REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 308/92

RE UR

AT AUCKLAND

Before:	R.P.G. Haines (Chairman) W.G.C. Templeton (Member) G.W. Lombard (Non-voting Member)
Counsel for the Appellant:	R.K. Nand
Appearing for the NZIS:	No appearance
Date of Hearing:	10 May 1993
Date of Decision:	28 March 1994

DECISION

COURSE OF THE HEARING

This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a citizen of Fiji of the Indian race.

The appellant is a forty-three year old married man with three children aged sixteen, fifteen and nine years respectively. He arrived in New Zealand on 24 October 1987, some twenty-nine days after the second coup took place in Fiji on

25 September 1987. His wife and children arrived in New Zealand on 10 October 1987. The family have remained in New Zealand since their arrival.

The appellant claims that following the first coup of 14 May 1987 he was involved in incidents which give rise to a well-founded fear of persecution.

The application for refugee status was lodged somewhat belatedly, however. It would appear from the voluminous Immigration Service file that an application for residence was lodged by the appellant in August 1988 based on occupational grounds, the appellant being a bank officer. That application was declined in June 1989 whereupon the appellant requested that the application be reconsidered. The Immigration Service, however, affirmed their decision to decline the application in December 1989 whereupon the appellant appealed to the Minister of Immigration. That appeal was declined in June 1990. In July 1990 an application for residence was lodged by the appellant's wife, also on occupational grounds, it being said that she had tailoring skills. That residence application was declined in May 1991 whereupon an appeal was made to the Minister. By letter dated 28 August 1991 the Minister advised that the decision made by the Immigration Service to decline the residence application was correct and was maintained. The appellant and his family were requested to make immediate arrangements to leave New Zealand.

On 29 November 1991 the appellant, through his solicitors, lodged an application for refugee status. Attached to the application was a brief two and a half page handwritten statement by the appellant with a few further details being provided in the equally brief solicitor's letter. The appellant was interviewed by the Refugee Status Section of the Immigration Service on 11 February 1992. A written interview report and summary of the appellant's claims were subsequently provided to the appellant's solicitors by the Immigration Service by letter dated 4 March 1992, the appellant being afforded an opportunity to correct the document or add any further information. Subsequently, by letter dated 18 March 1992 the appellant through his solicitors provided a number of amendments and comments on the report.

By letter dated 15 April 1992 the appellant was advised that his application for refugee status had been declined. By letter dated 28 April 1992 an appeal was lodged.

The hearing of this appeal took place on 10 May 1993. Evidence was given by both the appellant and his wife. The Authority was also tendered a copy of a report dated 10 November 1992 from Mr Michael Marris, a child psychotherapist. This report had been obtained by the appellant in connection with an application for residence on humanitarian grounds, an application which had apparently been declined by the Immigration Service shortly before the hearing of this appeal. The Authority's attention was also drawn to a letter dated 29 September 1987 from Mr Mahendra Chandra Vinod, a member of Parliament in the Coalition government which was deposed by the first coup. This letter was already on the Immigration Service file, having apparently been submitted in support of one of the earlier applications.

At the commencement of the hearing of the appeal, counsel submitted that subsequent to the filing of the appeal there had been many changes in Fiji and the Authority was asked to take a wide perspective of what was described as the "current situation" as well as the possibility of the events of 1987 being repeated. However, apart from the documentation already referred to, the Authority was provided with no evidence of the changes referred to or of the "current situation".

The Authority drew counsel's attention to the Authority's earlier decision in Refugee Appeal No. 30/92 Re SM (26 November 1992), a decision which involved an unsuccessful appeal by another Fiji Indian. The appellant was invited to comment upon the evidence cited in that decision as well as the conclusions reached therein by the Authority. We have taken into account not only the appellant's response but also counsel's closing submissions which specifically addressed Refugee Appeal No. 30/92 Re SM.

Having been given virtually no assistance by the parties on the question of the changes and the "current situation", the Authority was constrained to carry out its own researches with the result that there has been a regrettable but unavoidable delay in delivering this decision. By letter dated 2 February 1994 the Authority wrote to the appellant's solicitors and to the Immigration Service disclosing in schedule form the information which had come to the attention of the Authority in the course of its researches. The parties were invited to inspect and consider the

information and to then call evidence and to make submissions thereon. The text of the letter was in the following terms (we do not intend setting out the Schedule):

> "This appeal was heard by the Authority on 10 May 1993.
>
> The Authority was provided with virtually no country information on Fiji even though it was invited by the appellant to "take a wide perspective of the current situation" in that country and the possibility of the events of 1987 being repeated. The Authority has therefore been constrained to conduct its own researches.
>
> The material uncovered by the Authority's researches is listed in the attached schedule and is available for inspection at the office of the Secretariat. The appellant is entitled to inspect and make submissions and call evidence on that material.
>
> Notice is given that any further evidence or submission intended to be presented by the appellant is to be filed within 21 days of the date of this letter.
>
> The New Zealand Immigration Service has the same opportunity to present evidence and submissions if it so wishes.
>
> At the hearing of the appeal, the attention of the appellant and his counsel was drawn to the previous decision of this Authority in Refugee Appeal No. 30/92 Re SM (26 November 1992). While that decision deals with the particular facts of the specific case, the Authority nonetheless referred to a number of political events in Fiji, to human rights developments in that country and also discussed the 1990 Constitution. The Authority, on that information, drew certain conclusions and made findings to the effect that there was virtually no evidence to show that in the years since the coups the situation in Fiji has justified, objectively speaking, the holding of a well-founded fear of persecution by Fiji Indians. The Authority also made certain observations concerning the 1990 Constitution. As it may be argued that there is little to distinguish the facts of [the appellant's] case from those in Refugee Appeal No. 30/92 Re SM, it is highly likely that in the present case the Authority will use the same evidence and adopt the same findings and conclusions. Notice is given that the Authority wishes to hear from the appellant as to whether there is any reason why such a course should not be followed and as to whether the appellant disputes any of the evidence, findings, conclusions or observations in Refugee Appeal No. 30/92 Re SM. Any evidence or submission the appellant intends to present in relation to Refugee Appeal 30/92 is also to be filed within 21 days of the date of this letter. The New Zealand Immigration Service has the same opportunity to present evidence and submissions if it so wishes."

As can be seen, a response was requested within twenty-one days of 2 February 1994. However, no submissions on behalf of the appellant or the Immigration Service were received.

In the meantime, fresh elections were held in Fiji during the week commencing Monday, 21 February 1994 and the Authority deterimined that in fairness the parties should be afforded an opportunity to be heard in relation to the outcome of those elections, namely the re-election of the Rabuka-led party, the Soqosoqo Ni Vakaveluwa Ni Taukei. By letter dated 4 March 1994 the Secretariat wrote to the parties in the following terms:

> "I note that there has been no response to my letter dated 2 February 1994 notwithstanding the expiry of the 21 day period for making submissions.
>
> Please advise whether the appellant intends responding to the matters raised in my letter.
>
> I have also been directed by the Authority to enquire whether the appellant wishes to address any submissions on the course of the elections held in Fiji during the week commencing Monday, 21 February 1994 or on the outcome of those elections. In this regard, both the Fiji Times and the Daily Post for the period Monday, 21 February 1994 to Saturday, 26 February 1994 are available for inspection at the office of the Secretariat. The newspapers contain extensive reports of the course of the elections. The outcome of the election is reported in the New Zealand Herald, Monday, February 28, 1994 "Rabuka Back After Beating Off Rivals". The comments of the newly-elected Prime Minister, Mr Rabuka, as reported in the New Zealand Herald, Tuesday, March 1, 1994 "Promise to Indians" is also relevant. Copies of the two New Zealand Herald articles are attached to this letter. Inspection of the Fiji Times and the Daily Post newspapers can be arranged by making an appointment with the Secretariat.
>
> Notice is given that any further evidence or submission intended to be presented by the appellant in relation to the recent elections is to be filed within ten days of the date of this letter.
>
> The New Zealand Immigration Service has the same opportunity to present evidence and submissions if it so wishes."

Neither party to this appeal has responded to this letter.

In the event, the Authority has not taken into account any information or material in respect of which the parties have not had an opportunity to be heard.

THE APPELLANT'S CASE

According to the appellant's statement, after leaving school in 1970 he joined the Department of Lands, Survey and Mineral Resources but after less than two years resigned to pursue better prospects by working in a well-known bank. References attest to the fact that he remained in the employ of that bank for the next fifteen years and rose from the position of teller to that of a branch accountant. He resigned on 4 December 1987, just one month after his arrival in New Zealand.

The appellant is the fifth eldest in a family of nine, he having two sisters and six brothers. With one exception, all his siblings presently reside in Suva. One brother presently lives in the United States. Until 1992 the appellant's parents also lived in Suva but they have now moved to the United States. The appellant's wife is the eldest daughter in a family of three daughters and two brothers. Her father died some eleven years ago and her mother presently lives in the United States as do her two brothers and one sister. Her youngest sister lives in Canada.

The appellant claims that he was actively involved in Fiji politics and was a staunch supporter of the National Federation Party - Fiji Labour Party Coalition which won the General Election held in April 1987. He said that his brothers were also stout supports of the Coalition though not active to the same degree as he was.

He stated that during the election campaign he was actively engaged in the distribution of pamphlets, used his motor vehicle to ferry electors to meetings and also donated both food and money for the campaign. His claims are supported by

the letter from Mr Vinod dated 29 September 1987 already referred to. In his evidence at the hearing the appellant explained that he was in fact assisting in the campaigns of two candidates: Mr Vinod and Mr Navin Maharaj. Mr Vinod is a long-time acquaintance of his but in addition the appellant was actively involved in assisting the Coalition candidate in his (the appellant's) own electorate, Mr Navin Maharaj who eventually became Minister for Trade, Industry and Tourism in the Bavadra Government.

During the election campaign itself, the appellant encountered no problems in relation to either his race or his political opinion.

However, a few days after the first coup of 14 May 1987 the appellant attended a rally at Albert Park, Suva, the purpose of which was to hold a prayer meeting for the ousted government ministers. The meeting was disrupted by pro-coup Fijians and fighting broke out. Many of those attending the meeting were assaulted, the appellant himself being punched in the face. No serious injury was inflicted and the appellant did not suggest that he required medical attention.

The appellant described the tension and fear which particularly affected the Indian community at that time and their feeling of powerlessness given that the police were either unable or unwilling to investigate complaints in relation to the actions of the military and their supporters. In particular the appellant related incidents in which stones were thrown at his vehicle as well as at his house. On two occasions windows in the house were broken. Stones were thrown at his house right up until the time he left for New Zealand in October 1987. The house was also burgled one evening when the family were out. Some cash and personal items were stolen.

He also related an incident when upon his return home from work one day he stopped outside a shop to purchase cigarettes. As he was leaving several Fijian youths tried to hit him. He immediately got into his car and drove off. He conceded that this was a random attack and that his would-be assailants did not know him personally but clearly they would be able to identify him as a Fiji-Indian.

Possibly the most significant incident related by the appellant was the occasion on which he was arrested by army officers and detained for approximately twenty-four hours. It is not clear when this incident occurred but in the Refugee Status Section interview report it is said that the event occurred in August 1987, almost one month prior to the second coup.

The appellant related that after returning home from work one afternoon approximately five uniformed military personnel arrived at his home between 5.30 p.m. and 6.00 p.m. They accused him of holding meetings in his home and of attending meetings held elsewhere. They accused him of being against the coup. The appellant surmised that this unwelcome visit to his home was the result of the appellant having taken food to Dr Bavadra at his Suva home situated approximately two miles from the appellant's own residence. After some ten or fifteen minutes the appellant was taken to an army camp and placed in a cell where he was kept for approximately twenty-four hours. It is his recollection that he was arrested on the Friday evening and released the following Saturday afternoon. He accepts that he was not physically harmed but was subjected to a large amount of abuse and psychological pressure. He was accused of being a trouble-maker and questioned about who he supported. However, he was not asked to make a statement and he saw no written note being taken of what he said to the military officers. When he was released he was told to be careful and not to attend any meetings. It was at this time that the appellant decided to leave Fiji.

Subsequent to his release the appellant's home was visited on some two to five further occasions. On each occasion the house was searched and accusations made against the appellant that he was against the coup.

The appellant's evidence as to the circumstances of his arrest and subsequent searches of his home was confirmed by his wife. She said that while the military officers who searched the home never touched or harmed her or her children or asked questions of them, they were nevertheless upset by the incidents and made

more fearful for their safety. In her own words, she suffered emotional harm.

In answer to questions from the Authority, the appellant conceded that no member of his family who remained in Fiji after his departure for New Zealand had come to any harm or suffered any of the difficulties experienced by the appellant. He further conceded that he was not aware of any person similarly situated to himself who had come to harm since the date of his departure, 24 October 1987.

The appellant claimed that his experiences amounted to persecution and feared that what had happened in 1987 could happen again were he to return to Fiji.

He also mentioned that subsequent to his arrival in New Zealand he had been actively involved with the Coalition for Democracy in Fiji based in Auckland, had been very vocal and outspoken and led protest marches in New Zealand, including an occasion on which Fiji's Prime Minister, Major-General Rabuka, visited New Zealand. There is no evidence, however, that involvement in such activities and the organization concerned would place the appellant at risk were he to return to Fiji, nor is there any evidence to suggest that others who have had a similar involvement have encountered difficulties upon their return to Fiji. The absence of such evidence is hardly surprising. Even Dr Anirudh Singh, the academic who was kidnapped and tortured by soldiers in October 1990 and who is now resident in the United Kingdom, has returned to Fiji on several occasions without incident: "Opponent of Fiji Rulers Struggles to Mend Life", *NZ Herald*, Thursday, May 28, 1992; "When Justice is Not For All", *The Review*, November 1993, 18. The latter article reports that the purpose of that particular visit by Dr Singh was to file a compensation claim of F$2m against the Fiji government and the Fiji Military Force.

The appellant, however, points to the 1990 Constitution as being biased against Fiji Indians and institutionalizing discrimination against them. He and his wife fear that the education of their sons in Fiji will suffer and that the opportunities for the family there will be limited. In this regard the report from Michael Marris dated 10 November 1992 records that:

> "Mr and Mrs [name deleted] are primarily concerned for the welfare of their three sons should the family be required to leave New Zealand and return to Fiji. They say all boys are deeply integrated into this society and that the children's lives would not only be severely disrupted but that they would be exposed to an alien and now unknown environment in Fiji."

The conclusion reached by Mr Marris is that the consequences of return to Fiji would be especially stringent given that the family has been highly "Europeanized" and has become assimilated into the New Zealand culture. While emphasizing that the children will be able to cope with the change, Mr Marris expresses the opinion that they will experience "a profound and probably very distressing change of culture that would perhaps have some marked effect upon their general development and well-being". As to this aspect of the case, the Authority pointed out at the hearing that the factors referred to in the Marris report fall outside of the Authority's terms of reference. We have jurisdiction only to decide whether the appellant (or any member of his family) is a refugee. Humanitarian circumstances of a general kind such as those referred to in the report fall well outside our terms of reference.

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 the context of this case the four principal issues are:

1. Is the appellant genuinely in fear?

2. If so, is it a fear of persecution?

3. If so, is that fear well-founded?

4. If so, is the persecution he fears persecution for a Convention reason?

In this regard we refer to our decision in Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB (11 July 1991).
In the same decision this Authority held that in relation to issue (3) the proper test is whether there is a real chance of persecution.

It is important in the circumstances of this case to emphasize that the relevant time for determination of refugee status is the date of determination, not the date of arrival in New Zealand or the date of the lodging of the application for refugee status: Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, 399, 405 (HCA), a decision which we have applied on several occasions. See by way of example: Refugee Appeal No. 6/91 Re SSS (11 July 1991); Refugee Appeal No. 81/91 Re VA (6 July 1992); Refugee Appeal No. 296/92 Re KT (5 February 1993).

Having isolated the issues it is now possible to turn to an assessment of the appellant's case.

ASSESSMENT OF THE APPELLANT'S CASE

Having seen and heard the appellant and his wife give evidence we are satisfied that the factual narrative given by them is accurate. We accept them as credible witnesses and for that reason accept also the facts of which they have spoken.

Those facts, however, establish no more than that due to a combination of the appellant's race and political opinion the following incidents occurred in mid-1987:

(a) On one occasion he was punched in the face in Albert Park.

(b) An attempt was made to assault him outside a shop.

(c) Stones were thrown at his vehicle and his home. Two windows in the home were broken.

(d) His house was burgled, though the racial or political ingredient of this event is speculative.

(e) He was detained by the military for twenty-four hours but received no physical ill-treatment. Subsequently, his house was searched on some two to five occasions.

Unpleasant though these experiences may have been for the appellant and his family they do not in any way amount to persecution, as the infringements of the appellant's human rights were transitory and with one exception, bordering almost on the trivial. The only exception relates to his twenty-four hour detention and the subsequent house searches. These amounted to a more significant infringement of his human rights, but the nature and degree of the infringement was not serious and the detention was an isolated event which was not repeated. It is not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion which constitutes persecution: Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, 429 per McHugh J. Or as pointed out by Goodwin-Gill in The Refugee in International Law (1983) at 38, whether an event or series of events amount to persecution remains very much a question of degree and proportion. The point made in Hathaway, The Law of Refugee Status (1991) 103 is that the intention of the drafters of the Convention was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population. That is, the drafters were not concerned to respond to certain forms of harm *per se* but were rather motivated to intervene only where the maltreatment anticipated

was demonstrative of a breakdown of national protection. No evidence at all was produced to the Authority to establish that such a breakdown took place at the time of the first and second coups or more importantly, exists at the present time or that there is a real chance of it occurring in the future.

Since the appellant's departure from Fiji there have been substantial developments in the racial and political arenas. In July 1990 the then head of state Ratu Sir Penaia Ganilau promulgated a new constitution which gave indigenous Fijians, who make up slightly more than half of the 760,000 population, a permanent majority in the seventy-seat Parliament with thirty-seven seats. Indians were allocated only twenty-seven seats although they numbered almost forty-six percent of the population. Five seats were allocated to other races and one to Rotumans. The Constitution is still the major bone of contention for the Indian parties, namely the Labour Party and the National Federation Party, in their quest for equal rights: see generally "A Nation on the Move", *Pacific Islands Monthly*, October 1993, 35.

The mere fact that Fiji Indians do not enjoy equal rights does not mean, however, that they have **no** rights or **no** political power. On the contrary. The present Prime Minister, Major General Rabuka, was appointed Prime Minister in preference to the former Finance Minister, Josevata Kamikamica, following the May 1992 elections only because of the support given to him by the Labour Party led by Mahendra Chaudhry: see "The Making of a Prime Minister", *Pacific Islands Monthly*, June 1992, 7-10; Keith-Reid, "The Day of the General", *Islands Business Pacific*, June 1992, 16; "Rabuka Calls for Racial Tolerance", *NZ Herald*, Wednesday, June 3, 1992; "Neighbours' Attitudes No Worry", *NZ Herald*, Monday, June 8, 1992.

Labour's support for Rabuka was given in return for a promise for a review of the Constitution, the Agricultural Landlords and Tenants Act, value-added tax and the labour reform laws. The Labour Party, however, walked out of Parliament in June 1993 and withdrew its support for Rabuka, claiming the Prime Minister had not kept his word on the promised reviews. Labour MPs, however, subsequently returned to Parliament, their return coinciding with the moving of a motion by

Rabuka recommending the appointment of a special commission to examine the constitution with a view to promoting "racial harmony and national unity": "Boycott of House in Fiji Ends", *NZ Herald*, Wednesday, September 15, 1993; "Few Bouquets for Labour Term", *The Review*, December 1993/January 1994, 28. Rabuka subsequently set up an extended Cabinet subcommittee, which included NFP opposition leader Jai Ram Reddy, to look into the review of the Constitution: "A Nation on the Move", *Pacific Islands Monthly*, October 1993, 35.

Indeed, far from being excluded from political power, Fiji Indians have a considerable influence on political developments. This was apparent not only in the events leading up to the appointment of Rabuka as Prime Minister, but also in the events which led to the snap election called by him in November 1993 following the defeat of the Government's annual budget on 29 November 1993: "Rabuka Calls Snap Poll", *NZ Herald*, Tuesday, November 30, 1993. All Labour and National Federation party members of Parliament voted against the budget and when a small group of anti-Rabuka members of his own party, the Soqosoqo Ni Vakavulewa Ni Taukei, also voted against the budget the eighteen-month old government was brought down. Too often it is assumed that Fijians subscribe to a single political agenda and support only one political party. This is not so. See, for example, "Battle for Survival" and "Kuli Changes Course Midstream" in *The Review*, October 1993, at pages 10 and 16 respectively; Keith-Reid, "Fiji's Political Future", *Islands Business Pacific*, December 1993, 16; "In Search of a New System", *The Review*, December 1993/January 1994, 37. It would not be inaccurate to say that no Fijian-dominated political party can rule without the support of one or both of the Indian parties. See "Great Council or House of Lords?", *Pacific Islands Monthly*, July 1993, 36, 37:

> "There is an assumption behind the 1990 constitution that with numerical supremacy in the House the Fijians could rule the country without the active consent of other racial groups. The assumption is that Fijians would unite and would hence have numerical supremacy. This was of course pure naivete. Fijians, like everyone else, unite in times of crisis and once the crisis is over it is back to politics as usual. And in the game of power politics power is much thicker than blood. The reality and irony of post-coup Fiji politics is that because the SVT is not united no-one can rule without the Indians."

See further "Fiji: Back to the Future ... Again", *Pacific Islands Monthly*, January 1994, 17, 18; "Rabuka's Lost Opportunity", *The Review*, December 1993/January 1994, 10, 11. The evidence uncovered by the Authority's own researches is all one way: since the coups the Fijian and Indian communities have engaged in an ongoing political dialogue in an attempt to arrive at a mutually-acceptable accommodation in relation to their possibly irreconcilable aspirations - the Indians to political authority and the Fijians to possession of the ultimate political authority. For an exposition of the Fijian perspective see Ravuvu, The Facade of Democracy: Fijian Struggles for Political Control 1830-1987 (1991). That dialogue is set to continue folowing the victory of Major General Rabuka at the polls and his reappointment as Prime Minister. See "Promise to Indians", *NZ Herald*, Tuesday, March 1, 1994 in which Major General Rabuka is reported as saying that he wanted Fiji Indians in his cabinet within the next five years and that serious consideration would be given to including Indian ministers in a government of national unity. He also renewed his commitment to a review by 1997 of the Constitution.

The significant point, however, is that in almost seven years since the coups no evidence has emerged that the Indian community in general is being persecuted or that there is a real chance of persecution occurring in the future. The possibility of such persecution occurring remains no more than conjecture. This in no way satisfies the real chance test required by the Convention. We repeat the observations we made in Refugee Appeal No. 29/91 Re SK (17 February 1992) at 21:

> "In distinguishing between conjecture and inference helpful reference can be made to the following quote from Jones v. Great Western Railway Co (1930) 47 TLR 39, 45 (HL) where Lord MacMillan stated:
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> > "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."

> The reference to "legal proof" is, of course, inappropriate in the context of a refugee determination process but the sense of the distinction between conjecture and inference is nonetheless tolerably clear."

On the facts we find that the appellant's fears are based on no more than conjecture. There was an orderly transition from the interim administration at the time of the May 1992 elections. The political fortunes of the various parties in Fiji have waxed and waned since then according to the tide of events, and the fall of the Rabuka government at the end of November 1993 took place without civil disorder or unrest. Nor did the death of the President of Fiji, Ratu Sir Penaia Ganilau on 16 December 1993 or the subsequent election of Ratu Sir Kamisese Mara as the new President result in any such events: "Fiji President Dies", *NZ Herald*, Friday, December 17, 1993. The February 1994 elections passed without violence or racial antagonism. In short, there has been nothing in the sometimes turbulent Fiji politics over the past seven years which would provide any basis for establishing that there is a real chance of persecution if the appellant and his family return to Fiji.

Against this background we return to the four issues earlier referred to.

Addressing first the issue of the appellant's fear it is our finding that at the time he left Fiji he was in fear but it is our further finding that he is not today in any **genuine** fear because there is a total absence of evidence on which any fear could be based.

As to the second issue, it is our finding that at the time of the appellant's departure from Fiji he was not in fear of persecution as that term is defined objectively. It is our further finding that as the appellant is not presently in fear, it follows that there is no fear **of persecution**.

As to the third issue, namely the well-foundedness of a fear of persecution, we find that even if a fear of persecution is held by the appellant, it is not a well-founded one.

Our reasons have already been set out above, but by way of summary they are:

1. The incidents related by the appellant took place during a period unique in the history of Fiji. It was a time of considerable tension. Those events have not since been repeated, nor has there been a recurrence of the violence which accompanied those events.

2. The experiences of the appellant and his family did not in any event amount to persecution. The infringement of their human rights was of a minor nature.

3. There has been a very considerable effluxion of time between the events of which the appellant has spoken and the present time. The appellant's case is notable for the fact that no evidence has been adduced to show that in the intervening years the situation in Fiji justifies, objectively speaking, the holding by the appellant of a well-founded fear of persecution at the present time.

4. It is significant that there was no violence in the lead-up to the May 1992 elections, at the time of the fall of the Rabuka government in November 1993 or at the February 1994 elections. The case of Dr Anirudh Singh, already referred to, would appear to be unique. We adopt what we said in relation to his case in Refugee Appeal No. 30/92 Re SM (26 November 1992) 17:

> "The only specific case cited to us by the appellant of continuing abuse of power is the case of seven civil rights activists who participated in non-violent protests against Fiji's new Constitution in October 1990. They were charged with sedition. The seven included Dr Anirudh Singh who had been abducted and tortured by army officers: Robie, "Human Rights: Abductions and Torture" in Robie (ed) Tu Galala: Social Change in the Pacific (1992) 116-121. The sedition charges were subsequently dropped against all but Dr Singh: *NZ Herald*, Thursday, May 28, 1992. The soldiers responsible for Dr Singh's abduction and ill-treatment surrendered themselves to the authorities, were prosecuted and pleaded guilty. On 22 November 1990 they were given one year suspended jail sentences and fined F$170 on each count:

> Robie, "Human Rights: Abductions and Torture" op cit 120. According to the *NZ Herald* report referred to, Dr Singh has left Fiji and returned on several occasions during this period. More recently he has returned to Fiji in order to "clear up the sedition count" but apparently attempts by his lawyer to fix a trial date have been frustrated because the Court Registry cannot locate his file. Efforts to prepare a compensation claim have stalled because the Courts refuse to release records, citing bad publicity the case has had overseas.
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> We do not see how Dr Singh's case assists the appellant. The abduction and torture are inexcusable, but on the evidence we have been given there is nothing to suggest that this was anything more than an isolated, if not rare, occurrence. Furthermore, it is significant that the persons involved surrendered themselves and have been prosecuted. While the sentence was surprisingly light, it is our opinion that the appellant has placed on this case a significance it simply cannot carry. We have also taken into account the fact that in June 1991 the Fiji Court of Appeal quashed the 1989 sedition convictions against eight chiefs from the island of Rotuma and that charges of malicious publication against three journalists were dropped by a lower Court on 15 August 1991: Amnesty International Report 1992 116-117."

It is accordingly our assessment that as far as the objective element of the refugee definition is concerned, any claim by the appellant to a fear of persecution is not well-founded and there is no real chance of persecution should he and his family return to Fiji. We re-emphasize, however, that we do not accept, in the first place, that the appellant is in fact now genuinely in fear of persecution.

Given these findings there is no need for us to consider the remaining issue, namely whether the claimed fear of persecution is persecution for a Convention reason. This issue is entirely hypothetical given that the first three issues have been determined against the appellant. The fourth issue could in those circumstances only be approached in a factual vacuum and we do not consider that the issue can be determined on such a basis.

Finally, we turn to the appellant's reliance on the 1990 Constitution and its provisions. We did not understand his case to be that the terms of the Constitution itself establish persecution of Fiji Indians and of the appellant in particular. Rather

his case was that it was part of the background to his claimed fears and in particular it established an institutionalized discrimination in favour of Fijians and against Indians. At the hearing of the appeal the attention of the appellant and his counsel was drawn to the fact that this issue is addressed by us at some length in Refugee Appeal No. 30/92 Re SM (26 November 1992). We have heard nothing in the appellant's evidence or in his counsel's submissions on this issue to persuade us to differ from the assessment of the Constitution we there made at 19 *et seq*:

> "**The Constitution**
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> At the hearing of the appeal we were also asked to consider the provisions of the 1990 Constitution and we were referred in particular to a report by the National Federation Party and the Fiji Labour Party Coalition called The Fiji Constitution of 1990: A Fraud on the Nation (1991). We have given careful consideration to the contents of this booklet as well as to the article by Jone Dakuvula in "Chiefs and Commoners: The Indigenous Dilemma" in Robie (ed) Tu Galala: Social Change in the Pacific (1992) 70 but cf. Mataitoga, Constitution-Making in Fiji: The Search for a Practical Solution (1991) 19 Melanesian Law Journal 43.
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> It is our understanding that the Independence Constitution of 1970 did not provide for racial balance in the Lower House of Parliament. Indians and Fijians had twenty-two seats each but eight seats were held by a General Elector group of Europeans, part-Europeans and Chinese. General electors held the balance of power, a colonial legacy which permitted five percent of the population to control fifteen percent of the Lower House seats. However, the voting mechanism did provide for cross-ethnic voting for national seats. That is, besides voting for their own ethnic group - Fijians for Fijians, Indians for Indians - electors also chose a candidate on a common roll. Under the system, politicians theoretically had to attract support from races other than their own. The arrangement was intended to ensure a stable multi-racial future for Fiji.
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> However, the 1990 Constitution abolishes cross-voting by adopting a strict communal system. There is now little incentive for candidates to appeal across ethnic lines. There are a total of seventy seats in the new House of Representatives: thirty-seven seats for Fijians, twenty-seven for Indians, five for other ethnic groups such as Europeans and Chinese and one for the Rotuman constituency.
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> Thirty-two of the Fijian seats are allocated to provincial areas which return either two or three members of Parliament. According to *Islands Business Pacific*, April 1992 p.20 in these constituencies there is an average of 3,457 voters per seat. But in the five urban

Fijian seats there is an average of 8,655 voters per seat. For this reason the Constitution has been criticized for (inter alia) allocating the Fijian seats inequitably amongst the fourteen provinces and for providing for under-representation of Fijians living in urban seats.

The Indian voters, with twenty-seven seats, have an average of 5,500 voters per seat. Those on the general roll are far better represented as there are an average of 2,121 voters a seat.

But more particularly, Fijians are guaranteed fifty-three percent of the seats whereas the Indians are given thirty-eight percent only, despite almost equal populations.

In addition, the Constitution gives the Great Council of Chiefs - the Bose Levu Vakaturaga - power to appoint and dismiss the President. The President, in turn, appoints the Prime Minister who, under the Constitution, can only be a Fijian. He is vested with powers that reach beyond other Parliamentary democracies. He has a crucial say in the appointment of the Chief Justice, the Director of Public Prosecutions, the head of the Public Service and the police force. Moves to remove the President can be started by the Prime Minister.

We do not intend to enter into an exhaustive examination of the principal features of the Constitution. It is sufficient for present purposes to note that it enshrines discrimination on a racial basis. The same, however, can be said of the 1970 Constitution which entrenched discrimination in the political system: Robie, Blood on Their Banner: Nationalist Struggles in the South Pacific (1989) 210. McLachlan in "The Fiji Constitutional Crisis of May 1987: A Legal Assessment" [1987] NZLJ 175 goes even further and states (at p.175):

> "Ever since Fiji became, at its own request, the first British colony in the Pacific Islands in 1874, government of the territory has been characterised by a full-blooded and continuous policy of protecting the interests of the native Fijians."

And later at p.181 he continues:

> "It is beyond question that the rights of the native Fijians as *Taukei ni qele* are entitled to constitutional respect and protection. One need not look far afield in the region to see current examples of the repression or inadequate protection of the rights and laws of indigenous peoples. The plight of the native Hawaiians, the Kanaks of New Caledonia, the Papuan peoples of Irian Jaya, and the current struggles of the Torres Strait Islanders, the Australian Aboriginal people and the New Zealand Maori must be as evident to the modern Fijian, as the earlier victims of colonial expansion in the Pacific were to his

> predecessors in 1874. The question is not that such rights exist and are worthy of protection, it is rather how best that is to be achieved."

Robie in Blood on Their Banner: Nationalist Struggles in the South Pacific (1989) 210 also points out that eighty-three percent of the land is owned by ethnic Fijians and both the then and the now-existing law prohibits the sale of land by the indigenous citizens. Land is not given individual titles but is held in common by the *mataqali*, and is classified into two categories - reserved and unreserved. Reserved land is prohibited from being either sold or leased to any non-Fijian while unreserved land can be leased to anybody, irrespective of race. Tenure is for a restricted period only. The law, therefore, explicitly denied more than half the Fijian nationals the right to own most of the available land.

We did not understand the appellant to say that the institutionalized discrimination written into the 1970 Constitution, and now the 1990 Constitution, amounts *per se* to persecution. In any event, we would not accept that on the present facts such an argument could be entertained. Rather, we understood the appellant to have drawn our attention to these matters as providing the context in which his fears, and their well-foundedness, should be assessed. This is accordingly the context in which we made our assessment.

We acknowledge that the 1990 Constitution has attracted widespread criticism but we also note that the Constitution is presently under review as a result of the political manoeuvring which took place at the conclusion of the May 1992 elections and the eleventh hour support which the Fiji Labour Party gave to General Rabuka's candidacy for Prime Minister. These events are more particularly described in the *NZ Herald*, Wednesday, June 3, 1992, *Pacific Islands Monthly*, June 1992 7-10 and *Islands Business Pacific*, June 1992 16-17. In short, General Rabuka gained the Prime Ministership only with the support of the Labour Party and following his agreement to review the Constitution, modify Fiji's land and labour laws and abandon a ten percent value added tax proposal. The rival candidate for Prime Minister, Mr Josevata Kamikamica, had also acknowledged a need to review the Constitution: *Pacific Islands Monthly*, May 1992 13. The conclusion we have drawn is that politics in Fiji as well as the balance of power will continue to be in a state of flux, a situation not unique to Fiji.

But more fundamentally, when examining the terms of the 1990 Constitution a distinction must be drawn between a breach of human rights and persecution for a Convention reason, a distinction we have drawn previously in other contexts. See, for example, Refugee Appeal No. 37/91 Re MAU (13 May 1992) and Refugee Appeal No. 72/92 Re MB (12 August 1992). In this respect we find the analysis by Dr M. Rafiqul Islam in The Proposed Constitutional Guarantee of

> Indigenous Governmental Power in Fiji: An International Legal Appraisal (1988) 19 California Western International Law Journal 107 too simplistic when compared with the more thorough and detailed analysis in Brownlie, Treaties and Indigenous Peoples (1992). We can find no basis for going further than recognizing that since Independence discrimination has been entrenched in the political system of Fiji. But this most certainly does not amount to persecution under the Refugee Convention."

As to the latter paragraph, it would be as well to emphasize that discrimination in favour of a particular group is not necessarily, of itself, a negative or sinister factor. See in this regard the observations of Brennan J in Street v Queensland Bar Association (1989) 168 CLR 461, 505-512; (1989) 88 ALR 321, 347-352 (HCA), a position vigorously argued in Ravuvu, The Facade of Democracy: Fijian Struggles for Political Control 1830-1987 (1991).

CONCLUSION

By way of summary our conclusions are as follows:

1. The appellant held a genuine fear when he left Fiji in October 1987 but does not presently hold any such fear.

2. The harm originally feared by the appellant was not of sufficient gravity to amount to persecution. Even if we are wrong in this finding, such consequences of return as he may now fear are likewise not of sufficient gravity to amount to persecution.

3. The fear held by the appellant in 1987 was not well-founded, he presently holds no fear of persecution and even if such fear were held by the appellant, the fear is not a well-founded one.

4. In view of these findings there is no basis for a consideration of whether there is a Convention reason.

Our overall conclusion is that the concern of the appellant and his wife is really in relation to the future of their three children in that they have quite understandably come to New Zealand in search of improved living conditions and for reasons of personal convenience. However, there is a clear line between migration for such reasons and migration driven by fear of a human rights violation tantamount to persecution: Hathaway, The Law of Refugee Status (1991) 117. Having found that neither the appellant nor any member of his family is a refugee within the meaning of Article 1A(2) of the Refugee Convention, refugee status is declined. The appeal is dismissed.

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(Chairman)