

AT AUCKLAND

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| Appellant: | AB (Mexico) |
| Before: | A R Mackey (Chair) D L Henare (Member) |
| Counsel for the Appellant: | C Curtis |
| Counsel for the Respondent: | No Appearance |
| Date of Hearing: | 8 & 9 August and 12 October 2011 |
| Date of Decision: | 24 November 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, declining to grant either refugee status or protected person status to the appellant, a national of Mexico who claims he is of native ethnicity and Nahua tribal background.

[2] The central issue is whether the appellant, who because of his indigenous ethnicity, became a human rights activist involved in the Zapatistas movement (otherwise known as the Zapatista Liberation Army or EZLN) presents credible evidence that establishes there is a real chance of him being persecuted if he returns to Mexico. He claims the persecution will be either at the hands of supporters of a major drug cartel in Mexico and/or members of the police or army in Mexico who support, through bribery and corruption, the drug cartels and their leaders.

[3] For the reasons that follow, the Tribunal is satisfied the appellant should be recognised as a refugee.

[4] This appellant also lodged a humanitarian appeal, *AC (Mexico)* [2011] NZIPT 500329. A brief decision dismissing the humanitarian appeal is published immediately following this decision.

[5] As the same factual matrix is relied upon as the basis for both the refugee and the protected person appeals, it is appropriate to set out the factual background in a statement of the appellant's case that follows.

Corroborative Evidence

[6] At the conclusion of the second day of hearing, on 9 August 2011, the appellant was given leave to produce a forensic evaluation report that was being prepared following a physical and psychological examination carried out on 21 June 2011 in Auckland. The report, by Thomas Wenzel, Professor of Psychiatry at the Medical University of Vienna, Austria, and Sebnen Korur Fincanci, Professor of Forensic Medicine, Istanbul University, Istanbul Faculty of Medicine, Turkey, was completed by the two professors on 10 October 2011 and submitted to the Tribunal at the commencement of the third day of hearing. The report by the two specialists followed the guidelines of the United Nations "Istanbul Protocol" forensic investigation of victims of torture. The two professors were in New Zealand in June 2011, acting in their capacity as medical and psychiatric experts with the International Rehabilitation Council for Trauma Victims (FEAT). It is understood that the visit of the two professors was primarily for teaching purposes but some clinical examination work was carried out, including the interview and examination of this appellant. The report from Wenzel and Fincanci, dated 10 October 2011, has been taken into account by the Tribunal.

[7] At the end of the third day of hearing, leave was given for the appellant to provide any corroborative evidence in respect of the claimed detention of a Mexican immigration officer (AA) whom the appellant claimed assisted him to pass through the Mexico City airport. Some details from a website "Justice in Mexico.org", dated 27 July 2009, were provided to the Tribunal on 17 October 2011. This material has also been taken into account by the Tribunal.

THE APPELLANT'S CASE

[8] The account which follows is a brief summary of a long, complex and, at times, confusing account given by the appellant during the three days of the appeal hearing.

[9] The appellant was born in 1982 in Chiapas state, Mexico. Both his parents were of indigenous Nahua ethnicity. They were peasant farmers. All his family had supported the rights of indigenous people in Mexico. Before the appellant was born, his father was killed by the Mexican army during a raid on Zapatista groups in Chiapas.

[10] Within three months of his birth, his mother disappeared, leaving him with his paternal grandparents. He was cared for by them and various other relatives and family friends. In Z, a small village where he lived, the majority of the people spoke the Nahuatl language as well as Mexican Spanish, although he himself never became a fluent Nahuatl speaker. His understanding was that the Nahua people were originally a Mayan people. They had been dispersed around Mexico since the time of colonisation and were discriminated against by the predominant Mexican population.

[11] The appellant started school at the age of approximately eight. He was able to receive some basic schooling at various schools in the Chiapas area over the period 1990 to 1995. In 1994, when living and working on communal/family land, the appellant witnessed a raid by the Mexican army who were trying to clear the indigenous people from the communal land. He heard gunshots and saw many people, including his uncle, being chased and shot at by the soldiers. The appellant was able to hide in bushes and tall vegetation. After several hours in hiding, he saw some community members come out into an open area where he had last seen his uncle. His uncle was found shot dead. The appellant, and other members of his community, were unable to return to their homes. They were told that the soldiers had burned them down. Several bodies, including that of his uncle, were taken into caves in the hills where they were buried. The appellant understood that his grandparents, a brother and sister had been detained at the family home. He never saw them again and understood that they may have been shot.

[12] After that, he lived with family friends in camps and caves for a period of about six months. They were supported by the Zapatistas. The appellant acted as a sort of messenger and “spy” for their activities. He was directed by elders to travel around several states in central Mexico. His job was to deliver messages, money, clothes and medicine. At this time there were armed hostilities going on between the Mexican army and the Zapatistas. At times he was stopped by the Mexican authorities and the goods, clothes and medicines that he was delivering

were stolen from him. He had some basic identification documents but on occasions these were taken by the authorities as well.

[13] At the age of approximately 15 years, he decided that he needed to get new direction in his life and commenced work in a restaurant while still attending some school classes. After a short time, he moved to Tijuana, near the United States border, with the objective of trying to learn English. He lived and worked with Zapatista supporters for a period of about three years in the Tijuana area.

[14] At the age of approximately 18, the appellant decided to return to Chiapas and find out what had happened to his relatives and the family/communal land. He found that the land was unoccupied but controlled by the government. It had been used for military training. While there were no Zapatistas living in his home area, they did occupy enclaves in various other parts of Chiapas. He was able to stay with a group of three friends he met while he conducted his search for family members. Unfortunately, he was unable to get information or find anyone. When he realised there was nothing for him in Chiapas, he decided, primarily at the direction of leaders of the Zapatista to move to Veracruz state to be an activist for groups of indigenous people who were occupying communal land in the district of Y. By that time, the Zapatista had formed itself into an alliance known as the EZLN.

[15] Following the directions of the EZLN, he promoted himself to the local indigenous communities in rural areas. Often, using interpreters, he explained their rights to them, getting them together by holding barbecues and other gatherings. The Y area near Veracruz was one of the few areas in Mexico where there was a reasonable amount of customary land held by indigenous communities. The appellant, as a motivator of indigenous peoples, encouraged them not to sell their customary land to private enterprise or the government officials. This was a highly contentious issue at the time because the privatisation of indigenous customary land by the Mexican government was a precondition to Mexico joining the North American Free Trade Agreement (NAFTA).

[16] The appellant's role with the EZLN involved him in going back and forth to Mexico City to get instructions, funding and documents from the leaders of EZLN and to report on the work that he was doing.

[17] He started to work with two colleagues, BB and CC, who worked for an organisation known as the FPDT, involved in similar Zapatista and indigenous peoples' promotion activities in the nearby X area.

[18] When, in 2004, his activities became difficult and dangerous in the Veracruz area due to army and police activities to stamp out the activities of the EZLN, the appellant moved to X. He stayed on a farm with BB and CC. He continued his support of indigenous peoples' rights and wrote articles and attended meetings to promote their causes. He became a foundation member of "The Other Campaign" which was an initiative, at the political level, to promote the rights of indigenous people. Over all of this time, he was undertaking some farming work and doing some on-line university/technology courses in agriculture and farming. He never actually completed any of these courses. Later, by payment of a bribe to a university in W, he was able to obtain a diploma in about 2006. (He later used this diploma as part of his skilled migration application in New Zealand made before he lodged this refugee claim.)

Arrests and Detentions

[19] In 2006, the appellant joined a group of protesters in the streets of V. They were protesting against the government decision to evict stallholders from a local market so that a "Wal-Mart" store (the United States-owned supermarket chain) could be erected there. In the protest, he was arrested by the police when he and a group of some 50 other people formed a chain to try and stop the police destroying the stalls in the market. Eventually the police forced their way through the chain and arrested the protesters and stallholders. The appellant was arrested when he tried to run away from the "federal police". The police were using machine guns and other weapons which ultimately led to the death of some protestors. The whole incident went on for several hours.

[20] The appellant, and a number of other people, were taken away in vans and other vehicles to a building in V where they were questioned and their details were recorded. After an initial interrogation, which took several hours, he was then taken to a small room where he was handcuffed to a chair and a hood was put over his head. His feet were bound in metal ankle braces and he was tied up with a chain. He was left in this situation while a number of questions were put to him, particularly about DD, who was a well-known female commander of the EZLN. There were also questions about the Zapatistas and the names of others involved in the protest. Under torture, he told them a lot of the things. He was hit, kicked and beaten with sticks on his hands and feet. He also received bleeding wounds on his thumbs, the palms of his hands and to his temples. These were done with a knife. He stayed conscious although he lost a lot of blood.

[21] After several hours of such treatment, he and a number of other protestors were placed in a filthy van which was covered with blood and excrement. He was unsure where he was taken but the van appeared to travel for approximately 40 minutes. Occasionally it stopped and a person was taken off and then they continued the journey. The police were trying to intimidate them, stating that they were being taken into the jungle where they would be left for the wild animals. Eventually, he was let out of the van in a jungle area. He was told that the next time he would be killed by the police. During this time, the police were addressing him by his correct name. A policeman put a gun to his head and pulled the trigger. However, there were no bullets in the gun. He was abused and told that he was lucky he was not killed. The hood was taken off his head and he was told to run and not look back. He was not sure where he was; it was a forest-like area and it was night time. He walked and stumbled his way to a small ranch house where he saw lights, and a woman assisted him. With her help, he was taken by horseback to the nearest highway and, at a gas station, he was able to catch a bus which took him to Mexico City. It was not a great distance so he was able to pay for the ticket, using the small amount of money he had on him.

[22] Rather than return to X, the appellant remained in Mexico City. He lodged an official complaint to the National Human Rights Commission (CNDH) and reported his treatment in V to some journalists so that they could report the information.

[23] After making his signed complaint to the CNDH, however, he was told that there was not much they could do about it and they could not enforce any compliance with the human rights laws that were meant to be applicable in Mexico. They told him that as it was a complaint by one person, there would be no follow-up. He and some of his colleagues had been told by Amnesty International that they should make complaints as a group. However, he went alone although a group of people from the FPDT later did make a complaint.

Return to Y, Arrest and Detention in T

[24] After spending approximately a month in Mexico City, the appellant, after discussions with his colleagues from EZLN, decided he should return to assist the indigenous community in Veracruz/Y. He was able to maintain himself there through some small savings he had, assistance from the EZLN and from the community in Y. On his return, he started to investigate the killings of some

peasants by landlords and drug bosses when they had been attempting to evict the people from their communal land.

[25] In early 2006, in the area of U, near Y, a serious incident arose which ultimately led to the appellant's arrest and later torture and detention. This incident involved an attack by the police on a camp that had been built on the land which the appellant and the indigenous people were trying to occupy and retain. The appellant had been involved in trying to get a title to the land and to set up a new community on that land for communal use by indigenous people. The project was called: "The 14th of June". The attack was made by municipal police and gunmen operating under the instructions of landlords and drug bosses (who wanted the land to cultivate drugs). Initially, the appellant and his group were asked to leave quietly or otherwise force would be used. The appellant showed them the "title" to the land and said that they had a right to stay. He was laughed at and told to get into the "real world". Following this, the attackers started shooting in the air so the appellant and his group left any way they could. They tried to throw rocks at the policemen but ultimately there were far too many police and, although nobody was killed, many of his friends were injured. The appellant was arrested.

[26] The main drug cartel "bosses" in the area were a woman, EE, her husband and family. The appellant considered that the local civil police operated hand in hand with gunmen and other supporters of EE.

[27] After being detained by the police the appellant was handcuffed and taken to a house, the appellant assumed, was owned by EE or her associates. He was placed in a windowless room and told that an interrogator would come to see him. A policeman came alone and seriously abused him while he was handcuffed and in a defenceless position. He was initially beaten by the policeman and had a cattle prod put into his back until he remained stationary. The policeman told him he was gay and then proceeded to rape the appellant. The police officer told him not to tell anyone what had happened or he would never get out alive. After the rape, the officer left and other officers came into the room. They were smiling and clearly knew that the appellant had been sexually abused.

[28] A few hours later, a hood was put over the appellant's head and he was taken to another room where other officers started heckling and torturing him, asking about his name, family, address and criminal background. The appellant gave them most of the details. During this time, he suffered all kinds of abuse, including kicking, punching and having very bright lights placed in his eyes. He thought that this whole series of incidents took between five and seven hours.

[29] The appellant was then taken to a jail in T. He did not know the name of the specific jail, only that there were a number of jails in T. He was later told by some of his friends that the jail may have been called S, but he is not certain. His friend, BB, told him this had been the place where he had gone to visit the appellant while he was detained over a period of some six months.

[30] On the journey to the prison, the police stopped the vehicle on one occasion and asked him for a bribe for his release. The appellant said he had no money. The policemen, who were smoking marijuana at the time, became very angry, and one policeman hit him with a stick on the knee and another policeman grabbed him by the hair and started hitting him. They then grabbed him by the arms and legs and asked him again whether he was going to give them money or not. Ultimately, they threw him onto the gravel road. He landed on his elbow and broke his arm, to the extent that his bone was protruding through the flesh. He was in immense pain and lost consciousness for a while. The next thing he remembered was being in jail. At the jail he received no treatment for his arm but fortunately another inmate of the jail gave him some help and, when he was half asleep, moved his arm back into place by a very painful but quick movement. As a result of this, his arm was never correctly reset. The appellant provided evidence in the form of X-rays of the damage he claims was caused by this incident.

[31] There were some other detainees there, from the protest in Y, but the appellant was kept in solitary confinement so he could not communicate with them. During the whole time he was in the prison, he was physically and mentally abused and, during periods of interrogation, often given no food or no medication. On one occasion his head was put into a plastic bag that he thought was filled with marijuana smoke or some other drug. He considers this event has affected his mental capacity ever since.

[32] During the time the appellant was held at the T jail, the police claimed that he was involved with drug deals and took photographs of him with drugs and guns beside him.

[33] The appellant is convinced that during this time, the federal police, both in T and in X, had obtained full records and details of his background and, if it was ever needed in the future, they would be able to present evidence that he had been involved in drug dealing.

[34] Ultimately, with the assistance of some of his friends and fellow EZLN supporters, a woman lawyer was sent to assist him. She was able to get a

number of the detained people released after a period of only 20 days or so in detention. However, the appellant was held for about six months. In December 2007, when the police could not prove any substantive case against him, he was released. However, his release was only done on the basis that he entered into an agreement with the federal police that he would be an informant for them against EE and her supporters. He agreed because, while he considered there may have been no state or municipal charges against him, at the federal level there were still outstanding charges against him for illegally taking land and damage to police property.

[35] After being released from detention in T, the appellant initially returned to Tijuana near the Mexican/US border. He wished to get away from Veracruz and risks to him from EE and her gunmen.

Return to Mexico City and the “Assassin” Incident

[36] The appellant tried to obtain work and start a new future in Tijuana. He found he could only obtain odd jobs and he had no friends or contacts there on whom he could rely. After less than two months in Tijuana, he decided to return to Mexico City and try to meet up with his old friends from the EZLN and find out what had happened to his fellow protesters from Y.

[37] After returning to Mexico City, the appellant tried to lay charges with the federal Attorney General’s office, against EE and her cartel and the police in respect of the maltreatment he had suffered at the T jail. At the Attorney General’s headquarters, he was given a lot of documentation to complete and was interviewed. He wrote everything down but was told that his complaints would not be followed up as he was considered to be a member of a “terrorist group” (the EZLN) and thus he could not be helped. The appellant’s name was shown to him on a database termed the “Mexican Platform”. A false identity card that he was using showed sufficient information about him for him to be traced and linked with the Attorney General’s database. The appellant considered that he had been tricked by the Attorney General’s office when they had appeared to accept his complaint, which they had then rejected because of the information on the Attorney General’s database.

[38] After his return to Mexico City in early 2008, the appellant found work as a kitchen hand and a security guard. He resumed his contacts with the EZLN, preparing letters and attending protests in the streets that were organised by them.

He kept a low-key role in the EZLN at this time, merely as a protester, rather than active involvement in their organisation.

[39] One evening when returning from work, the appellant was approached by a man in the street who put a gun to his back. He thought he had seen the man before using a two-way radio in the street, and at an earlier time in Veracruz, when gunmen and supporters of EE, along with police, had chased him and his colleagues off the indigenous land they were occupying.

[40] The “assassin”, as the appellant termed him, swore at him and, in crude language, told him he was finished and he should keep walking in front of him or he would kill him. The appellant thought they were walking him towards a van that was parked some way up the road. Because of his fear of past torture and problems with the authorities and EE’s supporters, the appellant turned around and faced the assailant and got into a struggle with him, at which time he thought the gun had fallen to the ground. He called for help at the same time as he struggled with the assassin. There were a lot of people milling around as the incident took place outside the Fine Arts museum. Some of these people came over to help him and, in the process, the assassin ran away from the appellant. Members of the crowd got hold of the man and the appellant thought they were wanting to lynch him. The appellant never saw the gun again, although he is confident he saw it and felt it.

[41] Within moments, the police arrived. Initially they tried to help the assassin who was being attacked by the crowd. They took the assassin away to their patrol car and put the appellant in another police car. They were not prepared to believe the appellant that there had been an attempted assassination. Immediately the appellant felt that the police were associated with the assassin or his drug cartel bosses. The police, in his view, were the last to come and give him support, although they were in fact closer to him than several members of the crowd. Once he was in the police car, the police came to him and told him that the “assassin” had not wanted to kill him, but just to rob him. They produced a few coins and asked if they were his. The appellant said they were not. However, the police said that they had no intention of charging the assassin and would release him. Some 40 or 50 people who were milling around supported the appellant and this ultimately gave the police no option but to take the appellant and the assassin to the police ministry. Members of the crowd had also told the police that there was a suspicious van that they should check out. However, the police did not take any notice of this and the van disappeared.

[42] The appellant was taken to the police office where he made a statement explaining the whole story. However, the police did not write it down as he stated but presented him with a totally different version of the incident, which the appellant said was not true. The police continued to insist that the assassin had been merely attempting to rob him of a few coins. The appellant presented documentation to the Tribunal from the Mexican Attorney General's office in Mexico City, which gave the "police details" of the incident. This documentation, which was headed: "Actioned Response" sets out the appellant's full name and the name of the assassin. It sets out details of charges which were laid against the assassin. However it goes on to show that quite serious initial charges, and potential sentencing, resulted only in a minor "fine".

[43] The appellant did not want to sign the documentation that he had been presented by the police, but was told he must sign it otherwise he himself would be arrested for lying. Ultimately he signed it and left. He saw the assassin released also and walk away from the police station.

[44] The appellant was convinced that the assassin had been sent by EE, or representatives of her cartel, to kill him because he knew too much. He was also convinced that this was the same man he had seen some time ago in Veracruz at the time of the confrontation and occupation of the indigenous land. The land that they had been occupying then was now owned by EE's cartel.

[45] After the attempted assassination incident in June 2008, the appellant went to an hotel and never returned to the previous accommodation he had been staying at. He only had a few clothes and personal effects at his former place so this did not concern him. The few documents he had, he kept in a security box so he was able to access them at a later date. Friends, particularly BB and CC, assisted him at this time. Because he was so frightened by the incident, the appellant decided he should try to get state protection under a "protected witness programme" that was being used to encourage witnesses to give evidence against the drug cartels.

[46] The appellant again returned to the Attorney General's office in Mexico City and explained that the cartels wanted to kill him as he had given information about them to the federal police in Veracruz. Again, however, the Attorney General's office told him that he could not be entered into a protected witness programme because of his past support for the EZLN and the information they had about him recorded in their database. They showed his name on the computer screen when he asked them how they knew about him. The appellant continued to insist that

he had the right, as a Mexican citizen, to get protection and he argued the issue with them for some time, setting out to them several core human rights, such as the right to life, that were universal and that he should therefore be protected. Again he was told that as he did not recognise the president of Mexico, nor the Mexican government, therefore he could not expect protection from them. The only protection they would offer would be in jail.

[47] After getting no result, the appellant left the building and asked his friends for ideas as to what he should do next. His friends suggested that he should leave Mexico and go to the United States, otherwise he would end up dead. He was not keen to go and live illegally in the United States and looked for other alternatives. He even went so far as to go to the External Relations Ministry in Mexico to find options. It appears they recommended to him that he should perhaps visit the immigration offices of various foreign governments in Mexico to check out their immigration programmes. As a result of these enquiries, he met immigration officials at the New Zealand Embassy and was told about a working holiday scheme which he could possibly enter into after payment of a fee and obtaining the requisite documentation, including a passport.

Departure for New Zealand

[48] The appellant obtained his Mexican passport by payment of a bribe to a person at the passport office. After a period of some two weeks, the helper he was using told him that there was a problem getting his birth certificate, which was a prerequisite to the passport. The helper had tried in several places to obtain it but found that he was not registered. The helper therefore went to the town of R, where he considered that fraudulent documents would be more readily obtained, and corrupt officers were prepared to co-operate. Taking this option, a birth certificate was obtained for him, after the appellant had personally gone to the town of R and had the birth certificate "corrected" (fraudulently).

[49] The appellant then returned to Mexico City and was given the names of an immigration officer and his supervisor, so that his departure through the airport could be arranged and his record on the attorney general's database would not be checked.

[50] He then proceeded to the New Zealand Embassy and obtained the visa in his passport. He was then able to leave Mexico, passing through the airport with the assistance of the immigration officer, to whom he had paid a bribe.

Activities While in New Zealand

[51] As noted, the appellant did not lodge his application for recognition as a refugee until some 18 months after his arrival. Initially, he remained validly under the work visa he had obtained to come to New Zealand. He then made an application under the Skilled Migrant programme. This was rejected, because the appellant had presented fraudulent evidence of qualifications and work experience in Mexico. It was only after this rejection that the appellant lodged his application for recognition as a refugee. Later, as noted, after the coming into force of the 2009 Immigration Act, the appellant also lodged protected person's claims.

[52] While he has been in New Zealand, he has kept up his interest and sympathy for the causes of indigenous people in Mexico and the EZLN. He claims that he has written articles on "Facebook" and keeps abreast of the situation of changes in Chiapas. He uses a pseudonym on Facebook.

[53] The medical reports that he obtained and presented on the final day of hearing, he claims, correctly set out his mental and physical condition and, in particular, that he has short-term memory loss that may be impaired by past torture, post-traumatic stress disorder, brain trauma and drug use. Currently, he states that he continues to have amnesia and forgetfulness and is highly nervous on many occasions. He has nightmares and hallucinations which recall his past torture.

Country Information

[54] The Tribunal was supplied with a considerable amount of relevant country information both from counsel and from its own research. Clearly, the most recent information has the highest relevance. Of particular assistance to the Tribunal were the articles set out below. All of these, including the recent articles provided by counsel on 14 November 2011 have been taken into account.

Relevant articles

- (a) International Federation for Human Rights "Steadfast in Protest – Annual Report 2011 – Mexico" (25 October 2011);
- (b) Human Rights Watch "Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's 'War on Drugs'" (9 November 2011);

- (c) “Recalling the Rule of Law: Report of lawyers’ delegation to Mexico. A report on protection of human rights defenders and the rule of law in the states of Guerrero and Oaxaca, Mexico” (July 2010) *Bar Human Rights Committee of England and Wales*; accessed at www.irwc.org 12 October 2011;
- (d) *United Nations Human Rights Office of High Commissioner for Human Rights*: “High Commissioner recognises advances made in Mexico on human rights, but expresses concerns on high levels of violent crime” (8 July 2011); accessed at www.ecoi.net.local on 9 August 2011;
- (e) *Security Sector Reform Resource Centre CIGI* “Victims’ lawyers: Mexico “unwilling to comply” with international court sentences in military rape cases”, Kirsten Bricker, Mexico (22 February 2011); accessed at www.ssresourcecentre.org; accessed 17 August 2011;
- (f) *Amnesty International* “Demand protection for indigenous activists” (21 June 2011); and
- (g) *Congressional Research Service, United States*: “Mexico: Issues for Congress”, Clare Ribando Seelke, Specialist in Latin American Affairs (9 June 2011).

[55] The Tribunal also took into account considerable poorly-sourced material from the Internet submitted by the appellant. Also noted were a number of decisions of the Immigration and Refugee Board of Canada (IRB) relating to the risks to former Zapatista members and their supporters who made claims for refugee status in Canada. The Tribunal noted submissions in respect of these cases from counsel. Unfortunately, these IRB decisions mostly appear to date from the period 1997 to 2003 and therefore do not reflect the current situation. Others relate to sympathisers of the Zapatista, rather than indigenous people themselves.

ASSESSMENT OF THE APPEAL

[56] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[57] Initially, it is necessary to reach credibility conclusions in respect of the appellant's evidence. Following that, the “facts as found” can be established. As noted, the same factual matrix is relied on in both the refugee and protected person claim that follow. The same established facts are summarised and used in the assessment of all three.

Credibility

[58] As noted above, the Tribunal found a considerable amount of the appellant's evidence to be problematic, disjointed and, at times, *prima facie* inconsistent. The problematic issues with his evidence were raised with the appellant. On occasions, the situation was readily clarified; on other occasions, the Tribunal was still left with some doubts.

[59] The core elements of the appellant's claim however are accepted by the Tribunal, and the forensic evaluation report is substantively supportive of those core elements of the appellant's claim. It has thus been unnecessary to traverse several parts of the appellant's evidence which he was unable to present in a clear, logical and consistent manner to the Tribunal. The Tribunal is, however, satisfied as to the well-foundedness of the risk on return, despite the confusion and complexity in several parts of the appellant's evidence. The Tribunal finds that his psychiatric condition, coupled with the lack of formal education, led to considerable confusion and perversity in the presentation of his evidence.

[60] The appellant has been fortunate that he has had the services of two world class professors in the preparation of a forensic evaluation report. The standard of this report is excellent. It has assisted in explaining to the Tribunal many of the problems in the presentation of his evidence. As noted, the report by Wenzel and Fincanci sets out his physical and mental situation and his recollection of key events, particularly as they related to his detention and torture. The diagnostic summary found that his symptoms were highly consistent with post-traumatic

stress disorder (PTSD) and recurrent depressive episodes. The discussion on his mental health reached findings that showed consistency with memory impairment and highly increased PTSD during interviews relating to torture, together with disorientation and his:

“... symptoms also could indicate additional neuropsychological factors such as blunt brain trauma leading to postcommotional/postconcussional syndrome which would also be consistent with the described beatings.”

[61] Additionally, there were findings of infrequent headaches and dizziness that could be related to possible diagnostic categories. An intolerance to treatment was indicated, along with his urination problems where the report states:

“Urination problems as described by the client are frequently reported by victims of sexual torture, and are most probable linked to the events described but require further assessment to differentiate physical and psychological factors.”

[62] Medical forensic aspects of the report conclude:

“Medical examination revealed that he had several marks, and his broken elbow consistent with his history of blunt trauma, and also perineal injury highly consistent with described rape. The localisation of injuries excluded self-infliction of these injuries. His history of torture with all described methods is found to be reliable since he also indicated several of the scars to be sustained before detention, not being related with his torture which confirmed his sincerity. Some symptoms (see above) require further diagnostical procedures to be classified as to being physical or psychological/psychosomatic.”

[63] In conclusion, the report stated:

“Psychological/psychiatric symptomatology and diagnosis assessed together with physical findings based on a thorough medical examination indicate that all physical and psychological findings are highly consistent with the patient’s history of torture during arrest and detention.”

[64] The terms of this report, coupled with a small but important point of corroboration relating to the name and prosecution of the immigration officer, led us to accept the credibility of the appellant’s core claim and to extend the benefit of the doubt to him where we still had lingering doubts on core issues.

[65] The appellant's claim, as accepted, is a highly individualised one and conclusions reached on it have only been reached by the Tribunal after careful and lengthy examination of the appellant, the medical/psychiatric reports submitted and the application of the benefit of the doubt.

The Appellant's Current Profile

[66] The Tribunal therefore accepts that the appellant is a 29 year-old single Mexican citizen of Nahua ethnic background. Due to the loss of his parents and most other members of his family at a very early age it is unsurprising that he has no detailed knowledge of his personal history nor that of his family and that he does not have supporting identification and personal documentation that might otherwise have been expected. The appellant became a supporter and organiser of protests and programmes run by the Zapatistas and EZLN and various other Mexican indigenous “Indian” support organisations. As a result of this, he has come into conflict with both federal and state police who, on many occasions, have effectively worked in support of major landowners and drug cartels. This support and police corruption is consistent with the country information we have noted above. In these confrontations, the appellant was detained, badly tortured and abused several times over a fairly lengthy period of time. He is not a senior/major figure or organiser within the EZLN but has come to the attention of the federal police/Attorney General’s office on several occasions. He has also antagonised key members or supporters of EE’s drug cartel to the extent that he was subjected to an attempted abduction and possible assassination attempt.

[67] He departed the country illegally. Even though ultimately it appears he was travelling on a valid Mexican passport; that passport was obtained, as was virtually all of his other personal documentation, through corruption and bribery.

[68] While the false documentation he presented in respect of his immigration application in New Zealand would rightly give cause to doubt the appellant’s credibility, when set against his personal predicament and the egregious level of corruption in Mexico that is clearly indicated in the country information set out above, the Tribunal considers that any doubts in this direction are explained when seen with the totality of the evidence now available.

The Refugee Convention

[69] Section 129(1) of the Act provides that:

“A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.”

[70] 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.”

[71] The Tribunal has adopted the jurisprudence of the RSAA where applicable. The principal issues to be addressed in claims for recognition as a refugee have been established for many years, going back to *Refugee Appeal No 70074* (17 September 1996). Those 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?

Conclusion on Refugee Status Issues

[72] The appellant predicts that he will be at substantive risk of serious maltreatment on return. His initial risk of detention or apprehension will either be at the hands of the federal police or the Attorney General’s office because of outstanding enquiries in respect of his alleged occupation of land in Veracruz. The appellant considers there is a real chance he would come to the attention of the federal police on return, particularly because his name is held on the Attorney General’s database and/or his departure was assisted through a corrupt immigration officer who has now been prosecuted by the Mexican authorities. Once detained the appellant predicts he will be seriously maltreated in a manner similar to his past treatment. He alternately predicts he will be killed by EE’s supporters.

[73] The appellant also predicts that even if he is able to return to his home district of Chiapas, and endeavours to stay in a semi-autonomous EZLN district, he would still be at a real chance of being persecuted by supporters of the EE drug cartel and/or corrupt police or army personnel working in conjunction with that cartel.

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

[74] Assessed on the totality of the appellant’s accepted evidence, and noting the personal profile that has been established and set out above, the Tribunal

concludes that there is a real chance of this appellant being persecuted on return to Mexico, either by state or non-state actors. The Tribunal has carefully assessed the appellant's predicament on return against the relevant country information which is set out above and the endemic and unfortunately pervasive corruption that continues to exist in Mexico. There are significant individual and personal factors that cause the Tribunal to give the benefit of the doubt to the appellant, including taking into account the medical and psychiatric evidence presented. Assessed in the round therefore, the Tribunal is satisfied that the appellant has established a well-founded fear of being persecuted on return to Mexico.

[75] The first issue is therefore answered in the affirmative.

Is there a Convention reason for that persecution?

[76] The second issue is also answered in the affirmative. The real chance of being persecuted on return is for reasons of the appellant's past demonstrated political opinion, coupled with his ethnicity.

[77] The appellant is therefore found to be a refugee within the meaning of Article 1A(2) of the Refugee Convention.

The Convention Against Torture

[78] 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 Convention Against Torture

[79] 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."

[80] The appellant is recognised as a refugee. It follows he cannot be deported from New Zealand. This country's *non-refoulement* obligation arises at international law pursuant to Articles 32 and 33 of the Refugee Convention, and is expressly brought into domestic law by section 129(2) of the Act. The limited exceptions (section 164(3)) have no application here.

[81] The Tribunal must determine the appellant's claim on the basis of the present circumstances. As he is presently not at risk of being deported from New Zealand, he does not require recognition as a protected person under section 130(1) of the Act. This finding is also consistent with the terms of section 137(4) of the Act.

[82] The reality is, therefore, the appellant has the protection of another country (New Zealand) and thus does not require recognition as a protected person.

Conclusion on Claim under Convention Against Torture

[83] For the foregoing reasons, the appellant is not a protected person within the meaning of the Convention Against Torture and section 130(a) of the Act.

The ICCPR

[84] 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

[85] 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:
- (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.”

[86] The same analysis applies to this limb of the appellant's protected person claim. The appellant, having been recognised as a refugee, cannot be deported from New Zealand. The *non-refoulement* obligation arises at international law

under Articles 32 and 33 of the Refugee Convention, and is brought into domestic law by section 164 of the Act. The limited exceptions (section 164(3) and (4)) have no application.

[87] The appellant is not at risk of being returned to Mexico; there are no substantial grounds for believing he is in danger of being subjected to cruel treatment therefore. He is not a person to whom New Zealand owes protection obligations under the ICCPR and section 131 of the Act.

Conclusion on Claim under ICCPR

[88] For the foregoing reasons, the appellant is not a protected person within the meaning of the ICCPR and section 131 of the Act.

CONCLUSION

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

- (a) is a refugee within the meaning of the Refugee Convention;
- (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.

[90] This appeal is allowed.

"A.R.Mackey"

A R Mackey
Chair

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A R Mackey
Chair