REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 67/92

RE BR

AT AUCKLAND

Before: B.O. Nicholson (Chairman)
R.P.G. Haines (Member)
Z. Kawi (Member)

Counsel for the Appellant: Mr R.P. Chambers

Appearing for the NZIS: No appearance

Date of Hearing: 6 August 1992

Date of Decision: 10 November 1992

DECISION OF THE AUTHORITY DELIVERED BY R.P.G. HAINES

This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, an Indian national of the Sikh faith born in the Punjab.

THE APPELLANT'S CASE

The appellant is a thirty-three year old married man with

two children. The appellant is a mason and carpenter by occupation. His family, comprising his father, mother, wife and children live in the village B situated in the District of Jalandhar in the Punjab. The family has a small land holding of some five acres which is rented out. They also own a further piece of land on which the appellant built a shop. That shop is also rented out and is presently run as a tyre repair shop.

Between February 1981 and March 1986 the appellant worked under contract in Dubai, remitting money home to his family. He returned to India on 24 March 1986. It was from that point that various incidents occurred which have led to his application for refugee status.

1. One morning in April 1986 the appellant was travelling on a scooter he had bought during a home visit in 1984. It still looked new. Without warning two armed extremists emerged from a field of sugarcane and forced the appellant to stop. Neither of their faces were covered but the appellant was unable to recognize them.

   The appellant is an Ad Dharmi, was not wearing a turban and probably gave every appearance of being a Hindu. However, the two men said nothing about his appearance or his religion. They told him that they had a job to do and required his scooter. They promised that they would return it within two days. He was to pick it up near the water pump on a road they named. They also took the appellant's ring, a purse containing approximately Rupees 150 and the appellant's contract card establishing that he was a B Class contractor. The appellant was warned not to report the matter to the police otherwise his family would be killed. The

appellant did not get his motor scooter back.

Following this robbery the appellant spent a further two weeks in the village B and thereafter went to Delhi where he stayed for five or six months. During that time he returned to his village from time to time in order to obtain funds from his parents but he would stay only one night before returning to Delhi. He said that during this time he did not look for work in Delhi as he had gone there only to hide. In this he was successful as he had no problems from the Sikh extremists while in Delhi though he did emphasize that he changed hotels and also used different names. He said that it was hard to survive but the money provided by his parents made it possible.

He then moved to Jalandhar where he was able to find work as a carpenter.

2. In April 1986, approximately twelve months after the first incident the appellant was in a shop in Jalandhar when a group of Sikh extremists shot and killed three Hindus close by. The appellant accepts that his presence at the scene of the shooting was purely fortuitous and that the extremists did not threaten him personally. However, he felt that as he himself does not wear a turban he could also have been taken as a Hindu and killed.

The day following the shooting incident the appellant returned to Delhi for fifteen to twenty days, and having obtained the necessary visa, returned to the Middle East to work. According to the appellant's passport he appears to have been in Saudi Arabia from 7

April 1987 until 12 October 1988.

During the appellant's absence abroad no member of his family encountered trouble with the extremists and no enquiry was made by the extremists as to the appellant's whereabouts.

3. In December 1988, two months after the appellant's return from the Middle East, he received a letter from the Khalistan Commando Force demanding payment of Rupees 50,000 within five days. The letter said that someone would collect the money. The letter did not say why the demand was made of the appellant though the appellant assumed that it was because he was a Hindu. It is our view, however, that this is not a realistic interpretation of the event as it was plain that the appellant gave the appearance of a wealthy man who had just returned from a lengthy period in the Middle East and whose family owned two rental properties, albeit of modest size. It is our view that the letter being entirely silent as to the reason for the demand, it was in all likelihood motivated by the fact that the appellant was seen as a man in possession of some wealth.

Be that as it may, the appellant left his village the following night and went to Jalandhar where he initially stayed with a friend but thereafter rented a house in that city. His wife did not join him there as he had sent her to stay with her parents.

The appellant said that while he was living in Jalandhar he tendered for work and in the meantime used money from his family in order to support himself.

However, after about fifteen to twenty days he moved to Pathankot which is about seventy-five or eighty kilometres from the village B. There he found work repairing bus stops. His employment began in February 1989.

4. In March 1989 while working at a Pathankot bus stop the appellant was approached one morning by two Sikh extremists. He thought he recognized them as the two men who had taken his scooter in April 1986. He drew this conclusion because the two men appeared to know about him and in particular knew that he had worked in Saudi Arabia. They told the appellant to hand over what he then had in his possession (which was about Rupees 2,000) and said that they wanted a further Rupees 20,000 within five days, saying that they needed the money to buy arms for Khalistan. There was no reference to the appellant's religion at all. Indeed, the appellant said that he thought that he had been approached because he had been overseas and also because he was a contractor.

That night the appellant returned to the village B, told his parents of the incident and the following day travelled to Delhi.

He stayed in Delhi for seven to eight months. Once again he did not seek work as he had gone there only to hide.

5. Five days later extremists arrived at the village of B and spoke to the appellant's father. They were told that the appellant had gone to Delhi.

6. In October 1989 a letter was received at the family home in the village of B from extremists stating that the appellant's name had been put on their hit list because he had failed to pay the money demanded of him.

On 4 December 1989 the appellant was successful in obtaining a New Zealand visa and he eventually arrived in New Zealand on 20 December 1989. His application for refugee status was not submitted until mid-October 1990.

7. He says that on 17 October 1991 extremists visited his home in the village of B making enquiries as to his whereabouts. He learnt this through a letter from his father. Tendered in evidence was a letter from his father dated 19 October 1991 in which the circumstances of the visit are outlined. It emerges from that letter that the family received a visit from a person called P. The extremists came to learn that someone had visited the appellant's parents and assumed that the person P was in fact the appellant. Thus, when the extremists spoke to the appellant's father they told him that they had heard that his son had returned home. The father told them that this was not so.

The appellant conceded that in the three years since the letter of demand of October 1989 there had been only this one visit by the extremists to the family home in the village B. He did add, however, that the Khalistan Commando Force had visited the address of his in-laws in November 1991 asking for the appellant by name. Since that time there have been no further visits to that address either.

8. The appellant also produced in evidence undated press clippings documenting the fact that a Mr RK, a resident of the village B, had been kidnapped by the Khalistan Commando Force with a ransom demand of Seven Lakh Rupees, a very considerable sum. RK later died at the hands of the extremists on an unspecified date. The appellant fears that the same fate awaits him were he to return to the Punjab.

THE ISSUES

The Inclusion Clause in Article 1A(2) relevantly provides that a refugee is a person who has a:

> "... 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."

In the present context we formulate the issues before us as follows:

1. Is there a genuine fear?

2. Is the harm feared of sufficient gravity to constitute persecution?

3. Is there a real chance that persecution will occur?

4. Will the state fail in its duty to protect the appellant from serious harm?

5. Is the harm feared related to any one of the five grounds recognized in the Convention, or is it related to other factors?

In this regard we refer to our decision in Refugee Appeal No. 11/91 Re S (5 September 1991) in which these issues are addressed in greater detail.

ASSESSMENT OF THE APPELLANT'S CASE

Although there are some inconsistencies in the account given before us when compared with the appellant's original statement and his evidence at the Refugee Status Section interview, we do not find them to be material and we accordingly accept that the appellant is a credible witness.

The Authority is therefore satisfied that an affirmative answer must be given in relation to issues (1) and (2).

In relation to issue (5), the appellant's case falls to be determined under the "religion", "political opinion" or "particular social group" categories. The appellant no doubt points to the fact that each occasion involved Sikh extremists and in the fourth incident the extremists claimed that they wanted the money to buy arms for Khalistan. However, while we accept that there were political (and perhaps religious) overtones in the various incidents, there is no evidence to establish that the demands and threats were made "for reason of" the appellant's religion or his

political opinion (actual or imputed) in terms of the Convention. Therefore, if the appellant's case is to succeed, he must establish that the demands and threats were made by reason of his membership of a particular social group.

It is our finding that the demands have been made of the appellant because he has been perceived as a wealthy person against whom extortion demands could be made with profit. This was made particularly clear by the March 1989 incident at the Pathankot bus stop where the extremists referred specifically to the fact that the appellant had been overseas and was also a contractor.

As to whether such persons fall within the "social group" category, we have previously held that persons of substantial financial standing cannot be regarded as a social group within the meaning of the Refugee Convention. See Refugee Appeal No. 24/91 Re HS (9 June 1992); Refugee Appeal No. 34/91 Re GS (9 June 1992); Refugee Appeal No. 87/91 Re USP (9 June 1992); Refugee Appeal No. 76/91 Re SS (1 May 1992); Refugee Appeal No. 69/92 and 70/92 Re VS and SK (23 July 1992); and Refugee Appeal No. 82/91 Re BS (30 March 1992). Those decisions were recently reviewed by us in Refugee Appeal No. 3/91 Re ZWD (20 October 1992) and we found no reason to reappraise the jurisprudential basis on which the earlier decisions have been assessed.

In the result, it is our finding that the harm feared by the appellant is not related to one of the five grounds recognized in the Refugee Convention.

Turning now to issue (3), it is our further finding that there is no real chance that persecution will occur at the

hands of the extremists should the appellant return to India. As mentioned, it is now some three years since the appellant received the letter of October 1989 advising that he had been placed on a hit list. Since then there have been only two enquiries. The first in October 1991 at the family home in the village of B and a month later at the home of the appellant's in-laws. In the intervening twelve months there have been no further incidents. We are of the view that in these circumstances there is no more than a bare possibility that the extremists still have an interest in the appellant. This is not sufficient to meet the "real chance" test we have adopted.

We turn now to the final issue, namely whether the state will fail in its duty to protect the appellant from serious harm. Even if we are wrong in our conclusions in relation to the presence of a Convention reason and the well-foundedness of the appellant's fear, the result of this appeal would be no different as on the question of failure of state protection, we find against the appellant. In both 1986 and 1989 the appellant was able to successfully relocate in Delhi and find protection in that city. It is noteworthy that on neither occasion did he try to find work although he conceded that he has a trade that is in high demand. While he did refer to the fact that he was licensed only to work in the Punjab, he accepted that were he to relocate in another state he would be able to get a licence to ply his trade there. Accordingly, the appellant presents as a man with a demonstrated ability to relocate elsewhere in India. He is also a man who has spent two tours of duty in the Middle East and this too has demonstrated his adaptability. We also note that his family has been able to provide him with the financial resources to survive for lengthy periods in Delhi and there is no reason to believe

that such support will not be available in the future to tide the appellant over until he secures employment.

As the appellant has the opportunity to find effective protection within the country of his nationality, New Zealand's obligations under the 1951 Convention on Refugees and the 1967 Protocol are not invoked. Our conclusions on the facts of the appellant's case are entirely in accord with an established line of authority which we recently reviewed in Refugee Appeal No. 18/92 Re JS (5 August 1992).

CONCLUSION

In summary our conclusions are as follows:

1. The appellant holds a bona fide subjective fear of returning to India.

2. The harm feared by him is of sufficient gravity to constitute persecution.

3. However, his fear is not well-founded and there is no real chance that the harm feared will occur.

4. The harm feared by the appellant is not connected with or related to any of the five Convention reasons.

5. It cannot be assumed that the authorities in India will fail in their duty to protect the appellant from the harm feared.

6. As the appellant can access effective protection in some part of his country of origin, and as it would not be unreasonable to expect him so to do, he cannot be said to be at risk of persecution.

For these reasons 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.

However, before closing we wish to draw attention to one of the reasons given by the Refugee Status Section for declining the appellant's refugee application. It was pointed out that the passport on which the appellant arrived in New Zealand expired on 10 November 1990. The appellant then made application to the Indian High Commission in Wellington, New Zealand for a new passport. In due course a new passport was issued on 27 March 1991. The Refugee Status Section concluded:

> "By virtue of the replacement passport [the appellant] would not normally continue to be covered by the UNHCR Convention for Refugees."

The Authority has noted similar reasoning in earlier cases and it would appear that there are misconceptions as to the significance of the possession of a valid passport or, following arrival in New Zealand, the significance of either extending the passport or obtaining a new one. The following comments are accordingly set out for guidance in future cases.

PASSPORTS

The significance of passports tends to arise, in the main, in two situations. First, in assessing the refugee application in terms of the Inclusion Clause in Article 1A(2) of the Refugee Convention. Secondly, in assessing the application of the Cessation Clause in Article 1C(1), namely the voluntary re-availment of the protection of the country of nationality. In this regard, we find that with respect, certain passages of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status must be treated with considerable caution.

For example, paragraph 49 states that if an applicant for refugee status, without good reason, insists on retaining a valid passport of a country of whose protection he is allegedly unwilling to avail himself, this may cast doubt on the validity of his claim to have "well-founded fear". The paragraph further states that once recognized, a refugee "should not normally retain his national passport".

Likewise, in the context of the Cessation Clause, paragraph 121 of the Handbook states that if a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality.

In our opinion the better view is that advanced by Hathaway in The Law of Refugee Status (1991) at 40-43 (Inclusion Clause) and 192-196 (Exclusion Clause).

In our view, the possession of a passport, whether valid or forged, must be seen as an essential modern-day prerequisite

for flight from persecution rather than signifying in some abstract legal way that the holder of the passport has made a conscious decision to avail himself of the protection of the country which has issued the passport and in which the persecution is feared.

In terms of the Inclusion Clause under Article 1A(2) an individual may depart her country without impediment, even travel on a valid passport, and still be a genuine refugee. Conversely, illegal departure from the country of origin, even involving forged documentation, is also no bar to a refugee claim: Hathaway, op cit 43.

The essential point is that Convention refugee status is fundamentally a function of the risk faced by the claimant, not of her mode of departure.

This point must be made forcefully, for as noted by Hathaway (op cit 45) there is an unfortunate tendency to be reflexively dismissive of claimants who have freely exited their country or who possess valid travel documents. Suspicion is particularly high in the case of persons who have been actively assisted to leave their country. But for the reasons we have referred to, even in situations where the refugee's departure is facilitated by the state of origin, a genuine claim to refugee status can be established. The conclusion reached by Hathaway at op cit 45 is:

> "In the result, the role of evidence on mode of departure should be carefully confined to situations of evidentiary ambiguity, and should not be allowed to override the fundamental concern to identify persons who would be at genuine risk of serious harm upon return to their state of origin."

We turn now to the issue of voluntary re-availment of national protection raised by Article 1C(1).

Paragraph 121 of the Handbook is based on the premise that if a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that she intends to avail herself of the protection of the country of her nationality. A similar view is to be found in Goodwin-Gill, The Refugee in International Law (1983) 48.

The powerful counter-argument presented in Hathaway, The Law of Refugee Status (1991) at 192 is in the following terms:

> "Such an interpretation of this cessation clause represents a formal view of the notion of protection. As Atle Grahl-Madsen points out, "... a person may seldom have well-founded fear of being persecuted by the members of the foreign service of his home country; the pertinent fact is therefore that he fears persecution in the case of his return to his country of origin". It is simply a legal fiction to assume that more than an exceedingly small percentage of persons who avail themselves of a state's consular facilities do so as a demonstration of either political loyalty or trust. Rather, the practical exigencies of life - travel, enrolment in school, professional accreditation, etc. - may simply require a person genuinely at risk of persecution to contact the external office of her state of origin to secure essential documentation. Too, many persons renew identity documents as a matter of routine, with no thought to the legal ramifications of their act. **The disparity between the legal formalism familiar to the drafters of the Convention and the common understandings of most people** has required the strict construction of this clause in order to avoid undercutting the protective mandate of refugee law."

[emphasis added]

We respectfully adopt this reasoning.

In the present case, no attempt appears to have been made to ascertain from the appellant his reasons for obtaining a new passport. We would rather imagine that if asked his answer would have been that it was a practical necessity, not a desire for the protection of the Government of India. Or at the very worst, his response would have been that he obtained the passport as a matter of routine. Certainly, having seen and heard the appellant it is unreal to suggest that he gave any thought to the legal ramifications of his act.

This case is illustrative of the fact that it is common for decision-makers to rely on the inaccurate assumption that receipt of travel documentation is inherently a means of securing national protection. In this regard we adopt what was said by the Canadian Immigration Appeal Board in Felix Salatiel Nuñez Veloso (Immigration Appeal Board Decision 79-1017, C.L.I.C. Notes 11.15, August 24, 1979 at 4-5, per J.P. Houle cited in Hathaway, The Law of Refugee Status (1991) 194:

> "... it seems high time to dispel an idea that is all too prevalent - and, what is more, false - of exactly what a passport is. A passport is no more, in fact and in law, than a travel document issued by a country's proper authorities to allow one of its nationals to travel abroad and, if necessary, to call upon the services of its consular authorities in the foreign countries visited to provide the holder of the document with proper protection. The fact of holding a passport, even if it is valid and issued legally,

> in no way constitutes a guarantee that protection will be provided ...."

It is our view that the following statement taken from Hathaway op cit 195 is correct in principle:

> "Since there is no automatic linkage between the issuance or renewal of a passport and the granting of protection, it is critical that the real reason it is being sought form part of the determination authority's considerations. Unless the refugee's motive is genuinely the entrusting of her interests to the protection of the state of her nationality, the requisite intent [required by the cessation clause] is absent."

We hope that these observations will assist the future assessment of the significance of the obtaining and possession of passports, whether valid or invalid.

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R.P.G. Haines

(Member)

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