

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76368

AT AUCKLAND

Before: A R Mackey (Chairman)
Representative for the Appellant: Appellant represented himself
Date of Decision: 23 July 2009

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Malaysia.

INTRODUCTION

[2] The appellant arrived in New Zealand on the first occasion on 21 March 2008. He was issued a limited purpose work permit until 16 October 2008. He departed New Zealand on 15 October 2008 and went to Sydney, Australia. He returned to New Zealand on 8 December 2008 and was issued a limited purpose permit. On 23 February 2009, the appellant lodged a Confirmation of Claim for refugee status in New Zealand with the RSB. He was interviewed on 18 February 2009 and the application was declined on 28 May 2009 by the RSB. He then appealed to this Authority on 8 June 2009.

[3] On 19 June 2009, the Authority, through its Secretariat, wrote to the appellant at the address he notified in the appeal form stating that the Authority had reached a *prima facie* conclusion that the appellant's claim was a manifestly unfounded and/or clearly abusive one. The appellant was given until 4pm on Friday 3 July 2009 to present submissions responding to the matters raised in the Authority's letter of 19 June 2009. He was advised that following that deadline the

Authority, unless persuaded otherwise, by evidence and submissions presented, may determine the matter on the documents only, without offering the appellant an opportunity to attend an interview with the Authority. No response has been received to the Authority's letter as at the time of this decision.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[4] Under the circumstances, the Authority is permitted to determine an appeal on the papers without the appellant being given an interview. This arises under ss129P(5)(a) and 129P(5)(b) of the Immigration Act 1987 (the Act) where the appellant was interviewed by the RSB (or given the opportunity to be interviewed but failed to take that opportunity) and where the Authority considers the appeal to be a *prima facie* 'manifestly unfounded or clearly abusive' one. The Authority's general jurisdiction in this regard is examined in *Refugee Appeal No 70951/98* (5 August 1998).

[5] The letter from the Secretariat set out all the issues involved in a brief summary of the Authority's reasons for concluding that on the face of it, if the appellant returned to Malaysia there would be no failure of state protection and thus this was a 'manifestly unfounded or clearly abusive' appeal.

[6] The letter from the Secretariat stated also that the appellant bore the responsibility for establishing his refugee claim, pursuant to ss129P(1) and 129P(2) of the Act as further explained in *Refugee Appeal No 72668/01* (Minute No 2) (5 April 2002) and *Anguo Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

CONCLUSION ON WHETHER TO DISPENSE WITH AN INTERVIEW

[7] The appellant was interviewed by a refugee status officer on 24 March 2009. Despite being given the opportunity to persuade the Authority that an interview with the Authority was necessary and could assist in establishing his appeal the appellant has failed to make any submissions.

[8] In the circumstances of this case, therefore, the Authority will determine the matter on the papers without giving the appellant the opportunity to attend a further interview.

THE APPELLANT'S CASE

[9] The appellant is a man in his mid-40s. He is of Kadazan Chinese ethnicity and was raised in the Roman Catholic Christian faith. He was born and lived most of his life in the Kota Kinabalu district of Sabah, Malaysia. He worked on a dairy farm and did maintenance work on farm machinery over the period 1995 to 2008. He considered he had problems with discrimination on the basis of his Chinese ethnicity and his Christian beliefs.

[10] In June 2007, he met with a Muslim woman, AA, who was part of the BB tribe from Indonesia who had moved to an area he was working in. They had a number of conversations over a period of about three weeks whilst he was working on a friend's farm. Late in June 2007, three relatives of AA came to see the appellant and accused him of being intimate with AA. He assured them that he had done nothing wrong, nor had he been intimate with her. He did not trust the BB tribe however and thought they could kill him. After arguing with the men for some 30 minutes the appellant packed up his tools and left. He later heard rumours that the family wanted revenge on him for dishonouring AA but he did not take them seriously. Some two months later when he returned to the same district he was confronted by five men when he returned to his parked vehicle. They beat him until he was unconscious. He had cuts on his arms, swollen eyes and internal injuries. No one had seen the attack. The appellant considered it was people from the BB tribe. After that he avoided working in the area near AA's village and worked on a dairy farm some 40 kilometres away.

[11] In February 2008, he obtained a Malaysian passport after he had heard, through friends, of jobs in New Zealand picking kiwifruit. He borrowed money from his brother to purchase the air tickets and travelled to New Zealand on a visitor's visa. After his arrival he was issued with a limited purpose work permit valid to 16 October 2008. About a month after he arrived in New Zealand he heard from his brother that some of AA's relatives had been looking for him.

[12] The appellant predicts that on return he will be attacked by members of the BB tribe. By his own admission, however, he has not reported the matter to the police but simply avoided the area where the BB people lived until he departed from Malaysia.

THE ISSUES

[13] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly 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, is unable or, owing to such fear, is unwilling to return to it."

[14] 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 APPELLANT'S CASE

[15] As noted, the Authority has determined it will not interview this appellant and thus an assessment of credibility will not be made.

[16] Accordingly, his account, as recorded, is accepted for the purpose of determining this appeal.

State protection

[17] The Authority, has over many years recognised in its jurisprudence that the concept of "being persecuted" contained in Article 1A(2) of the Refugee Convention involves both serious harm (amounting to sustained or systemic violation of basic human rights) together with a failure of state protection. Clearly in cases where the prediction is of serious harm at the hands of non-state actors as is the case here, it is essential to establish that there will also be a failure of state protection.

[18] The Authority has recognised that Malaysia is a country where there is a presumption of state protection unless convincing evidence to the contrary is provided. In *Refugee Appeal No 75447* (4 April 2005) it was stated at paragraph [21]:

"...It is a well established principle of refugee law that nations should be presumed capable of protecting their citizens. Clear and convincing evidence is required to demonstrate a state's inability to protect its citizens."

[19] In this case the appellant has not established any clear or convincing evidence that there would be a failure by the Malaysian authorities to provide meaningful state protection against risks to him from the BB tribe. Indeed, in the past the appellant did not contact the Malaysian authorities on the one occasion when he was attacked. For this reason alone the appellant's claim cannot succeed as he has not established a real chance of being persecuted through a failure to indicate that he would be unable to access meaningful protection from the state of Malaysia.

[20] In this appellant's case, the Authority considers on the evidence that the appellant could return to his home district with safety. The BB tribe apparently are located some way from his home district so any likely encounter with them must be considered as remote or highly speculative. In addition, the appellant would have the ability to seek an internal protection alternative (that is, relocate to another part of Malaysia). Such a relocation to another part of Malaysia would clearly, on the evidence, not place him at a real risk of being persecuted or having to return to his home district and also, as a Malaysian citizen he could access the same level of protection as other Malaysian citizens.

[21] It is the responsibility of the appellant to establish his own case. The Authority considers that this appellant has not, at any point, established that he has a real chance of being persecuted on return to his home country. The objective country information, set out in the most recent United States Department of State Country Report on Malaysia (25 February 2009), confirms this conclusion.

[22] In this situation, the first issue is answered in the negative. It is unnecessary thus to proceed with consideration of the second issue.

CONCLUSION

[23] The Authority finds 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.

"A R Mackey"

A R Mackey
Chairman