REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 70165/96

J M AND S J

AT AUCKLAND

Before:	C Parker (Chairperson) A Wang Heed (UNHCR) (Member)
Counsel for Appellant:	S Laurent
Representative for NZIS:	No Appearance
Date of Hearing:	6 November 1996
Date of Decision:	13 February 1997

DECISION

This is an appeal against the decision of the Refugee Status Branch (RSB) of the New Zealand Immigration Service declining the grant of refugee status to the appellants who are Malaysian citizens.

INTRODUCTION

Following the hearing the appellants' counsel was handed a copy of the Authority's decision in Refugee Appeal No. 659/92 Re PVS (20 December 1994) and given ten working days within which to make submissions. Counsel made further submissions by letter dated 6 December 1996 and these have been taken into account by the Authority in reaching its decision.

THE APPELLANTS' CASE

JM is a 48 year old man and SJ is a 36 year old woman. They are both of Indian ethnicity and were born in Malaysia. They were married on 28 January 1984 and have three children born in 1984, 1988 and 1993. The children were born in Malaysia and are included in this application. The family has been Catholic for several generations.

The appellants claimed to have a fear of persecution on the basis of difficulties they encountered in securing a Christian education for their children, in obtaining appropriate employment and religious intolerance. In support of their claim the appellant JM described his employment history in some detail.

JM left school in December 1967 having attended a Catholic school, in JB, Malaysia. In 1968 he went to India to study automobile engineering. He completed the two year course in 1970 and obtained a diploma but had some difficulty finding work in the field of automobile engineering upon his return to Malaysia. His Indian qualification was not recognised in Malaysia but he eventually found work as an unpaid apprentice in JB as well as some casual, paid work. However, after two years he decided to work overseas, and in 1973 left for Austria. He worked for a Catholic mission organisation and also in a textile engineering shop as a machine operator. He returned to Malaysia before his permit expired.

In 1974 the appellant JM left Austria for London to try and find employment in the hotel industry. After working in a small hotel he found work in a large, 'four star' hotel where he gained good experience for approximately one year. He returned to Malaysia in mid 1976 as his father was sick and had asked him to return. His work permit was also about to expire. He spent a few months in Austria, working, on his way home to Malaysia.

Upon his return the appellant JM attempted to pursue his career in the hotel industry and approached five or six large hotels in Kuala Lumpur and JB (Malaysia) and in Singapore. He had several interviews but his applications were all unsuccessful. He was told that there were no vacancies but the appellant believes that the real explanation for his failure to obtain employment was that the key personnel in large hotels were Muslim Malays who preferred to employ workers from their own ethnic and religious group. Between 1976 and 1978 the

appellant JM supported himself by doing casual work including painting, carpentry etc. In 1978 he went to work in a large hotel in Dubai as a receptionist. He remained in that position for two years returning to Malaysia in 1980.

From 1980 to 1981 the appellant JM again attempted to find work in a large, preferably four or five star hotel in Malaysia. In JB, the appellant's home town, however, there was only one such hotel. He contacted that hotel and also a few hotels in Kuala Lumpur. His written applications were unsuccessful and he was told that there were no vacancies. He made two or three telephone calls or visits to some of these hotels but was still unsuccessful. However, throughout this period he supported himself by working in his mother's catering business and believed that the experience he gained in this business would help find hotel work. This was a successful catering business with three full-time employees, including the appellant. From 1981 to 1982, the appellant JM completed a course in reception and book-keeping in India which he hoped would increase his chances of finding work in the hotel industry. He received a certificate at the end of the course which was produced to the Authority during the hearing. He returned to Malaysia in 1982 and found a position in a large hotel in his home town JB, where he was hired by an Indian manager. During this employment the appellant was promoted to the position of Front Office Supervisor.

In 1984 the appellants married and JM resigned from his position in JB and moved to Kuala Lumpur. Unfortunately, the hotel industry was feeling the effects of a general recession but JM quickly secured a position as a sales representative. He remained in the sales area until he stopped work in January 1994 (prior to coming to New Zealand) with only one months' unemployment in 1987 and one weeks' unemployment in 1992. The appellants had moved to P in 1990 and in 1992, when asked to relocate by the company, the appellants refused and JM resigned from his position. However, within a week he had found a new job in P and was immediately promoted to the position of sales manager. This was the best position the appellant JM had ever secured, with a higher salary, a company vehicle and his own sales team.

As far as the appellants' difficulties in securing a religious education for their children are concerned, the appellants described events which occurred after a new principal joined the school which their eldest child, VM, (now aged 12) attended in P. In approximately 1993 the Catholic principal of this school left due to ill-health and a Muslim principal took over. She effected a number of changes

at the school about which the appellants were unhappy. These changes included taking the crucifix from the roof of the chapel. Foreign nuns teaching at the school were sent home and only a few Chinese (local) nuns remained. More Muslim and fewer Christian students attended the school and the appellants' elder daughter complained of being teased by Muslim students and became very unhappy. The Principal stopped holding Christian education classes which had previously been held for three hours per week in the school's chapel. However, the appellants took their daughters to church every Sunday and taught them to say prayers at home. Students were encouraged to learn Arabic script but this was not compulsory and the appellants' daughter did her homework instead during these classes.

The appellants' younger daughter had registered in about 1991 for a place at this convent school and the appellants had been assured that she would be able to attend when she was old enough. However, in December 1993 the appellants received a letter saying that their younger daughter could not attend the convent school and would have to go to school closest to their home. The appellants did not want her to attend this school as it was not a Catholic school but were unable to persuade the school to accept their younger daughter. They were told that she could attend a private Catholic school but the appellants could not afford the fees, which were double those of state schools.

The appellants perceived that there was an "Islamisization" process underway in Malaysia which was of concern to them as Indian Christians. The appellant gave examples of this, such as the replacement of bibles in the hotel rooms by the Koran and the replacement of the 'Red Cross' symbol on ambulances by the 'Red Crescent'. Church services are normally now conducted in the Malay language (apart from monthly services in other languages such as English, Tamil or Chinese). The appellants were concerned that the Muslim religion was achieving a higher profile - for example, Islamic prayers were on television daily and there were restrictions and delays upon new Christian churches being built. The appellant JM cited the example of a friend of his who was a married Christian and who was caught in Kalwaz (close embrace) with a Muslim woman and was forced to marry her, and renounce his first family. The appellant JS knew of a Catholic woman who was caught talking to a Malay man on the street and had been forced to marry him.

The appellant also referred to the fact that "Bumiputra" (indigenous Malay) are given preferential treatment in many situations - for example, they are given 10%

discounts on house prices. The appellants remarked that many non-Muslims married Muslims and indeed were encouraged to do so, in order to achieve a better way of life. The appellants described the anguish of a Christian friend who discovered her young son secretly reciting Islamic prayers in his room and related to the Authority their fear that their children would be indoctrinated with Islamic ideology and lured away from the Christian fold.

The appellants complained of experiencing verbal racist abuse which is used against Indians. The appellant JM also described several occasions on which he felt that people were unhelpful towards him because he wore a crucifix around his neck.

As a result of their concerns about the increasing predominance of Islam which they perceived as a threat to them as Indian Catholics in modern-day Malaysia and more particularly the difficulties that they were encountering with their children's education, the appellants decided to move to a Christian country. Accordingly, the appellant JM resigned from his position in P in about January 1994 and the whole family moved to live with the appellant SJ's mother in K. The appellants arrived in New Zealand on 11 May 1995 and applied for refugee status on 19 June 1995. Their application was refused on 3 July 1996. Since arriving in New Zealand the family have attended church regularly and their children go to a Catholic school, and are very happy there. The appellant JM has applied for many jobs but has been unable to find work apart from part-time casual work with a commercial cleaning company which lasted for a period of about six months.

In addition to hearing evidence from both appellants the Authority also had the opportunity of hearing evidence from DJ, the brother of SJ. DJ left Malaysia in 1990 and emigrated to Australia where he now resides. DJ worked as a plumber in Malaysia and although his business was good he felt Indians were treated as 'second class citizens' by comparison with Malays. DJ left Malaysia, however, largely due to difficulties he encountered in securing a Catholic education for his son. He explained that his son was refused a place at a Catholic school and had to attend the local school which was Muslim. There was no Catholic religious education at this school so DJ took his son to Sunday School at the Catholic church he attended. DJ explained that he became concerned when his son started to join in with the Muslim prayers broadcast daily on television. He also confirmed the appellants' evidence about students being encouraged to learn arabic script at school. DJ said that this was justified on the basis that road signs

would all be in Arabic in future but he suspected it was, in fact, to enable everyone to read the Koran. DJ confirmed the appellants evidence concerning increasing numbers of Muslim students at previously Catholic schools and thought that this was because students were being made to attend their local school rather than the school of their choice. He also remarked that standards of education and discipline at “Catholic” schools were regarded as high and that this attracted many Muslim students.

The appellant’s were afraid that they would not be able to freely choose the religion of their children and adequately shield them from the influences of Islam if they were forced to return. The appellants submitted that if this matter alone did not constitute persecution on religious grounds then the cumulative effect of the various forms of discrimination suffered and likely to suffered by them, as Indian Christians, amounted to persecution sufficient to justify the grant of refugee status.

THE ISSUES

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."

In terms of Refugee Appeal No. 70074/96 Re ELLM (17 September 1996), the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

2. If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

The Authority found both appellants and the witness, DJ, to be credible. The appellants gave a frank and detailed account of their experiences in Malaysia and no attempt appears to have been made to exaggerate or embellish their account.

The Authority's focus, in considering whether there is a real chance that the appellants will face persecution upon their return, has been upon whether the appellants' claims concerning difficulties they have encountered in securing a Christian education for their children, in obtaining appropriate employment and in practising their religion, amount to persecution.

RELIGION

The Authority has considered country information in relation to the religious education of children in Malaysia which confirms that it is not the official policy of the state to convert minors to Islam. The Malaysian Constitution "gives parents the right to determine the religion of their children". In 1989 the Selangor state government purported to pass a law allowing forcible conversion of children to Islam upon reaching puberty (the Islamic age of maturity). This legislation was struck down by the Malaysian Supreme Court, which affirmed the right of parents to decide the religion of their children, up to the age of 18 (DIRB Response to Information Request MYS 11596, 17 September 1992).

The Authority has considered the appellants' concerns about the changes which occurred at their daughter's convent school in 1993 when the school became more secular. Christian religious education for students is no longer available at the school but no restrictions have been placed upon the appellants' right to secure religious instruction for their children at home and at church. The Authority notes, in this regard, that instruction in the Muslim faith was never forced upon Christian students at the appellant's daughter's school. Students were encouraged to learn Arabic script but they were not obliged to do so and the appellants' daughter did her homework instead of attending these classes. The appellants' daughter was teased by Muslim students but unfortunately teasing, and even bullying, occurs in schools almost everywhere.

The Authority therefore finds that the appellants are able to secure religious instruction for their daughters outside school and notes that in many countries

state schools are secular. The appellants were unable to afford to send their children to a private Christian school but this, clearly, cannot amount to persecution.

The appellants are concerned that their children will become influenced by and perhaps even interested in Islam as a result of both their education and the more general changes they have observed in Malaysian society such as the broadcasting of Muslim prayers on television and the increasing prevalence of the Malay language. Counsel has submitted that if the appellants' children were to convert to Islam as a result of these influences this could pose a threat to the unity of the family and therefore contravene principles universally asserted to be fundamental to human rights. There was no evidence before the Authority to suggest that the appellants' children might convert to Islam and such a suggestion is purely speculative. The Authority notes, however, that parents world-wide are faced with outside influences which they perceive as 'undesirable' and from which they wish to protect their children. The Authority accepts that the appellants are genuinely concerned about their children's future but the fact that they have taken the drastic step of removing them to a distant land to escape the influence of Islam cannot elevate their concerns to the level of "persecution" on religious grounds.

As far as the right of the appellants themselves to practise their religion the Authority accepts that there are some, minor restrictions placed on the Christian community. The US Department Country Reports of Human Rights Practices (1995) states that:

> "Religious minorities, which include large Hindu, Buddhist, Sikh and Christian communities generally are permitted to worship freely but are subject to some restrictions."

Hathaway says that "persecution may be defined as the sustained or systematic violation of basic human rights, demonstrative of a failure of state protection". (Hathaway The Law of Refugee Status [Butterworths Canada 1991] pp 104-5). The Authority has considered persecution on the grounds of religion in Refugee Appeal No. 659/92 Re PVS (20 December 1994) where the appellant, a Malaysian national, complained inter alia, of persecution on the grounds of religion, he being a Muslim who had converted to Christianity. He complained, in particular, that a number of restrictions were placed upon his ability to observe and preach his religion.

The Authority referred to Article 18(3) of the International Covenant on Civil and Political Rights which provides:

> "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

The Authority held that "A breach of the rights contained in Article 18 is not persecution. See the references in the cases of Refugee Appeal No 37/91 Re MAU (13 May 1992), Refugee Appeal No. 10/92 Re MI (12 July 1992) and Refugee Appeal No. 84/92 Re MI (12 November 1992). A person needs to be prevented from worshipping to warrant a claim of persecution."

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1988) at paragraph 72 provides:

> "Persecution for reasons of religion may assume various forms, eg prohibition of membership of a religious community, of worship in private or in public, of religious instruction or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community".

The appellants did not complain of being prevented from worshipping either in private or in public, but instead referred to delays and restrictions upon the building of churches in some areas and that church services are increasingly (although not exclusively) held in Malay. We understand that the appellants, as devout Catholics, would prefer to live in a Christian country, but the limited restrictions placed upon their right to practise their religion fall far short of a "sustained or systematic violation of basic human rights, demonstrative of a failure of state protection" (Hathaway, op cit) and therefore cannot amount to persecution.

The Authority has also considered the appellants' concerns about the process of Islamization, (exemplified by the replacement of the Bible by the Koran in hotel rooms) and the growing use of the Malay language. The Authority has considered these matters but finds that they are of a general nature and do not impact upon the appellants personally.

The appellants were also concerned that as Christians of Indian ethnic origin in Malaysian society they were being treated as "second class citizens". The appellants complained of racial abuse and negative attitudes as a result of the appellant JM wearing a crucifix. The Authority has some sympathy for the appellants and accepts that there is a real chance that they will be subjected to

further treatment of this nature if they return to Malaysia but does not find that these matters are sufficiently serious to amount to persecution.

EMPLOYMENT

The appellants have claimed that the appellant JM, was discriminated against in the field of employment as a result of both his Indian origins and being Christian.

Hathaway has stated that:

> "…the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter, or health care, will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment and hence unquestionably constitute persecution."
> (Hathaway, The Law of Refugee Status [Butterworths Canada 1991]).

This view was endorsed by the Authority in Refugee Appeal No. 732/92 Re CZZ (5 August 1994), who also held that "a substantial impairment of one's ability to earn a living, coupled with other discriminatory factors could, depending on the circumstances, constitute persecution".

The Authority accepts that the appellant JM has not always been able to obtain the employment of his choice. However, this has rarely been the result of racial or religious discrimination. At times matters such as the appellant's lack of experience have meant that he has not been successful and some stages in his life the appellant opted to look for work in a narrow field of employment which limited the opportunities open to him. The appellant himself blamed a general economic recession for his inability to find employment in the hotel industry when he moved to Kuala Lumpur in 1984. On a number of occasions, the appellant chose to resign from positions in order to advance his career or for personal reasons and was never dismissed for reasons connected with his race or religion.

However, the Authority accepts that the appellant was most successful in obtaining the employment of his choice through personal Indian contacts or when the employer was Indian. We also accept his evidence that Malay Muslims, on occasions, preferred to employ their own kind, and that the appellant has been denied work opportunities as a result of discrimination on the grounds of race and/or religion.

However, the Authority notes that the appellant, JM, has generally been able to secure some gainful employment, particularly in recent years when he was unemployed for just five weeks between 1984 and 1994. The Authority further notes that the appellant had been quite successful developing a career in sales, so that by the time he left Malaysia he had his own sales team, a company vehicle and higher salary.

The Authority, therefore, finds that whilst the appellant has suffered some discrimination on the grounds of race and/or religion with regard to employment, this does not amount to persecution. In reaching this conclusion the Authority has had regard to paragraph 54 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1988), which provides:

> "Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution".

Discrimination may, however, amount to persecution, where measures of discrimination lead to

> "consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities".

The Authority does not find the discrimination which the appellant suffered led to consequences of a substantially prejudicial nature. The appellant's right to work was never seriously restricted and we cannot, therefore, even when considering all measures of discrimination cumulatively, find that the appellant has experienced persecution.

CONCLUSION

The Authority concludes that the appellants have not suffered persecution. The Authority therefore finds that the appellants are not refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

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Chairperson