assaulted an immigration officer. He was convicted and fined. He was arrested on the second occasion in 2001 for robbery. He was falsely accused of this offence. He had been trying to help a friend retrieve some money owed to her, and in so doing had assaulted a person. The case was dismissed after two to three years. He was arrested again in 2003 for transporting weapons. He was stopped at a police checkpoint while driving some armed gang members to assist a person in need. He was convicted and fined.

[12] After being arrested by the police on the first two occasions, the appellant received a warning from his employer that if he was arrested again he would be dismissed.

Appellant Leaves No 4 Gang / Treatment by No 36 Gang

[13] The appellant lost his job in Singapore because of this latest conviction. For this reason he left the gang in 2003. He was a member of the gang for approximately six to seven years.

[14] Subsequent to leaving the No 4 gang the appellant experienced further difficulties from the No 36 gang. While dining at a restaurant, members of the gang, including "AA", "BB", and "CC", amongst others, arrived with weapons. He

managed to escape in his car. He had not seen these people before and did not learn their names until 2009, when his brother informed him. They lived in Perak but, as drug traffickers, travelled throughout the country.

Travel and Return from New Zealand / Treatment by No 36 Gang Members

[15] In December 2004, the appellant travelled to New Zealand. He was refused entry because he falsely claimed that he was a visitor when he had made prior arrangements to work. He did not apply for refugee status because he did not know about this possibility.

[16] Upon return to Malaysia, the appellant settled in Johor and worked in a snack bar for approximately five to six months. He later found employment in a warehouse in Singapore, where he worked for approximately three to four months. Members of the No 36 gang came to know of his return and whereabouts. They stole his car, although with the assistance of some friends he managed to retrieve it. Following several fights with members of the No 36 gang he decided to leave Malaysia and travel to Australia. On one occasion, gang members came to his home to attack him but he left unharmed. He did not know the names of these gang members who troubled him.

Travel and Return from Australia

[17] The appellant arrived in Australia in March 2005. He did not apply for refugee status there as he had lost his travel documents and, when he did manage to meet with a lawyer, he was told that as an overstayer he would be returned to Malaysia. He returned in June 2009 and lived in Perak. His eldest brother also lived in Perak, and was also a former member of the No 4 gang. He ceased being a member in 2005. No 36 gang members attacked him several times between 2005 and 2009, leaving serious injuries. The appellant does not know the details of these attacks.

Treatment by No 36 Gang Members in Perak

[18] On 6 November 2009, the appellant and his brother were attacked by members of the No 36 gang in Perak. They had returned to his brother's home from dining in a restaurant to find approximately seven to eight members of the No 36 gang waiting for them and calling them to fight. The appellant and his brother entered the house, but later came out and spoke to them. The gang

members identified his brother by name, the fact that he and the appellant had been former gang members, and stated that the problems between them had not finished. After returning inside, the appellant and his brother came out of the house a second time and entered into a fight with them. AA, BB and CC joined in, and a larger group of No 36 members arrived. There were approximately 18 members of the No 36 gang, in total, carrying knives and other weapons, who entered into a fight with them. The appellant's brother was attacked with a helmet and pieces of wood. The appellant was attacked with knives, suffering cuts to his arm and head, by AA, BB and CC, amongst others. He incurred serious injuries. After being dragged into the house by his brother, gang members attempted to get inside, damaging the house. However, they were unable to get inside. Later, a group of friends came to support the appellant and his brother, affording the brother an opportunity to take the appellant to a hospital for medical treatment. Hospital reports from Perak record that he was admitted to hospital on 6 November 2011 and his payment for surgery that he received.

Statements to Police and Identification Parade

[19] The appellant's brother gave a statement concerning the incident at a police station in Perak. After the appellant was released from hospital he gave a statement at a different police station. Several months after the incident the appellant received a telephone call from the police to attend the station and identify those responsible for the attack. Together with his brother, he travelled to the police station where his brother had made a complaint. They were asked to identify the suspects in a face-to-face identification parade. Separately, they identified BB and CC in the parade. Later that day they attended another police station and identified CC. The appellant attended this police station again, several days later, to confirm this identification.

[20] Approximately half an hour after being summoned to the station, the appellant's brother received a telephone call from a member of the No 36 gang, and was told that he and the appellant should not go to the police station. When they drew near to the police station they noticed two men on motorbikes, and one of the men brought a mobile to the appellant's brother. The person on the mobile told him that he and the appellant were not to talk to the police and that they would be paid money in return.

[21] The appellant learnt that the gang members he and his brother had identified were released on bail following two to three days in detention. He does not know if they made any court appearances. He did not make enquiries of the police as he had lost trust in them. He considered there to be collusion between the police and the offenders as, immediately prior to the appellant and his brother attending the police station for the first identification parade, they received a threatening call from a gang member.

[22] After leaving the hospital, the appellant stayed with a friend in Perak for approximately five to six months. He heard from his friend's mother that a suspicious car was regularly passing close to the house where he stayed. Several months after identifying the gang members he received two to three threatening telephone calls from a member of the No 36 gang known as DD, who threatened that he was going to kill him. The appellant knew this person previously from the village where he was born. He had no previous conflict with him.

[23] The appellant left Perak and went to live in Johor. While living there he attended a welding course in Singapore. The appellant continued to receive threatening calls once or twice a week from DD, so he departed Malaysia for New Zealand. He did not change his mobile telephone number to avoid these calls, as he was trying to find employment and was afraid he might miss an important call.

[24] Since identifying the gang members in November 2009, the appellant's brother has moved closer to his mother to live. He was contacted by members of the No 36 gang, known as AA and DD. He was asked during these phone calls why he was in hiding and was threatened that he and his children would be killed and his wife raped.

Arrival in New Zealand

[25] The appellant arrived in New Zealand on 2 August 2010. He first spoke to his eldest brother after learning of a second assault on him by DD in February 2011, the first occurring in September 2009. The appellant submitted to the RSB copies of his brother's complaint to the police concerning these incidents in September 2009 and February 2011. He did not contact his brother earlier because he did not want any more problems and wanted to live in peace. With the exception of his eldest brother, since coming to New Zealand the appellant's family have not experienced any difficulties with the No 36 gang.

[26] The appellant believes that the No 36 gang members will carry out their threats to kill him. He has heard recently that AA has shot someone to death and is in prison. He believes that the No 36 gang members will take revenge upon him as he joined their opposition gang. He also fears they will take revenge as he identified three of the gang members to the police. He does not believe that the police will protect him from members of the No 36 gang as they are corrupt and take bribes, having released the men whom he identified only days later. He also believes that as he is not an important person the police will not give him protection all the time.

[27] The appellant considers the No 36 gang are strong in Johor, Kuala Lumpur and Ipoh, and he is not sure if it is possible to evade the No 36 gang if he lived elsewhere in Malaysia. He considers that gang members are spread throughout Malaysia. In addition, he is subject to bankruptcy proceedings (on account of defaulting on home and car loans) and will be prevented from leaving the country upon return. He will not be able to work if required to return to Malaysia and will be prevented from working in Singapore. If he does manage to find employment he will have to support his mother. He is also concerned for his Canadian girlfriend who cannot go to Malaysia with him because of his problems there.

[28] Counsel filed submissions with the Tribunal, dated 15 June 2011.

[29] On the morning of the hearing, 20 June 2011, the Tribunal provided the following country information to the appellant and granted leave to provide a response and closing submissions by 4 July 2011. This country information included:

- a) UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (March 2010);
- b) Freedom House Countries at the Crossroads 2010, Country Report – Malaysia (2010);
- c) “We are watching you, IGP warns former gangsters” Malay Mail Online (www.mmail.com.my) (10 August 2010);
- d) “Double Protection”, Straits (11 December 2010);
- e) “Born Criminals – The ‘Steyr’ and ‘Mamak’ gangs never die Malay Mail Online (www.mmailcom.my) (26 July 2010);
- f) “Police out to curb gangsterism” The Star Online (www.thestar.com.my) (28 January 2009);

- g) "Malaysia to take fight against gangsters to social sites" The Associated Press (11 May 2011);
- h) "6 gangsters detained for 2 years" New Strait Times (21 October 2009); "Underworld link probe" Malay Mail Online (19 August 2010);
- i) "Bogus Datuk arrested for trying to intimidate police" Malay Mail Online (www.mmail.com.my) (17 September 2009);
- j) "Police arrest two members of a secret society" Utusan Online (www.utusan.com.my) (14 January 2010);
- k) "Nabbed – fugitive who fled to Singapore for hand reattachment" The Star Online (7 September 2010);
- l) "He made RM45,000 a day from drugs!" Asia Africa Intelligence Wire (21 October 2004); "Extortion Gang 04 Busted" (www.sukaweb.penang.gov.my).

[30] Subsequent to the hearing, counsel filed closing submissions with the Tribunal, including country information, dated 30 July 2011.

THE REFUGEE CONVENTION – THE ISSUES

[31] 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."

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

- a) Objectively, on the facts as found, is there a real chance of the appellants 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 CLAIM TO REFUGEE STATUS

The Appellant's Credibility

[33] Portions of the appellant's evidence concerning contact with members of the No 36 gang, and their ongoing interest in him, were characterised by inconsistencies and contradictions that the Tribunal finds impugn his credibility in these areas.

Gang following appellant from customs

[34] The appellant gave evidence to the RSB that, upon return from New Zealand in December 2004, he was followed from customs at the Kuala Lumpur airport by members of the No 36 gang. When RSB advised the appellant in its interview report that it considered this claim to be implausible, the appellant responded that he had not meant to say this at the interview. What he had meant was that, some time after his return to Malaysia, the gang found out that he had returned and began to harass him. When asked to respond to this inconsistency by the Tribunal, he maintained his later evidence. The revised account does not, of course, explain why he had initially asserted that he had been followed by the gang from the moment of his arrival.

Contact with No 36 gang members prior to November 2009

[35] Before the Tribunal, the appellant claimed that he had contact with three members of the No 36 gang (AA, BB and CC), prior to their attacking him in November 2009. He stated that they had waited for him outside a restaurant in Johor in 2004, armed with weapons, but that he had escaped them. Later in evidence, however, he claimed that he had not had any dealings with them prior to the November 2009 incident and, when asked if he had seen them before that time, he stated that he thought he had seen them but could not say where. When reminded that he had already stated in evidence that he had seen them at the restaurant in Johor, he changed his evidence, acknowledging that he had seen them there but did not know their names and had not been close to them at the time.

[36] The appellant later gave evidence before the Tribunal that a No 36 gang member, DD, also arrived to attack him at the restaurant in November 2009. When asked why he had mentioned earlier the names of only three persons who

came to attack him on that occasion, he explained that, at the time of the incident, he had not known this fact, but, after returning from Australia, he came to know that DD was in the same group. When reminded that he would have known this information earlier in the hearing and could have volunteered it, he changed his evidence again, stating that DD was not present at the restaurant at the time.

Telephone calls from No 36 gang members

[37] The appellant claimed to the RSB that he had received a telephone call while attending the police station to identify the perpetrators of the attack on him. He is recorded as expressly stating:

“[w]hen I was at station, a man brought a phone and when I answered, a voice said I should not be doing this, and they would pay me money for that.”

[38] However, before the Tribunal he claimed that it had been his brother who had received the telephone call at the station. Further, he claimed that the call had been received on the way to the police station. He then claimed that, upon arrival at the station, his brother was passed a telephone and received similar threats. He was clear that he did not talk on the telephone himself on either of these occasions. When asked to comment upon these discrepancies the appellant stated that he had meant that his brother had spoken to the gang member on the telephone at the station and his brother had relayed the message to him. He stated that perhaps he had answered incorrectly to the RSB at the time. He added that he had received similar threatening calls after leaving the hospital and prior to being called to the station.

[39] Before the Tribunal, the appellant claimed to have received further threatening telephone calls and messages from DD when living in Perak. When questioned why he had not mentioned this to the RSB he stated that he had not been asked this question. When presented with his evidence in the RSB interview that he first started receiving threatening calls about a month or two after he reached Johor, and that he had not been called prior to this time, he stated that he had made a mistake and that DD had called him before he arrived in Johor as well.

Kidnap of stepsister

[40] The appellant informed the Tribunal that, with the exception of his eldest brother, none of his family in Malaysia had experienced any difficulties with the

No 36 gang since his arrival in New Zealand. When asked to comment upon his evidence to the RSB in a letter from counsel, dated 13 December 2010, that his sister had been kidnapped by gang members recently and that he was waiting to receive documentation from Malaysia to confirm this, he stated that she had been kidnapped but he could not prove who had done this. He stated that the family had paid a ransom for her release and the police had captured those who were guilty. When the Tribunal suggested that, as the perpetrators had been arrested, he should know the identities of those responsible, he stated that he had not spoken to his family about this. When reminded that he had advised the RSB that he was seeking documentation to confirm the kidnapping he responded that he had checked the internet but his sister's name and the kidnappers had not been mentioned. When advised by the Tribunal that he could simply have asked his family he stated that he knew his sister was kidnapped, that money had been paid and the perpetrators caught. He added that the matter was unrelated to his refugee case. When reminded that he had previously considered it relevant, he reiterated that he was not sure she was kidnapped by the No 36 gang and that she had been kidnapped for money. When asked whether gangs commit kidnappings and extortion he agreed.

Conclusion on credibility

[41] Having regard to the abovementioned inconsistencies and contradictions, the Tribunal rejects as non-credible the appellant's account that he received threatening telephone calls, or interest, from members of the No 36 gang following his identification of perpetrators of the attack in November 2009. The Tribunal also rejects his evidence that those members he identified as perpetrators of this incident had any previous contact with him. His evidence before the RSB that he was followed from customs at Kuala Lumpur airport by members of the gang upon return from New Zealand, and the kidnap of his stepsister, are further illustrations of self-serving and mobile evidence that the Tribunal rejects.

[42] What the Tribunal does accept is that the appellant was a member of the No 4 gang and was attacked by No 36 gang members on 6 November 2009. Hospital reports corroborate that he was admitted into hospital on 6 November 2009, and received surgery. The Tribunal accepts the appellant's evidence that he and his brother identified offenders in several police identification parades. The Tribunal also accepts that the appellant's brother has received

threatening telephone calls from members of No 36 gang subsequent to his identification of them.

[43] While the Tribunal has some reservation about the apparent implausibility in the appellant's evidence that he did not engage in gang-related activities, such as commission of robberies and drug-trafficking, and generally only used knives when he took them off rival gang members in a fight, such crimes constituting core objectives of the No 4 gang, it affords the appellant the benefit of the doubt and accepts this evidence as credible.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted upon return to Malaysia?

[44] The "being persecuted" element of the refugee definition is interpreted by the Tribunal as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection; See J C Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at [15]. As such, the concept of persecution is a construct of two essential elements, namely, the risk of serious harm, defined by core norms of international human rights law, and a failure of state protection.

[45] When assessing a protection claim in which the agent of persecution is not the state itself, the Tribunal must consider whether the protection available from the state will reduce the risk of serious harm to below the level of well-foundedness – or, as interpreted in New Zealand, to below the level of a real chance of serious harm; see *Refugee Appeal No 71427/99* (16 August 2000) at [66]; *Refugee Appeal No 75692* (3 March 2006).

[46] During the occurrence of events relevant to the appellant's refugee claim, he lived in two states in Malaysia, namely, Johor and Perak. The risk of the appellant being persecuted must first, therefore, be assessed in relation to these areas.

Fear of harm in Perak

[47] The harm experienced by the appellant at the hands of gang members in Perak was serious. According to the hospital records, the injuries to his arm required surgery and he remained in hospital for a week. Approximately three

months after this incident he attended several police stations in Perak and identified three members of No 36 gang as responsible for inflicting the injuries. The attendance of the appellant and his brother at the police station was accompanied by threats of further harm. Such details of past treatment inform the degree of risk that the appellant will face if returned to Perak.

[48] Other evidence relevant to this assessment is the degree of interest shown in the appellant subsequent to these events. The reality is, however, that while staying with a friend in Perak for some six months, and Johor for approximately four months, the appellant was not contacted at any time or threatened in any way by members of the No 36 gang. Given his evidence, and country information that the No 36 gang is represented in various states throughout Malaysia, the question arises as to why, if the appellant was of interest to them he was not contacted or harmed at all, within this ten-month period.

[49] The Tribunal has, however, accepted that the appellant's eldest brother received threats from No 36 gang members, both at the police station and subsequent to that time. Following the November 2009 attack, he was harassed, threatened and attacked further by gang members. Unlike the appellant, his brother has a history with No 36 gang members in Perak. The members of the gang know him personally by name. They have his contact details. It is evident that the appellant's brother has a heightened profile and history with gang No 36 that exceeds the appellant's own.

[50] The Tribunal finds that while No 36 gang members appear to have no interest in pursuing the appellant, having regard to the interest shown in the appellant's brother by No 36 gang members, should the appellant continue to live in Perak and associate with his brother there would be a risk, in time, that he would suffer serious harm on account of the family tie between he and his brother, combined with his own recent history with the gang.

[51] The question thus arises whether the protection of the state is sufficient to reduce that risk below the level of a real chance.

State protection in Perak

[52] As to the risk that the appellant will encounter serious harm at the hands of the No 36 gang in Perak, meaningful state protection is available to him, reducing the risk to a level below that of a real chance.

[53] 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; *Refugee Appeal No 523/92* (17 March 1995). Notably, the Refugee Status Appeals Authority has previously held that Malaysia "[i]s in effective control of its territory and possesses a developed law enforcement and legal system which makes serious efforts to protect its citizens from harm"; *Refugee Appeal No 72598* (23 April 2001), para [10]. Country information does not signal that, since then, there has been any change to that finding.

[54] While corruption is frequently reported in the police force in Malaysia, as are ties between various police officers and gangs (see Freedom House *Countries at the Crossroads 2010, Country Report – Malaysia 2010*; and Malay Mail Online, "Police Corruption: Clean up, if it's true, says Home Minister" (14 December 2010), Malay Mail Online "Corruption index: Thumbs up to government but no police" (10 December 2010), and Global Integrity, *Global Integrity Report: Malaysia – 2010* (as cited in counsel's submissions 30 July 2011)), it cannot be said that the police force as a whole is unwilling or unable to afford civilians protection from gangs, to such an extent as to cause the appellant to face a real chance of being persecuted. The degree of risk to the appellant is such that state protection would be available to him. Former gang members, such as the appellant, can eschew violence and obtain state protection to do so. Both the appellant and his brother have approached the police to report crime and seek protection in the past, and the appellant's brother has made several formal complaints to the police concerning gang-related crime since the appellant came to New Zealand.

[55] The Inspector General of Police in Malaysia has encouraged members of the public to come forward and report gang-related violence; "We are watching you, IGP warns former gangsters" *Malay Mail Online* (www.mmail.com.my), (10 August 2010). A witness protection program has also recently been implemented to provide protection; *Supra*, "Double Protection", *Straits* (11 December 2010). Numerous reports in the media also convey the message that the police are focussed upon countering gang violence in states throughout Malaysia; "Born Criminals – The 'Steyr' and 'Mamak' gangs never die" *Malay Mail Online* (www.mmailcom.my) (26 July 2010); "Police out to curb gangsterism" *The Star Online* (www.thestar.com.my) (28 January 2009); "Malaysia to take fight against gangsters to social sites" *The Associated Press* (11 May 2011); "6 gangsters detained for 2 years" *New Strait Times* (21 October 2009);

“Underworld link probe” *Malay Mail Online* (19 August 2010); “Bogus Datuk arrested for trying to intimidate police” *Malay Mail Online* (www.mmail.com.my) (17 September 2009); “Police arrest two members of a secret society” *Utusan Online* (www.utusan.com.my) (14 January 2010).

[56] While the appellant submits that there was collusion between the police and the gang members he identified, his evidence was purely speculative. He gave evidence that they had been released lawfully on bail, yet at the same time claimed that they had bribed the police to be released. When asked to clarify whether the police had, in fact, been bribed he stated that he did not know what was true. The fact that his brother received a telephone call while on the way to the police station, warning him not to attend, does not provide evidence of collusion. The reality is that, if gang members had been rounded up for the purpose of an identity parade, they would well know why they were there and who was likely to be produced to identify them.

[57] Counsel also submits that use of a face-to-face identification by the police in one identification line-up which the appellant and his brother attended may have been done to intimidate the appellant or in some way invalidate the identification. There is no evidence of this and the assertion is mere conjecture.

[58] The Tribunal finds that state protection is available to the appellant in Perak.

Fear of harm in Johor and state protection

[59] There is no evidence that the gang members from Perak would be interested in the appellant were he to return to live in Johor. While it is accepted that the gang has representation in various states in Malaysia, including Johor and Perak, there has been no ongoing interest shown in the appellant or any other family member, aside from his eldest brother, by the members of the gang. While there is evidence, that the appellant’s brother has been attacked by a No 36 gang member from Perak on two occasions since the appellant arrived in New Zealand, there is no real chance that the attention of the Perak gang members would extend to the appellant should he return to live in Johor or another state in Malaysia other than Perak.

[60] Johor, of course, has its own group of No 36 gang members. While living there, it will be recalled, the appellant claimed to have had his car stolen by No 36 gang members, to have engaged in several fights with them, and to have evaded

them on one occasion when they visited his home. The reality is, however, that the appellant has not lived in Johor for many years, apart from the uneventful four months just prior to his departure for New Zealand. He no longer has any gang association there and the risk to him today is speculative only. Further, as mentioned above, state protection would be available to the appellant.

Fear of discrimination

[61] The appellant claims he will not be permitted to leave Malaysia because of his financial predicament and will not find work. The Tribunal finds that while some discrimination does exist towards Indians in Malaysia in terms of employment, in particular in the civil service sectors, and with affirmative action programs geared towards “uplifting” Malays (See Freedom House, *Countries at the Cross Roads 2010: Country Report – Malaysia*), it does not rise to the level of persecution. The appellant has completed a partial high school education, obtained qualifications in welding, and worked in this specialised field in Malaysia. He also has experience working in a snack bar in Malaysia. While he has relied on work opportunities in Singapore, where he claims to be able to earn a higher salary, his inability to work in Singapore on account of his bankruptcy does not constitute persecution. There is no evidence that he will be prevented or unable to find employment in Malaysia.

Fear of harm to partner

[62] The appellant further claims that he would not be able to live with his Canadian partner in Malaysia for fear of harm to her by gang members. The Tribunal finds that this situation would be a choice of the appellant and his partner. As abovementioned, state protection would be available to the appellant and would extend to his partner.

Internal protection alternative

[63] While not necessary to assess an internal protection alternative for the appellant given that there is no well-founded fear of the appellant being persecuted in the states of Perak or Johor, it is apparent that he could also live elsewhere safely in Malaysia, such as in Kuala Lumpur, where he has a number of family members residing. While there are reportedly No 36 gang members there, he has no background or history with them. He does not hold a well-founded fear

of being persecuted there or face any other form of harm, and would be able to access basic norms of civil, political and socio-economic rights.

Conclusion on Claim to Refugee Status

[64] For the reasons stated above, the Tribunal finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[65] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

Assessment of the Claim Under the Convention Against Torture

[66] Section 130(5) of the Act provides that torture has the same meaning as in the Convention against Torture, Article 1(1) of which states that torture is:

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Conclusion on Claim Under Convention Against Torture

[67] The appellant relies on the same evidence in support of his claim under the Torture Convention as he did to support his claim under the Refugee Convention. No evidence has been presented that the appellant will intentionally be subjected to severe pain or suffering at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity, or for one of the specific purposes outlined in Article 1(1) of the Convention against Torture.

[68] The Tribunal is satisfied that the appellant has not established that there are substantial grounds for believing that he would be in danger of being subjected to torture if he now returns to Malaysia.

[69] The appellant is not entitled to be recognised as a protected person under section 130(1) of the Act.

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[70] Section 131(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.”

Assessment of the Claim Under the ICCPR

[71] Pursuant to section 131(6) of the Act, “cruel treatment” means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

- a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards; and
- b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

Conclusion on Claim Under ICCPR

[72] Again, the appellant relies on the same evidence in support of his claim under the ICCPR as he did to support his claim under the Refugee Convention.

[73] The Tribunal reaches a similar conclusion as on the claim under the Refugee Convention. State protection is available to the appellant reducing the risk of serious harm to a level which is speculative or conjectural only. It does not

establish substantial grounds for believing that the appellant would be in danger of being subjected to arbitrary deprivation of life or cruel treatment in Malaysia.

[74] The facts as found do not establish substantial grounds for believing that the appellant would be in danger of being subjected to in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

CONCLUSION

[75] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) Is not a refugee within the meaning of the Refugee Convention;
- (b) Is not a protected person within the meaning of the Convention Against Torture;
- (c) Is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[76] The appeal is dismissed.

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Member

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