

**AT AUCKLAND**

<b>Appellant:</b>	<b>BE (Fiji)</b>
<b>Before:</b>	B A Dingle (Member)
<b>Representative for the Appellant:</b>	The appellant represented himself
<b>Counsel for the Respondent:</b>	No appearance
<b>Date of Decision:</b>	13 December 2011

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**DECISION**

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**INTRODUCTION**

[1] The appellant is a Fijian national, of Indian ethnicity. He appeals against a decision of a refugee and protection officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), to refuse to consider his subsequent claim to be recognised as a refugee, and to decline to recognise him as a protected person.

[2] This is the second time that the appellant has appealed against the decline of a claim to refugee status in New Zealand. His first appeal for refugee and protection status was declined by the Tribunal (differently constituted) on 4 March 2011. Although his first claim to the RSB was only for refugee status under the Immigration Act 1987, on appeal the Tribunal (pursuant to the transition provisions of the Immigration Act 2009 ("the Act")) also considered and determined whether the appellant was a protected person under sections 130 and 131 of the Act.

[3] In relation to his second claim for refugee status, the RSB determined that it did not have jurisdiction to consider the claim because it was not satisfied that there had been a significant change in circumstances material to the claim since the previous claim was determined (section 140(1) of the Act). The RSB considered the merits of his protected person claim under sections 130 and 131 of

the Act but declined the claim.

## **DETERMINATION OF THE SECOND APPEAL ON THE PAPERS**

[4] Before turning to consider his second appeal, the Tribunal records its determination not to offer the appellant an oral hearing because it finds that the appeal concerns claims which *prima facie* repeat previous claims and are manifestly unfounded.

[5] Jurisdiction to dispense with an oral hearing derives from section 233(2) of the Act, which provides that, where an appellant was interviewed by the RSB (as this appellant was), the Tribunal may determine an appeal without offering the appellant an interview if it considers that the appeal is *prima facie* manifestly unfounded or clearly abusive or that it repeats a previous claim.

[6] Before making the determination, the Tribunal invited the appellant to comment on its preliminary view. By letter dated 16 November 2011, the Tribunal wrote to the appellant, advising:

“In view of the following matters, the Tribunal considers that your appeal may be, *prima facie*, manifestly unfounded. If so, your appeal could be determined without giving you an interview.

In your second refugee and protected person claim application, lodged on 8 March 2011, you claim that you fear you will be beaten by soldiers and tortured because you are Fiji Indian and you have criticised the (unspecified) coup. You go on to state that you have lived in fear of such mistreatment on account of your being a Fijian Indian since the coup in 1987.

The Tribunal also notes that in your Refugee Status Brach interview you stated that former clients of your business in Fiji, whose had previously threatened you if you did not work on their cars, had been asking about you since March 2011 and you feared they would harm you on return.

A subsequent refugee claim (and appeal) must not be considered unless there has been a significant change in circumstances material to the appellant’s claim since the previous claim was determined. Section 140(1) of the Immigration Act provides:

**“140 Limitation on subsequent claims**

- (1) A refugee and protection officer must not consider a subsequent claim for recognition as a refugee unless the officer is satisfied—
- (a) that there has been a significant change in circumstances material to the claim since the previous claim was determined; and
  - (b) the change in 1 or more of the circumstances was not brought

about by the claimant—

- (i) acting otherwise than in good faith; and
- (ii) for a purpose of creating grounds for recognition under section 129.”

As noted above, the only new circumstance alleged by you is that former clients, who had previously threatened you, have enquired as to your whereabouts since March 2011. However, in your first appeal you also alleged that the former clients had been making enquiries about you: see p [18] of [2011] NZIPT 800042. You have repeated your claim that you will be at risk of serious harm from them. In short, your second refugee claim discloses no change in circumstances since the determination of your first claim and, as such, it does not appear to meet the jurisdictional threshold set out in the Act for the consideration of a second claim.

As to your more general claim that you feared being harmed in Fiji because of your Indian ethnicity since 1987, clearly this is not a matter which has arisen since the determination of your first claim.

Finally, in regards to your protected person appeal, your current claim that you are at risk of being tortured by Fijian soldiers and that you are at risk of other mistreatment from your former clients is the same claim as that considered by the Tribunal in its determination of your first appeal (see [2011] NZIPT 800042). The Tribunal found that there was no basis on which to find that you were a protected person under either section 130(1) or section 131(1) of the Immigration Act 2009. The present Tribunal is entitled to rely on the factual findings of the first Tribunal (s. 231 of the Act). On the basis of such facts, it appears that there is no credible basis on which a claim of protected person status can be founded. The Tribunal’s *prima facie* view is that your second claim to protected person status is manifestly unfounded.”

[7] The appellant was invited to forward, by 30 November 2011, submissions responding to these matters. He was also reminded that it was his responsibility to establish the claim and to ensure that all information, evidence and submissions which he wished to have considered were provided to the Tribunal before it made its decision (see section 226(1) of the Act).

[8] On 30 November 2011, the Tribunal received the appellant’s response stating that he did not wish to provide any further submissions or evidence in support of his appeal.

[9] The Tribunal finds, for the reasons more fully explained below, that the appellant’s second refugee and protected person claims repeat the first claims (as considered by the Tribunal in the first appeal). Strengthening this view is the appellant’s concession to the RSB during his interview for his second claim that there has been no significant change in circumstances material to the claim since the determination of the previous claim. The second claim is simply based on the continuation of circumstances which the appellant alleges were in existence at the

time the first appeal was finally determined. For that reason, and in accordance with section 233, the Tribunal determines not to offer the appellant an oral hearing and proceeds to determine the appeal on the papers.

[10] The Tribunal now turns to consider the appellant's appeals in relation to both his refugee and his protected person claims.

[11] The RSB declined the appellant's second claim for refugee and protected person status on 3 October 2011. As to the refugee claim the RSB determined, according to section 140(1)(a) of the Act, that there was no jurisdiction to consider the subsequent claim to refugee status. It then considered the appellant's protected person claim on the merits and dismissed it. The appellant appeals against these findings in accordance with sections 195(1)(a) and 195(2) of the Act, respectively. The Tribunal will address each in turn.

## **JURISDICTION TO CONSIDER A SUBSEQUENT REFUGEE APPEAL**

[12] Where a refugee and protection officer has refused to consider a subsequent refugee claim under section 140(1), a person may appeal to the Tribunal pursuant to section 195(1)(a) of the Act. Where an appeal is brought under this section, the Tribunal, in accordance with section 200(1) must first consider:

- “(a) whether there has been a significant change in circumstances material to the appellant's claim since the previous claim was determined; and
- (b) if so, whether the change in 1 or more of the circumstances was brought about by the appellant –
  - (i) acting otherwise than in good faith; and
  - (ii) for a purpose of creating grounds for recognition under section 129.”

[13] In order to assess whether or not there has been a significant change in circumstances material to the appellant's claim since the previous claim was determined, the Tribunal must compare the appellant's first claim against the second claim.

### **Comparison of the First and Second Claim**

[14] In the appellant's first claim, he stated in his claim form that he feared discrimination as a Fijian Indian and had done so since the 1987 military coup. During the RSB interview for his first claim, he asserted that he had experienced problems with two ethnically Fijian customers of his mechanic workshop who, in approximately 2007, refused to pay him for repair services. When the appellant asked them for the money owed the customers threatened to burn down his workshop and/or assault him. The threats were never carried out but the appellant was frightened and closed his business.

[15] In 2008, the customers asked the appellant to do further mechanical repairs but he told them that he no longer did such work. After the appellant travelled to New Zealand in early 2009, he was advised by his father (with whom he and his family lived in Fiji) that the ex-customers still asked after the appellant and when he would return and fix their vehicles. The appellant feared that if he returned to Fiji those customers would ask him to undertake repairs for them and, if he refused, would assault him. He did not think that the Fijian police would assist or that he could live elsewhere in Fiji.

[16] For the sake of completeness, it can be recorded that, on the appeal of the first claim, *AD (Fiji)* [2010] NZIPT 800042, the Tribunal accepted that the appellant had been the victim of two dishonest Fijian "bullies" who live in his home district. However, the Tribunal noted that the threats, while concerning, had never been acted on and found that there was no other indication that he would be at risk of serious maltreatment on return.

[17] As to the appellant's profile, the Tribunal found that he was a Fijian citizen of Indian ethnicity who would be returning to Fiji after being in New Zealand since early 2009. The Tribunal found that any risk to the appellant was "utterly insubstantive and remote". His refugee appeal was declined.

### **The Second Claim**

[18] The appellant repeats the grounds of his first claim. In his claim form submitted on 8 March 2011, he stated that he feared he would be harmed by indigenous Fijians in Fiji because of his ethnicity. He repeated his statement that he had held such fears since the 1987 coup.

[19] During his RSB interview on 17 August 2011, the appellant repeated the grounds of his claim and conceded that the only circumstance that has changed since the determination of his first appeal is that the ex-customers have again asked his father when the appellant is coming back. Asked by the RSB to clarify the change in circumstances, the appellant was not able to.

### **Whether a Significant Change in Circumstances Material to the Claim**

[20] Pursuant to section 200(1)(a) of the Act, the Tribunal finds that there has not been a significant change in circumstances material to the appellants claim since the previous claim was determined on 4 March 2011. The appellant conceded to the RSB that the claim is the same and merely added that the ex-customers have asked about his whereabouts again. An assertion in the second claim that the situation which existed at the time of the first claim (ex-customers occasionally asking about the appellant) is continuing, is not sufficient to establish a significant change in circumstances material to the appellant's claim.

[21] For the sake of completeness it is also noted that a review of recent credible country information sources by the Tribunal does not establish that the situation facing Fijian Indians in Fiji is worsening, or that there is a real chance of Fijian Indians, on the basis of their race alone, being persecuted in Fiji, as consistent with the Tribunal's findings in *AB Fiji* [2010] NZIPT 800045; see United States Department of State *Country Report on Human Rights Practices: Fiji* (8 April 2011); Freedom House *Map of Freedom in the World – Fiji* (2010); Amnesty International *Annual Report 2011: Fiji* (13 May 2011).

[22] For the reasons given above, the Tribunal is satisfied that the appellant's second refugee claim does not assert a significant change in circumstances material to the appellant's claim since the previous claim was determined. The jurisdictional threshold is not crossed and, pursuant to section 200(2)(a) of the Act, the refugee appeal must be dismissed.

## **ASSESSMENT OF THE PROTECTED PERSON CLAIM**

### **Jurisdiction**

[23] The RSB assessed the merits of the appellant's second claim to protected

person status under the Convention Against Torture and International Covenant on Civil and Political Rights and dismissed it. An appeal against this decision lies under section 195(2) of the Act and is to be determined as if it is an appeal to which section 198(1) applies.

[24] Section 198(1) of the Act requires the Tribunal to conduct its orthodox enquiry into 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).

[25] Further, the Tribunal may rely on any finding of credibility or fact by the Tribunal or any appeals body in any previous appeal or matter involving the appellant and the appellant may not challenge any finding of credibility or fact so relied upon (section 231 of the Act).

[26] Given that it is the appellant’s responsibility to establish the claim and because the Tribunal may rely on past findings of credibility or fact, it is necessary to summarise the findings made in the first claim before turning to the present claim.

[27] In determining the first appeal, the Tribunal found that the appellant was a Fijian citizen of Indian ethnicity who would be returning to Fiji after being in New Zealand since early 2009. The Tribunal also found that any risk of serious harm to the appellant from the ex-customers, who had never harmed him previously, was entirely remote and speculative. Similarly, it was found that there was no real chance of the appellant being subject serious harm due to general discrimination against Indian Fijians in Fiji. The appellant was not found to have any adverse profile with the Fijian authorities. The reasons given for the findings were cogent and persuasive and, in the absence of evidence or submissions to the contrary, the Tribunal is satisfied that it is appropriate to rely on those factual findings in the determination of this appeal.

## **The Convention Against Torture**

[28] 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."

[29] 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."

[30] The Tribunal is satisfied that there are no substantial grounds for believing that the appellant would be in danger of being subjected to torture if deported from New Zealand.

[31] Like the refugee enquiry, the enquiry into whether an individual would be in danger of being subjected to torture is a prospective one. The decision-maker is required to assess whether there is a risk, in the future, of the person suffering the relevant harm. The appellant has been threatened by two Fijian men in the past but they did not harm the appellant and there is no more than a remote chance that he will suffer harm at their hands in the future. Furthermore, there is no credible evidence before the Tribunal that the appellant, with the profile and characteristics he has, and considering the relevant country information, would be in danger of being subjected to harm from a public official or any person acting in an official capacity in Fiji.

[32] There are no substantial grounds for believing that the appellant would be in danger of being subjected to torture if deported from New Zealand. He is not a person in need of protection under the Convention Against Torture.

## **The ICCPR**

[33] 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."

[34] The appellant relies on the same evidence in support of his claim under the ICCPR as he did to support his claims under the Refugee Convention and the Convention Against Torture. For the same reasons, having regard to the factual findings set out in relation to the claim, 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 returned to Fiji.

[35] 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 131(1) of the Act.

## CONCLUSION

[36] This is the second time that the appellant has had a refugee and protection claim considered. He has not presented a credible foundation for his claim to be recognised as a refugee or protected person. The Tribunal does not expect to see any further claims lodged by the appellant on the same grounds.

[37] For the foregoing reasons, the Tribunal finds:

- (a) the appellant's second refugee appeal is dismissed pursuant to section 200(2)(a) of the Act;
- (b) the appellant is not a protected person within the meaning of the Convention Against Torture;
- (c) the appellant is not a protected person within the meaning of the International Covenant on Civil and Political Rights.

[38] The appeal is dismissed.

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