

AT AUCKLAND

Appellant:	AB (Malaysia)
Before:	D L Henare (Member)
Representative for the Appellant:	The appellant represented himself
Counsel for the Respondent:	No Appearance
Date of Hearing:	1 February 2011
Date of Decision:	10 March 2011

DECISION

INTRODUCTION

[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 to grant refugee status to the appellant, a citizen of Malaysia.

[2] This appeal was lodged with the Refugee Status Appeals Authority (the RSAA) prior to 29 November 2010 but had not been determined by that body by that date. Accordingly, it is now to be determined by a member of the Immigration and Protection Tribunal (the Tribunal). See subsections 448(1) and (2) of the Immigration Act 2009 (the Act).

[3] Further, pursuant to section 448(2), the appeal is to be determined as if it is an appeal under section 194(1) of the Act.

[4] Pursuant to section 198 of the Act, on an appeal under section 194(1) the Tribunal must determine whether to recognise the appellant as:

- (a) a refugee under the Refugee Convention (section 129); and

- (b) a protected person under the Convention Against Torture (section 130); and
- (c) a protected person under the International Covenant on Civil and Political Rights (the ICCPR) (section 131).

[5] As part of the transition process from the RSAA to this Tribunal, the appellant was asked whether he wished to make a “protected person” claim, and have that claim determined solely by the Tribunal at the same time as his outstanding refugee appeal. The appellant stated that he wished to pursue a protected person claim together with his refugee appeal. This decision addresses, therefore, both the claim to refugee status and the claim to protected person status.

[6] In this appeal, the obligations of the Tribunal, pursuant to section 198(1) (b), including the gist of the relevant definitions, were explained to the appellant at the outset.

[7] The crux of the claim is that the appellant says he faces a real chance of being persecuted in Malaysia on account of both his Christian religion and his Chinese ethnicity. The central issues are his credibility and the well-foundedness of the claim.

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

THE APPELLANT’S CASE

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

[10] The appellant was born in 1950 in Perak, Malaysia and is of Chinese ethnicity and Malaysian nationality. He is the second child adopted by his parents who raised him in the Catholic faith. Both he and his siblings were given Christian names upon their baptism. His parents and oldest sibling are deceased. The appellant’s brother continues to reside in Malaysia and they are in regular contact with each other.

[11] When the appellant was aged about eight years, the family moved to Ipoh, a predominantly Chinese community, where he was educated at a private

missionary school and then at a state run college. He experienced some verbal abuse from Malay students at the college because of his faith. He graduated with "A" level qualifications but did not gain entrance to the University of Malaysia within the quota system provided for non-Malays. At this time he had completed thirteen years of education in the English language and was determined to pursue tertiary education in the United Kingdom.

[12] At the age of twenty years the appellant joined a British owned insurance company in Penang, a largely non-Malay city. The appellant explained that he did not experience any discrimination as a result of his ethnicity or religion because his circle of friends and business clients were non-Malays. He married in 1976 and his son was born in the following year.

[13] In 1984, with the assistance of his sister who was then residing in the United Kingdom, he realised his aspiration for tertiary education when he was accepted into a university. He subsequently graduated with a degree in marketing management and worked in Wales.

[14] In 1991, the appellant returned to his family in Malaysia. He noted many changes in the political environment there as reported in the news media, particularly the overt racial opposition by Malays to non-Malays. This enmity was expressed generally by Malay fanatics urging non-Malays to leave Malaysia. The appellant found it difficult to get a job in the government sector, despite his qualifications and experience, since Malays were given preference in employment. He turned to operating a video rental business until he gained a marketing position with a foreign-owned company manufacturing jam. This work entailed travel to the rural eastern districts where the appellant often experienced racial slurs as he went about his work. In consequence, he visited these districts infrequently and focussed his marketing services in preponderantly non-Malay areas.

[15] In the late 1990s the appellant was contracted by an insurance company as a financial planner working on commission, an occupation he held until he left Malaysia for New Zealand. He obtained additional qualifications to enable his registration as a certified planner and became a member of the Financial Planning Association of Malaysia. He developed a client base which was mainly Chinese. He had only two Malay clients. The appellant considered his Malay clients had accepted his professional services because they were highly educated and had lived overseas.

[16] When the appellant met Malays in the course of his work, he followed the advice of his father which he had been given as a child, to avoid discussion or debate on issues of race and religion. As a result of exercising this restraint, the appellant did not experience any difficulties. Rather, the difficulties he encountered were in obtaining employment in the public sector because of government policies for preferential recruitment of Malays. He was able to get employment only when he competed with non Malays for work with foreign-based companies.

[17] The appellant grew strong in his faith after his mother died in 1994. He explained that he had enjoyed a close relationship with his mother who ensured that the family regularly attended mass.

[18] In Malaysia, the appellant had assisted at a Christian run home for the aged. After his mother's death he took a deep interest in the teachings of the Catholic faith. He went online to pursue Bible courses, one of which he completed by correspondence. As a result of his study of scripture, he began to question some of the tenets of Catholicism. Although the appellant has attended Catholic services since his arrival in New Zealand, he has recently turned to another Christian faith.

[19] In 2005, the appellant entered into a new relationship some eight years after he and his wife divorced. The appellant travelled to Thailand for holidays from time to time. The appellant's son resides in Penang with his wife and child. The appellant is aware that his son has not experienced any difficulties there on account of his race or religion because he does not associate with Malays and he works for an international freight company.

[20] The appellant explained that incidents concerning two high profile Malays had caused him to consider leaving Malaysia. In July 2008, the former Deputy Prime Minister of Malaysia, Anwar Ibrahim, faced politically motivated charges because of his opposition to the government. These cases are ongoing. In September 2008, a Malay prince of the Selangor royal family, Raja Petra Kamarudin (RPK), was arrested under the Internal Security Act which allows detention without trial because of his criticism of the Malaysian government on his website. RPK's son was also arrested on trumped up charges and there have been reported beatings of him in prison. Following a petition to the King and vigils held throughout Malaysia in which the appellant participated, RPK was released on bail and has since fled to the United Kingdom. These incidents troubled the

appellant because he believed they were indicative both of the erosion of human rights within Malaysia and government actions to quell criticism against it.

[21] The appellant referred to the Catholic Church having used the word “Allah” in one of its newspapers. The government sought to ban the use of “Allah” by non-Muslims as the translation for God. This ban was challenged in proceedings brought by the Catholic Church. In 2009, the Kuala Lumpur High Court ruled against the government’s ban.

[22] In November 2008, the appellant left Malaysia for New Zealand, where he was issued a visitor’s permit. Thereafter, he was issued extensions to his visa and his subsequent application for a work permit was declined. His partner arrived in New Zealand in February 2009.

[23] In January 2010, the appellant was informed by his brother of bombings and acts of vandalism against Christian churches and Hindu temples mainly in Kuala Lumpur. These attacks had occurred because of the High Court’s ruling against the government’s ban on the use by non-Muslims of ‘Allah’.

[24] In June 2010, the appellant’s brother posted to him a number of newspaper clippings which had reported these attacks. The appellant noted that the envelope containing the clippings had been torn and resealed by cellotape before delivery to him. The appellant suspects that the Malaysian authorities were responsible for such tampering because many non-Malays have left Malaysia and are critical of the government. The appellant believes that the tampering represented the authorities’ attempts to monitor such criticism. The appellant’s brother has not experienced any difficulties as a result, however.

[25] The appellant’s fears were further compounded when he learned in March 2010 that a solicitor friend had been sentenced, wrongly, by the courts, as a result of trumped up charges against him for corruption, after the friend spoke out against the legality of the Internal Security Act. The appellant was shocked by these circumstances and he sent an email of support to his friend’s daughter. As a result of the treatment of his friend, he does not have confidence in the independence of the Malaysian judiciary.

[26] The appellant learned from a friend in New Zealand that he could claim asylum when he expressed his fears for his safety based on his race and religion. On 21 April 2010, the appellant lodged a claim for refugee status.

[27] The appellant says that, if he returns to Malaysia, he is at risk of serious harm at the hands of Malays, particularly Islamic fanatics, because of his race and religion. He refers to the church bombings as examples of Islamic hostility towards non-Muslims. He says the government must bear responsibility for this hostility because of their attempts to implement the ban.

[28] The appellant says the government will use the issues of race and religion in the lead up to the general elections in Malaysia, because they wish to appease Malays and gain political support. He refers to government members who have incited racism and violence in the past against non Malays. He cites Najib Razak, the leader of the United Malays National Organisation (UMNO) who became Prime Minister in 2009. In 1988, Najib Razak was UMNO Youth President and raised a dagger at a political meeting, threatening to bathe it in Chinese blood. The appellant says he can have no confidence in government leaders.

[29] The appellant points to the racial riots of 1969 when Malays “went on the rampage and killed Chinese” as another reason for his fear that history will repeat itself and ‘Chinese blood’ will be spilled again in Malaysia. He has no way of “telling the future” but believes that all the instances outlined by him are proof that if racial riots or confrontation occurs, he may suffer serious harm and the government cannot protect him.

[30] He believes he will not be able to access meaningful protection because of the deterioration in human and political rights in Malaysia.

Documentary Evidence

[31] The Tribunal and the appellant have been provided with the files of the Refugee Status Branch, including copies of all documents submitted by the appellant at first instance.

[32] On appeal and also in support of his protection claim the appellant relied on the information which he had already supplied and also provided:

- (a) document attached to his letter dated 3 December 2010 entitled “Malaysia supports Iran as both are Muslim/Islamic countries”;
- (b) copy of an article from the Good News magazine which highlights the address of Iranian President Ahmadinejad to the United Nations on 29 September 2009.

[33] At the hearing the appellant provided the original of his passport for perusal by the Tribunal, which was subsequently returned to him.

[34] Since the hearing, the Tribunal has received from the appellant:

- (a) copy of his birth certificate;
- (b) copy of a summary of bombings and acts of vandalism of twelve religious sites in Malaysia since 8 January 2010.

THE REFUGEE CONVENTION – THE ISSUES

[35] 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.”

[36] 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 CLAIM TO REFUGEE STATUS

[37] Before considering the issues raised by the Convention, however, it is necessary to address the credibility of the appellant’s account. The appellant is accepted as a credible witness. He was open and frank in all of his answers. His evidence was broadly consistent with previous evidence he had given to the RSB.

[38] It is accepted that the appellant is a Chinese Christian from Malaysia, who has suffered the incidents of discrimination that he has indicated. His claim will be assessed against this background.

Objectively, on the Facts as Found, is there a Real Chance of the Appellant Being Persecuted if Returned to Malaysia?

[39] “Being persecuted” comprises two elements – serious harm and the failure of state protection. See *Refugee Appeal No 71427/99* (16 August 2000) at [67]. Further, the appropriate standard for persecution is a sustained or systemic violation of core human rights. See in this regard J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) p108 and *Refugee Appeal No 2039/93* (12 February 1996).

[40] In *Refugee Appeal No 76512* (22 June 2010), *Refugee Appeal No 76513* (24 June 2010) and *Refugee Appeal No 76156* (14 January 2008), the RSAA examined issues of discrimination in the refugee context.

[41] In *Refugee Appeal No 76156* at [23]-[24], the RSAA relevantly noted that:

“[23] In refugee law, persecution has been defined as the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection; Hathaway, *The Law of Refugee Status* (1991) 104 to 108, as [24] adopted in *Refugee Appeal No 2039/93* (12 February 1996) at [15].

[24] The Authority has previously noted that discrimination, in itself, is not sufficient to establish refugee status, nor does every breach of a claimant’s human rights amount to being persecuted; *Refugee Appeal No 71404/99* (29 October 1999) [65] to [67]. In that regard, the Refugee Convention was not intended to protect persons against all or any forms of harm, but confers protection where there is a real risk of serious harm that is inconsistent with the basic duty of protection owed by the state to its citizens.”

[42] In that same decision, at [26], it was found that:

“[26] The focus of the Refugee Convention is a prospective one, looking forward at risks that may be encountered by an individual applicant on return.”

[43] In short, discrimination, in itself, is not sufficient to establish refugee status. It is important to consider country information applied to the facts as found, in respect to the appellant.

Country information

[44] The appellant adduced a substantial quantity of country information to the RSB in addition to the information which he provided to the Tribunal in support of his claims. It has all been read and considered. This information largely comprises news clippings, articles and writings of individuals, particularly RPK to whom he referred in his evidence.

[45] The Tribunal has also considered the United States Department of State *Country Reports on Human Rights Practices for 2009: Malaysia* (March 2010) (“the DOS report”) and the United States Department of State *International Religious Freedom Report: Malaysia* (November 2010).

[46] Malaysia is a federal constitutional monarchy, with a multiparty parliamentary system of government. Elections are regarded by observers as generally transparent, the March 2008 elections showing a significant gain by opposition parties. The majority of the population of 28.3 million is Muslim. The constitution defines ethnic Malays as Muslim and Islam is the religion of the federation. Non-Muslims, who constitute approximately 40 per cent of the population, include Christian, Buddhist, Hindu and Sikh communities.

[47] Whilst the Malaysian government generally respected the human rights of its citizens; there were problems in some areas, notably, police abuse of detainees, use of arbitrary arrest and detention using the Internal Security Act and three other statutes that allow detention without trial, and persistent questions about the impartiality and independence of the judiciary. The government continued to pursue the prosecution of a prominent opposition leader and also arrested other opposition leaders, journalists, and internet bloggers for political reasons. In terms of religion and ethnicity, the government overtly promoted and protected Islamic interests at the expense of other religions, including in the allocation of funding for places of worship, and undertook extensive preferential plans, permitted under law and policy, in favour of ethnic Malays or “bumiputras”, who are generally Muslim. Generally, however, non-Muslims are free to practise their religion with few restrictions. Businesses were subject to race based requirements that limited employment and other economic opportunities for “non bumiputra” citizens.

[48] The appellant referred in his evidence to numerous instances of individuals being detained, or physically harmed, or otherwise restricted by the authorities. The incidents relating to the treatment of Anwar Ibrahim and RPK being particularly highlighted; and the High Court ruling against the government ban on non-Muslims’ use of “Allah”. Following this ruling, a number of attacks were made against churches and temples and there have been protests by certain Islamic groups. The BBC has also reported on this issue: "Churches attacked in Kuala Lumpur" *BBC News* (8 January 2010) www.bbc.co.uk:

“The Kuala Lumpur High Court struck down the three-year old ban on non Muslims using of the word Allah...”

Some major Muslim organisations, including the Islamic political party, PAS, have agreed with the court, saying other Abrahamic religions – Christianity and Judaism – may use the word...

But some vocal groups, including the Muslim Youth Movement, Abim, have cast the use of the word Allah as a surreptitious effort on the part of Christians to try to seduce Muslims away from Islam...

The government has appealed against the court verdict and the High Court has suspended the decision's implementation until the appeal is heard."

[49] Some of the news clippings provided by the appellant referred to the church bombings and the attempts by the government and community leaders to hold inter-faith dialogues. A news clipping referred to the investigations undertaken by the authorities; "Police: leave it to us" *The Star* (11 January 2010):

"Deputy Inspector General of Police Tan Sri Ismail Omar said the two arson attacks and vandalism were being investigated thoroughly. 'I assure the public that we have increased our presence at churches and mosques as well as other places of worship and will do everything within our means to bring to book those responsible'."

[50] Another news clipping provided by the appellant referred to one hundred and thirty Muslim non-governmental groups offering help in preventing further attacks on churches; see "Muslim NGOS offer help to protect Churches" *The Star* (11 January 2010).

[51] The incidents highlighted by the appellant and numerous similar instances are consistent with what is understood from the country information – that while Malaysia is a democratic society, the authorities do act to restrict personal freedoms where those are considered inconsistent with the goals of the government to promote Islam and to protect and positively promote the interests of the ethnic Malays. Further, state agencies do sometimes exceed their authority.

[52] It is against this overview of Malaysia that any risk of serious harm to the appellant must be assessed.

[53] The RSAA consistently adopted the approach in the decision of *Chan v Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted will be well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. This entails an objective assessment as to whether there is a real or substantial basis for the anticipation of being persecuted. Mere speculation will not suffice.

Application of the country information to the facts as found

[54] Despite the reported discrimination towards non-Malays in Malaysia, it is not established that the appellant is at risk of a sustained or systemic denial of basic or core human rights. In making this finding, the Tribunal observes that, prior to his departure from Malaysia, the appellant had been in employment (albeit not in the government sector) and had up-skilled in the area of financial planning. Apart from the time of his studies in the United Kingdom, he has lived and worked in districts where there have been predominantly non-Malay communities. He gave evidence that he had been discriminated against in his schooling (by way of verbal harassment); and when he travelled to certain areas in the course of his employment by the jam manufacturing company (by way of racial slurs); and in his attempts to find employment in the public sector. However, he conceded that he was able to find employment because of his qualifications and experience when he competed against non-Malays for employment in foreign owned companies.

[55] There is no other evidence before the Tribunal which would support a finding that the appellant faces a sustained or systemic denial of basic or core human rights in Malaysia to the real chance threshold.

[56] The appellant is not a person of any interest to the authorities. Unlike the persons to whom the appellant has referred in his evidence, he has not been involved in politics or critical of the government. It is not overlooked that he participated in a mass vigil for RPK and sent an email of support to the daughter of his friend who was detained and subsequently sentenced on trumped up charges of corruption. But these acts by the appellant himself are essentially passive. Nor is there any evidence that the Malaysian authorities are aware of his actions. The appellant's evidence is that he has always followed the advice of his father not to enter debate or be confrontational on issues of race or religion.

[57] The appellant was candid in his speculation that the damage to the envelope containing news clippings sent to him by his brother had been caused by the authorities and was not simply an incident of routine damage in the post. When asked by the Tribunal why the authorities would have suspicions about him, he did not have any specific reason to think that they would. He suspected that the authorities opened mail addressed to people who had left Malaysia who have openly criticised the government but has no evidence that they do. Even if the appellant is correct in his speculation that the postal authorities tampered with his mail, there has been no repercussion either for him, his brother or his son.

Indeed, the appellant's evidence is that both his son and his brother have not experienced any difficulties at all. In short, the Tribunal finds the evidence indicates that the damage to the envelope was nothing more than an innocent mishap in the post. Any suggestion of specific interest by the Malaysian authorities in the appellant or his family is highly speculative.

[58] In terms of his religious beliefs, the appellant is best described as a private Christian worshipper who neither proselytises nor draws attention to himself. There are no significant restrictions placed on the observance of private Christian worship in Malaysia. It is accepted that there are instances of state-condoned discrimination against Christians generally, such as disproportionately low funding, restrictions against proselytising to Muslims, the promotion of Islam in the education system and policies which favour Muslims in employment. Such discrimination is egregious and regrettable but it does not constitute persecution in the context of the Refugee Convention. Whilst there have been bombings of churches and temples, the information provided by the appellant shows that the authorities are conducting investigations into them and seeking to prevent them. The appellant is not at any risk of serious harm beyond the remote and speculative for reasons of his Christianity.

[59] As to his Chinese ethnicity, there is no evidence to suggest that it puts the appellant at a real chance of serious harm. Granted, there is positive discrimination in favour of the ethnic Malay population, but the country information does not disclose state practices against the vast ethnic Chinese population which could remotely be called "serious harm". It is accepted that there were riots in 1969 in which Chinese were killed in random acts of violence. However, it is speculative that those riots may occur in the future and that the appellant may be killed or seriously harmed as a result. At most, he might continue to experience discrimination of the kind which he has suffered in the past. However, he has successfully adopted particular strategies for his life which minimises such discrimination. Such prejudice which he has experienced is unfortunate and is to be denounced. It is not, however, serious harm.

[60] Even assessed on the totality of his profile any future risk of serious harm to the appellant in Malaysia is speculative only. The chance of it occurring in the future is no more than remote. The Tribunal is satisfied that the appellant does not have a well-founded fear of being persecuted in Malaysia.

CONCLUSION ON CLAIM TO REFUGEE STATUS

[61] For the foregoing reasons, the Authority finds the appellant is not a refugee within the meaning of Article 1A (2) of the Convention. Refugee status is declined.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[62] 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.”

[63] The issue for the Tribunal is whether there are substantial grounds for believing that the appellant would be in danger of being subjected to torture if deported from New Zealand to Malaysia.

ASSESSMENT OF THE CLAIM UNDER THE CONVENTION AGAINST TORTURE

[64] 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.”

[65] The evidence before the Tribunal does not permit a finding different to that in respect of the Refugee Convention.

[66] On the basis of the evidence, including the country information, 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 deported from New Zealand.

CONCLUSION ON CLAIM UNDER CONVENTION AGAINST TORTURE

[67] The Convention against Torture has no application to the appellant's circumstances and so his claim for protection under this limb must fail.

THE ICCPR – THE ISSUES

[68] 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."

[69] Section 131(6) provides that "cruel treatment" means cruel, inhuman or degrading treatment or punishment.

[70] The issue arising from these two subsections of the Act is whether, objectively, on the facts as found, there are substantial grounds for believing that the appellant would be in danger of being subjected to arbitrary deprivation or cruel treatment if deported to the appellant's country of nationality or a nominated third country.

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.

[72] Again, having regard to the analysis and reasoning set out in relation to the claim to refugee status, including the country information and the jurisprudence of the RSAA explained above, the Tribunal finds that the appellant has not established substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

[73] The risks to which the appellant refers are found to be only at the level of remote or speculative risks. It cannot be said that he is in danger of cruel, inhuman or degrading treatment.

CONCLUSION ON CLAIM UNDER ICCPR

[74] The appellant is not, therefore, a person requiring protection under the ICCPR and it follows that he is not a protected person within the meaning of section 130 (1) of the Act.

CONCLUSION

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

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

[76] The appeal is dismissed.

"D L Henare"
D L Henare
Member

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Member