REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75221

REFUGEE APPEAL NO 75225

AT AUCKLAND

Before:	B Burson (Member)
Counsel for the Appellants:	R Chambers and K Gore
Appearing for the NZIS:	No Appearance
Dates of Hearing:	19 and 20 April 2005
Date of Decision:	23 September 2005

DECISION

---

[1] These are appeals against the decisions of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellants, nationals of India.

INTRODUCTION

[2] The appellants are wife and husband respectively. They arrived in New Zealand on 26 December 2000. The appellants are part of a group of siblings who have all come to New Zealand and claimed refugee status (the family group). The appellants in *Refugee Appeal Nos 75222, 75223 and 75224* are the wife's brothers, the brothers-in-law of the husband. Their appeals were heard together by the Authority over three days. Each has been represented by the same counsel. The same arguments have been raised by counsel in respect of each appeal.

[3] The appellants' present claims for refugee status were lodged on 1 July 2003. They were interviewed in respect of that claim by the RSB on 3 September 2003. By decision dated 28 May 2004, the appellants' claims for refugee status were dismissed. Each appellant duly appealed to the Authority from that decision.

[4] This is in fact each appellant's second claim. Each has filed a previous claim for refugee status with the RSB in January 2001. Their first claims were dismissed by the RSB on 30 April 2002 and the appellants appealed to the Authority. Each appellant's first appeal was dismissed by the Authority on 21 March 2003.

[5] Because this is each appellant's second claim jurisdictional issues arise in respect of each. In *Refugee Appeal No 75139* (18 November 2004) the Authority revisited its jurisprudence on the issue of second time appeals. The Authority rejected the submission that the jurisdiction to entertain second claims was at large. Rather, the Authority found that an appellant on a second claim, must establish that the threshold set out in s129(O) of the Immigration Act 1987 ("the Act") is met. This must be determined as a preliminary issue and jurisdiction established before the Authority can proceed to consider the substance of any second claim.

[6] At the hearing, the Authority, after considering oral argument by counsel, indicated that it accepted jurisdiction to hear these appeals and gave brief oral reasons. It now sets out in full its reasons for finding the jurisdictional criteria have been met.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[7] Pursuant to s129O(1) of the Act it provides that:

> "A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[8] Each of these appellants is therefore only entitled to have their second claims substantively considered by the Authority if circumstances in India have changed to such an extent that their second claims are based on significantly differently grounds to their first.

[9] Each appellant's first claim was based on a risk said to arise because of the belief that they, or a close family member, were associated with terrorist groups in India. The substance of the appellants' second claims for refugee status is that they have a well-founded fear of being persecuted because of their caste status as Ad Dharmi, a scheduled caste under the Indian Constitution. As such they are commonly known as Dalits or untouchables. (Throughout this decision these terms will be used interchangeably as context requires).

[10] Their second claims are grounded in what counsel submits is the gross discrimination against Dalits, a situation made worse by what happened in Talhan where inter-caste violence broke out in June 2003. Clearly, this event is an event in their home country which post-dates the determination of their first claim by the Authority on 21 March 2003.

[11] Caste status can be considered to be within the Convention grounds of race - see in this context the discussion in Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) at pp141-142. Caste status can also denote membership of a particular social group; caste being an innate or internal defining characteristic – see generally *Re GJ* [1998] INLR 387, 401-408.

[12] The underlying basis upon which each appellant now seeks to claim surrogate international protection is not only different, but significantly different to the first. It is based in part on an incident which post dates the determination of their first claim and importantly, an incident described in some country information as a "turning point" in the context of inter-caste relationships in the Punjab – see "Talhan sets divisive trend" *The Times of India Online* (9 July 2003) http://timesofind.indiatimes.com/articleshow/msid-66425,prtage-1.cms.
Prima facie therefore, the Authority is satisfied that there has been a sufficient change of circumstance for the purpose of satisfying the jurisdictional criteria. The implications of this incident on the risk of serious harm faced by these appellants will be assessed later.

[13] Accordingly, the Authority finds that it has jurisdiction in this matter.

[14] Having so determined that it has jurisdiction in these appeals the Authority will turn to consider the substantive merits of each appellant's second claim. Before doing so, it sets out a summary of each appellant's evidence. It notes that counsel made no application to the Authority to challenge any of the findings of

fact made by the Authority in their first appeals. Those findings of fact therefore stand for the purposes of this appeal.

THE APPELLANTS' CASE

Evidence of the husband

[15] The husband was born in X in the mid-1950s and resided in X all his life until coming to New Zealand in 2000. He is Ad Dharmi. Of the 1,500 houses in X, approximately 50 belonged to Ad Dharmi. The house was originally constructed of mud as was common at the time, but some 30 years ago it was rebuilt in brick. There the husband lived with his parents, his wife and their five children. The husband's father owned three fields of land which he inherited upon his death in the late 1980s. The land was not of good quality but it enabled the husband to grow wheat for use by his family whenever there was sufficient rainwater. The husband also leased a further nine fields for a year some 20 years ago but it made a loss and he did not renew the lease.

[16] The husband worked as a casual labourer doing farm work for most of his life. The amount of time he worked in a week varied. Sometimes he would work the whole week, some days he would work only two or three days. From the time he began labouring as a young man, until shortly before his departure to New Zealand, the longest period of time he was without work was 10-15 days. This was invariably in the rainy season.

[17] The husband experienced problems relating to his caste at work. On one occasion he was not paid despite having worked a whole day. However, on many other occasions, he was paid less than he was entitled to for his day's work.

[18] In the late 1980s, the husband purchased a truck financed by a loan from a friend and from a private bank. He worked transporting goods to and from markets in the Punjab and Jammu/Kashmir. At each market he had to register with a local agent and wait his turn to receive a contract. The amount of haulage work varied monthly, but the longest period of time between contracts was approximately 15 days.

[19] The husband encountered problems with other truck drivers in one particular market. They berated him for trivial things such as not parking his truck in what they thought was the right place and told him he could not sit with them because of his caste. On two occasions, he was pushed around and punched three or four times. In the middle of 2000 the husband was subjected to a severe beating by a group of Jats who accused him of jumping the queue for work. On another he was punched by a group of five or six people. He did not report any of these incidents to the police because they would not bother to help him as he had no money to pay bribes.

[20] Because of these incidents he decided that having the truck was only bringing him trouble and he decided to sell it, selling it shortly before he came to New Zealand. He had told his mother of his troubles and she lent him Rs40,000.

[21] The husband confirmed that his wife did have problems getting medical treatment in India following the birth of their daughter. He confirmed that he had to pay Rs5,000 to have her treated privately. He also confirms that the wife had a major stomach operation shortly before coming to New Zealand which he also had to pay for privately. He paid for this out of money he had saved himself and from borrowing some from a cousin.

[22] The husband is worried about returning to India. He fears the discrimination that he faced will continue. He is also anxious because of what has happened in Talhan. A curfew was imposed on X village and many other villages in the area. He has been in contact with his son on a regular basis since being in New Zealand. His son has told him that the Jats continue to verbally abuse the Ad Dharmi in the village.

Evidence of the wife

[23] The wife was born in a village in the Punjab in the mid-1950s where she lived until she married the husband when she was around 20 years of age. At that time, she moved to live with her husband and his family in X until coming to New Zealand in 2000. She is Ad Dharmi caste. All the Ad Dharmis in X lived in the same area on the fringes of the village. The wife lived with her husband, children and mother-in-law in the same house.

[24] The wife did not receive any education. She went to school for a week. During this time, she was verbally abused because of her caste and decided not to attend any longer. She, therefore, remained at home tending her families' animals until she married her husband.

[25] Prior to an operation, she worked with her husband on the land doing casual labouring on a daily basis. They worked whenever work was offered to them. Some days they were not offered any work. Often they were beaten by Jat Sikhs who swore at them and made them leave the land. On occasions, she was not paid the full amount she was owed for her labour. On one occasion, when she was with her husband, they were not paid at all for their work. The husband owned three fields which they would plant with wheat from time-to-time.

[26] The wife was discriminated against in getting health care. Following the birth of her youngest daughter the wife fell ill. She went to the hospital with her husband but she was not seen the whole day. In the end, the husband took her to a private hospital where she got the medicine she required.

[27] The wife suffered ongoing discrimination at the hands of Jat Sikhs in their village. They were forever verbally abusing her and the other Ad Dharmi. Sometimes the Jats prevented them from going to the *gurudwara,* the Sikh temple. They are not allowed to sit amongst the other Jat people. Some of them tried to prevent them from getting feed for their animals. Sometimes the Jats come and force them to vote for whoever is the strongest party in the area. They were not allowed to use their votes freely.

[28] The wife is worried for her safety if she returns. She has heard about something in Talhan and knows there was a curfew.

[29] The wife also fears that the discrimination that she suffered in the past will continue if she returns.

Other material

[30] By letter dated 13 October 2004, counsel filed other country material with submissions thereon. The Authority has received from a lay person assisting the appellants, a voluminous bundle of country material with notations written thereon. The appellants having retained counsel, pursuant to the Minute issued by the

Authority dated 4 March 2005, counsel filed a bundle of such of that information, which, pursuant to s129P(1) of the Act, the appellants were in fact relying on together with a schedule of essential reading and a written memorandum of submissions. The Authority also received from counsel a letter dated 15 October 2004 enclosing five decisions from the Australian Refugee Review Tribunal. The appellants have also filed a report dated 16 July 2003 by Wolfgang Greve, Registered Psychologist.

[31] This material has been considered by the Authority in reaching its decision.

THE ISSUES

[32] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

> "... owing to a 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."

[33] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

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

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANTS' CASE

I. CREDIBLITY

The Wife

[34] The wife's evidence was punctuated by frequent sobbing and insistence that since her operation in India, she could not remember anything at all. When

asked for as much as she could recall, her evidence was vague, mobile or was at variance with either her account to the RSB or prior written statement.

[35] In her RSB interview, when asked about her employment, she said that she did not work as a woman of her age and position, just did domestic duties. Before the Authority however, she asserted that she did labouring work on a regular basis.

[36] As to troubles they faced, in her statement, the wife mentioned stones being thrown at the house. She did not mention this to the Authority when asked to describe the various ways in which the Jat Sikhs had done things to their house. She told the Authority she and her husband received regular beatings in the fields by Jats. This is not mentioned in her statement or interview, nor is it mentioned by the husband. Furthermore, she had first stated to the Authority that she had been beaten when complaining to Jats who were purposely placing their wheat cutting machines so that the rubbish sprayed into their houses. When asked for further details she changed her account to say that she had been beaten when going on to the land.

[37] As to vagueness, the wife was unable to remember if her husband had any trucks or not, something that should have been the subject of recall given it was the only work her husband had done apart from casual labouring. As to their finances generally, in a written statement filed in support of her application there is reference to the tickets for travel to New Zealand being paid for partially from savings. When asked about this, the wife said that she could not remember.

[38] The Authority is mindful of the wife's age, medical problems and lack of formal education. However, these matters notwithstanding, the Authority finds, for the reasons set out above, her evidence to be generally unreliable and no weight is given to it as an indicator of the couple's experiences in India on the basis of their caste.

The husband

[39] The husband's evidence was easier to obtain and in general terms was consistent with what he had said before in respect of his second claim. The Authority accepts his account of their experiences in India as being generally credible.

Summary on credibility

[40] The Authority accepts that the husband had primary school and 18 months of secondary education. It accepts the wife has had no formal education. It accepts they lived in a one-bedroom brick house on the edge of X village with the husband's parents and their children. The husband gained casual labouring work on local farms which was his primary source of employment for most of his adult life. On one occasion, he was not paid for work that he did. On a number of other occasions, he was paid less than he was entitled to.

[41] The Authority accepts that for the last 18 months of his time in India, the husband owned and operated a haulage business with his own truck. The Authority accepts the evidence that he was assaulted on three occasions as he claims and for this reason gave up his truck haulage business.

[42] The Authority accepts that the husband and wife had been subjected to verbal abuse in their daily life because of their status as Ad Dharma. The Authority in particular accepts that they have been prevented occasionally from celebrating the festivals of their *guru*. It accepts that the wife experienced the discrimination in the public health service on the two occasions mentioned by the husband.

II A WELL-FOUNDED FEAR OF BEING PERSECUTED

Country information

[43] Counsel filed much country information to support his submission that as Dalits, the appellants are part of a group that has been historically subjected to socio-economic discrimination and marginalisation. The Authority accepts this is the position.

[44] As to the Dalit population of India, the National Campaign on Dalit Human Rights *Broken promises and Dalits Betrayed* (undated) http://www.dalits.org/blackpaper.html (accessed 21 March 2005) (the NCDHR report) demands freedom from caste bondage in the name of "260 million Dalits of South Asia". The United States Department of State *Country Report on Human Rights Practises 2004: India* (28 February 2005) (The USDOS report) states that according to the 2001

census, scheduled castes made up 16 per cent (166.6 million) of the population with scheduled tribes a further 8 per cent (84.3 million). Dalits or untouchables thus comprise a substantial percentage of the overall population.

[45] The situation of Dalits in India has been comprehensively reported on by Human Rights Watch *Broken People: Caste Violence Against India's Untouchables* (March 1999) http://www.hrw.org/reports/4/1999/India. At Chapter 3, p2, the report deals with the context of caste violence and notes:

> "India's caste system is perhaps the world's largest surviving social hierarchy. A defining feature of Hinduism, caste encompasses a complex ordering of social groups on the basis of ritual purity. A person is considered a member of the caste into which he or she is born and remains within that caste until death, although the particular ranking of that caste may vary among regions and over time. Differences in status are traditionally justified by the religious doctrine of Karma, a belief that one's place in life is determined by one's deeds in previous lifetimes. Traditional scholarship has described this more than 2,000-year-old system within the context of the four principal varnas, or large caste categories. In order of precedence these are the Brahmins (priests and teachers), the Ksyatriyas (rulers and soldiers), the Vaisyas (merchants and traders), and the Shudras (labourers and artisans). A fifth category falls outside the varna system and consists of those known as "untouchables" or Dalits; they are often assigned tasks too ritually polluting to merit inclusion within the traditional varna system.
>
> Within the four principal castes, there are thousands of sub-castes, also called jatis, endogamous groups that are further divided along occupational, sectarian, regional and linguistic lines. Collectively all of these are sometimes referred to as "caste Hindus" or those falling within the caste system. The Dalits are described as varna-sankara: they are "outside the system" – so inferior to other castes that they are deemed polluting and therefore "untouchable". Even as outcasts, they themselves are divided into further sub-castes. Although "untouchability" was abolished under Article 17 of the Indian constitution, the practice continues to determine the socio-economic and religious standing of those at the bottom of the caste hierarchy. Whereas the first four varnas are free to choose and change their occupation, Dalits have generally been confined to the occupational structures into which they are born."

[46] The report goes on to state:

> "Most Dalit victims of abuse are landless agricultural labourers. According to the 1991 census, 77% of the Dalit workforce is in the primary (agricultural) sector of the economy. Those who own land often fall into the category of marginal land owners. Land is the prime asset in rural areas and determines an individual's standard of living and social status. Lack of access to land makes Dalits economically vulnerable; their dependency is exploited by upper and middle caste landlords and allows for many abuses to go unpunished."

[47] Within this context, the Human Rights Watch report is replete with instances of violence against individual Dalits which have gone unpunished in various provinces with Dalit populations in India. The report notes:

> "Between 1994 and 1996, a total of 98,349 cases were registered with the police nationwide as crimes and atrocities against scheduled castes. Of these 38,483 were registered under the Atrocities Act for the sorts of offences above. A further

> 1,660 were for murder, 2,814 for rape and 13,671 for hurt. Given that Dalits are both reluctant and unable (for lack of police cooperation in) to report crimes against themselves, the actual number of abuses is presumably much higher. IA national commission for scheduled castes and scheduled tribes has reported that cases typically fall into one of three categories: cases relating to the practise of "untouchability" in attempts to defy the social order; cases relating to land disputes and demands for minimum wages; and cases of atrocities by police and officials."

[48] As for Dalit women, the report notes:

> "Dalit women face the triple burden of caste, class and gender. Dalit girls have been forced to become prostitutes for upper caste patrons and village priests. Sexual abuse and other forms of violence against women are used by landlords and the police to inflict political "lessons" and to crush decent within the community. According to a Tamil Nadu State Government Official, the raping of Dalit women exposes the hypocrisy of the caste system as "no-one practises untouchability when it comes to sex". Like other Indian women whose relatives are sought by the police, Dalit women have also been arrested and tortured in custody as a means of punishing their male relatives who are hiding from the authorities."

[49] It is clear that despite the outlawing of untouchability in both the Indian Constitution and the 1955 Civil Rights Act, the practise of untouchability manifesting itself in the discrimination reported by Human Rights Watch in 1999, continues – see USDOS report which states:

> "the Constitution and the 1955 Civil Rights Act outlaws the practice of untouchability, which discriminates against Dalits and other people defined as Scheduled Castes; however, such discrimination remained an important aspect of life. Despite longstanding efforts by the Government to eliminate the discriminatory aspects of caste, the practice has remained, and widespread discrimination based on the caste system occurred throughout the country.
>
> Many rural Dalits worked as agricultural laborers for caste landowners without remuneration. The majority of bonded laborers were Dalits (see Section 6.c.) Dalits, among the poorest of citizens, generally did not own land, and often were illiterate. They faced significant discrimination despite laws to protect them, and often were socially prohibited from using the same wells and from attending the same temples as caste Hindus, and from marrying caste Hindus. In addition, they faced social segregation in housing, land ownership, and public transport. Dalits were malnourished, lacked access to healthcare, worked in poor conditions (see Section 6.e.), and continued to face social ostracism. NGOs reported that crimes committed by higher caste Hindus against Dalits often went unpunished, either because the authorities failed to prosecute vigorously such cases or because the crimes were unreported by the victims, who feared retaliation.
>
> Discrimination against Dalits covered the entire spectrum of social, economic, and political activities, from withholding of rights to killings. In January, Dalits participating in a national Dalit Swadhikar rally in Rajasthan were denied entry to the Shrinathji temple in Nathdwara. In May, a Dalit woman who had filed a complaint at the Aurangabad police station, died from severe burns, after allegedly being removed from the police station and set on fire by the officer in charge. The officer was suspended and charged with murder."

[50] Reference can also be made in this regard to Amnesty International *World Report: India* (2004) p1 and Human Rights Watch *World Report: India* (2005) at p1, each of which reports ongoing discrimination against Dalits. Other country

information reports attacks on individual Dalits in various parts of India – see for example Asian Human Rights Commission: *India: Brutal Attack on Dalits settlement in the Kalapatti Village, Coinbatore District, Tamil Nadu by upper caste* (28 May 2004) – http://www.ahrchk.net/ua/mainfile.php/2004/680 where an attack on 100 Dalit houses by 200 other caste members using weapons is reported.

Conclusion on country information

[51] Country information therefore establishes that despite the formal outlawing of the practise of untouchability in the Indian Constitution and other legislation, in general terms, the life of Dalits in India remains one of socio-economic marginalisation and discrimination. They continue to be subjected to caste-motivated violence.

[52] Counsel submits the appellants face two discrete forms of risk; firstly a risk of physical violence and secondly a risk of gross discrimination in the enjoyment of socio-economic rights. The Authority will deal with each in turn.

[53] Counsel refers to paragraph 43 of the UNHCR Handbook on Procedures for Determining Refugee Status. This provides that what happened to an applicant's friends, relatives and other members of the same racial or social group may show that the applicant's fear would also be well-founded. Paragraph 43 in this context, is referring to the objective assessment of risk and makes, properly, the point that the experiences of persons who are similarly situated to the appellant needs to be looked at in determining risk.

[54] Country information establishes Dalits do suffer serious harm in their thousands. This must however be seen in the context of a population comprising many millions. Plainly, the size of the Dalit population does not necessarily preclude individual Dalits from being refugees; as noted by Kirby J in *Applicant A and Anor v Minister for* Immigration *and Ethnic Affairs* (1997) 142 ALR 331, 385, the Refugee Convention itself, was influenced heavily by the depredations suffered by millions including the Holocaust, which involved the infliction of serious harm on millions of people for no reason other than a shared common immutable attribute. More recent sufferings in Rwanda and the former Yugoslavia are of a similar nature, as these conflicts also witnessed orchestrated and widespread campaigns of inter ethnic or religious violence, exposing all members of the

affected communities to a real chance of being persecuted, simply because they were members of that particular ethnic or religious community.

[55] However, the situation for Dalits in India, while one characterised by continuing socio-economic marginalisation and incidents of caste violence, cannot be placed in a similar category. Therefore, for the risk of serious harm faced by an individual Dalit to rise above the real chance threshold, something more than simply being Dalit will be required. Each case must be considered on its own facts. As with any other refugee claimant, these appellants must therefore establish that their particular circumstances give rise to a well-founded fear of being persecuted.

THE RISK OF VIOLENCE

The past experiences of the appellants

[56] The violence the husband suffered in the past was of an isolated nature, occurring only in one of the markets in which he operated his haulage business. He did not suggest this was a phenomenon which existed in each of them. The assaults, while unjustifiable, were of a minor nature and he suffered no serious injury as a result. He has not otherwise been subjected to assaults on an individual basis or as part of a generalised attack on the Ad Dharmi community in X by members of other castes. The wife has not been assaulted.

[57] Their past experiences do not therefore of themselves, establish that the chance of their suffering violence rises above the real chance threshold. While plainly, given the country information, the chance of it occurring cannot be ruled out in absolute terms, nevertheless, based on their past experiences, this is of a conjectural and serendipitous nature.

[58] That of course is not determinative of the issue; the Refugee Convention is forward looking. Counsel refers to the appellants' belief that their being in New Zealand could expose them to harm, as they will be seen to have done something "above their station". This submission is rejected. Counsel has referred to no country information establishing that those Dalits who have been overseas face serious harm because of it on their return. Indeed, the appellants in *Refugee Appeal Nos 75222 and 75224*, both spent time overseas working before returning to X, and yet neither were assaulted for acting "above their station" by working

overseas and using their funds to build houses for themselves and their families. The submission is based on surmise. Their fears in this regard are not well-founded.

[59] The main thrust of counsel's argument is however, that post-Talhan, the general level of violence against Dalits in the Punjab has risen significantly, such that the risk the appellants would be subjected to physical violence in the future rises above the real chance threshold.

Talhan and the risk of the appellants suffering future violence

[60] As to Talhan, some country information reports that the violence that erupted was precipitated in the wake of elections where tension broke out in villages where Dalit representatives achieved administrative positions – see "Talhan sets divisive trend" *Times of India* (July 10 2003). Yet other reports contextualise the violence in Talhan against a growing Dalit assertiveness of their rights - see "Dalit's are increasingly asserting in Punjab, Hayana and UP" *The Tribune* (9 May 2004) http://www.tribuneindia.com/2004/20040509/edit.htm. which states :

> "Punjab has the largest population of Dalits in the country – 31 per cent of the total population as against 9.75 per cent in Haryana. How is it that the Bahujan Samaj party is the shaper of the political destiny in Uttar Pradesh while in Punjab and Haryana it acts, at the most, as a spoiler?
>
> The intensity of the Dalit assertion in a particular state can be largely ascribed to two causes – the depth of the caste oppression and the reformative process among Dalits propelling them to break the caste shackles. The Green Revolution aggravated social inequality in rural Punjab. This affected Dalits most adversely as most of them are landless. The problem was further compounded with the influx of agricultural workers from Bihar and eastern UP, unleashing the "push out" effect on Dalits.
>
> Alongside, the fillip lent to the process of identity formation among Dalits with the onset of Ad-dharmi movement in Punjab, migration of Dalits to foreign lands, especially in Doaba, and their entry into government services through reservation - all this has thrown up a mobile segment among Dalits. This had made Dalits aware of the possibility of better life, rising aspirations pit Dalits against Jats in rural Punjab. The Talhan episode in Jalandhar district has to be seen in this light."

[61] There is country information reporting that the Dalits of Punjab are finding themselves subjected to increased discrimination for exercising their free will in recent elections – see in "Punjab: a division along caste lines" *The Hindu* (23 March 2004). In "Punjab: Resisting Oppression" *Frontline* (16 July 2004), it is stated that violence may have accelerated against Punjabi Dalits in recent times,

in response to an increase in Dalit resistance to exploitation by Jat landowners, or a growing political awareness amongst Dalits.

[62] In light of the above, the Authority accepts that there has been an upswing in discrimination against Dalits in the Punjab as a result of a growing assertiveness by Dalits of their rights, which has resulted in violence against Dalits in Talhan and other villages in the Punjab. Talhan may well have been something of a catalyst. The report "Talhan sets divisive trend" *The Times of India Online* (9 July 2003) http://timesofind.indiatimes.com/articleshow/msid-66425,prtage-1.cms states:

> "The Talhan incident has proved to be a critical turning point in the social milieu of rural Punjab with more than a score of incidents of Jat-Dalit conflict being reported in the past about one month."

[63] That said, country information does not evidence that some two years later, by reason of what occurred in Talhan and other villages, all Dalits in the Punjab face a real chance of being subjected to violence simply because they are Dalits.

[64] Rather, country information shows the anti-Dalit violence is episodic in nature, triggered by discrete events that affect the individual Dalits concerned, or localised groups of Dalits. These events do not carry implications of violence for all Dalits in the Punjab as a group. Thus for example, the report in "Punjab: Resisting Oppression" *Frontline* (*ibid*) cites examples of clashes following the death of a Dalit youth in a particular police station "sparking violence in a village"; in another example it cites, a riot broke out "in a village" following the shooting of a Dalit by police during a demonstration by Dalits protesting bias against scheduled caste members in the Punjab. There are no reports of these incidents triggering state or nationwide violence against the wider Dalit population. It simply cannot be said that since the incident in Talhan, the threshold has been reached whereby simply being Dalit gives rise to anything other than a random or serendipitous chance of being attacked.

[65] As to X itself, there is no evidence to suggest that, at the present time, because of what happened in Talhan and other villages, the situation in the appellants' home village has deteriorated to such an extent that simply by reason of their being Dalit, they face a risk of ill-treatment above the real chance threshold. The husband said that in the telephone conversations he had with his son, nothing "big" had happened in X following Talhan. Once the initial curfew had

subsided, life appears to have returned to the normal pattern of seeking work on a daily basis.

[66] Against this background, the risk that each appellant may be the victim of anti-Dalit violence in the future, because of what happened in Talhan, is not supported by the country information or their own evidence. This fear is not a well-founded fear.

The risk of the wife being sexually assaulted

[67] Counsel submits that the wife faces the added danger because she is a Dalit woman. Country information establishes that such women are often the victims of sexual assaults and that these assaults are carried out with impunity. This does not make all Dalit women *ipso facto* refugees. In this case, despite the discrimination she suffered in the past, this has not manifested itself in sexual violence against her. None of the husband's problems resulted in sexual violence or the threat of sexual violence against her. There is nothing about the wife's situation to amplify the risk to her beyond something which is anything other than random and serendipitous. It is not well-founded. The submission is entirely conjectural in nature.

THE RISK OF SOCIO-ECONOMIC DISCRIMINATION

Submissions

[68] Counsel referred to the "gross discrimination" the appellants faced in relation to their living conditions, work, in accessing healthcare and in education. Although not directly articulated in such terms, the submission is effectively that the appellants face a well-founded fear of being persecuted by reason of anticipated breaches of their rights under the International Covenant on Economic Social and Cultural Rights (ICESCR), to which India is a State party.

[69] The Authority accepts that the appellants are likely to encounter the discrimination they faced in the past. That is, they face a real chance of employment related discrimination and occasional discrimination in accessing health services. It accepts that they would return to live in the same basic housing conditions in which they left India.

[70] The question is whether this suffices to establish a well-founded fear of being persecuted. This inquiry necessitates consideration of whether or not there is a real chance that the Indian state will breach any obligation owed to the appellants under the ICESCR, such that it can be said there is a failure of state protection resulting in a real chance of serious harm to either or both appellants.

ICESCR – Basic observations

[71] Part III of the ICESCR contains a number of rights including, relevantly for present purposes;

(i) the right to work (Article 6);

(ii) the right to just and favourable conditions of employment (Article 7);

(iii) the right to adequate food (Article 11);

(iv) the right to adequate housing (Article 11);

(v) the right to the enjoyment of the highest possible standard of physical and mental health (Article12); and

(vi) the right to education (Articles 13 and 14);

[72] In relation to ICESCR rights generally, Alston and Quinn "The Nature and Scope of States Parties Obligations Under the International Covenant on Economic Social and Cultural Rights" *Human Rights Quarterly* 9 (1987) 156, 183-184 note:

> "… the main difference between the rights recognised in the two covenants [the ICCPR and ICESCR] consists of the fact that economic and social rights require relatively greater state action for their realization than do civil and political rights. This difference separates the two sets of rights more in terms of degree than kind and the relevant question to pose is not whether any particular kind requires state action, but rather the extent to which it can subsist without meaningful state support. Given that the chief difference is one of degree, it may be said in general terms that economic social and cultural rights are, on average, somewhat more dependant for their full realisation on positive state action than are civil and political rights (emphasis in original)
>
> …
>
> The above observations are important to bear in mind when evaluating the legal significance of the various words and phrases used in Part III of the Covenant to describe particular state obligations with reference to the various rights contained in that Part. At one end of the spectrum are words and phrases that create state

> obligations roughly akin to those minimalist ones created by classic civil rights. An example of such an undertaking is the one created by the word simply to "respect" certain of the rights. At the other end of the spectrum are various words and phrases that trigger positive and continuous programmes designed to ensure the realisation of certain rights. An example of a word creating such maximalist state duties is the undertaking to "guarantee" certain of the rights. In between these two poles are some shades of grey."

[73] Thus the ICESCR contains an amalgam of state obligations – some negative, to refrain from interfering with a right enjoyed (minimalist); others are positive in nature, requiring some action on part of the state (maximalist). This amalgam of obligations is sometimes referred to as an obligation to "respect protect and fulfil": "respect", requiring States parties to avoid all action that may hinder or prevent enjoyment of the right; "protect", requiring States to take measures to prevent enjoyment of the right being interfered with by third parties; and "fulfil", requiring States to take steps to ensure enjoyment of a right by all groups in society. There are both vertical and horizontal elements – see generally, Craven *The International Covenant on Economic Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, Oxford, 1995) at pp109–114; see also Masstricht Guidelines on Violations of Economic Social and Cultural Rights (1997) at paragraphs 6–7.

Are ICESCR rights justiciable?

[74] The Authority notes that unlike the ICCPR, the ICECSR contains no individual complaints procedure. This gives rise to the question of whether it is open to a refugee claimant to rely on ICESCR to found a claim for surrogate international protection, given the international treaty relied on to establish the right, confers no right to complain about breaches of its terms by way of an internal complaint mechanism.

[75] There has been much debate as to whether the ICESCR rights are justiciable. The Authority does not propose to embark upon a detailed traverse of the arguments that underpin the debate. However, the Authority recalls the basic principle as to the indivisibility of human rights, a principle affirmed in the Vienna Declaration 1993 following the World Convention on Human Rights. It notes the increasing emphasis post-Cold War on economic social and cultural rights, as manifested by repeated references thereto in the Vienna Declaration (see for example Articles 12, 14, 20 and 25) and by the appointment in the last decade for the first time, United Nations special rapporteurs for health, shelter, housing and food.

[76] D. Turk, UN Special Rapporteur on the Realisation of Economic Social and Cultural Rights, *Final Report on the Realisation of Economic Social and Cultural Rights* (3 July 1992) E/CN/4.Sub.2/1992/16 paragraph 28 (p8), after reviewing the competing arguments states:

> "the Covenant on Economic Social and Cultural rights is law and not merely exhortation and aspiration."

[77] Similarly, Alston and Quinn (*supra*) at pp165–166 dealing with the basic obligation of States note:

> "In essence the undertaking is akin to assuming an obligation of conduct… while the undertaking is clearly to be distinguished from, and is less demanding than a guarantee, it none the less represents a clear legal undertaking. The key point is that the undertaking to take steps is of immediate application. Thus, at least in this respect, the Covenant imposes an immediate and readily identifiable obligation upon state parties. While the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken either before or within a reasonably short time after ratification."

[78] The Authority respectfully agrees. In light of the above, the Authority is not persuaded by the argument that the rights contained in the ICESCR are not justiciable.

[79] While plainly not resulting in any enforceable action against the country of origin, ICESCR rights are nevertheless quasi-justiciable under the Refugee Convention. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) at pp108, 110,111, discussing the concept of persecution puts the matter thus:

> "Within the International Bill of Rights, four distinct types of obligation exist… .
>
> Third are those rights contained in the UDHR and carried forward in the International Covenant on Economic, Social and Cultural Rights. In contrast to the ICCPR, the ICESCR does not impose absolute and immediately binding standards of attainment, but rather requires states to take steps to the maximum of their available resources to progressively realize rights in a non-discriminatory way. The basic values protected are the right to work, including just and favourable conditions of employment, remuneration, and rest; entitlement to food, clothing, housing, medical care, social security, and basic education; protection of the family, particularly children and mothers; and the freedom to engage and benefit from cultural, scientific, literary, and artistic expression. While the standard of protection is less absolute than that which applies to the first two categories of rights, a state is in breach of its basic obligations where it either ignores these interests notwithstanding the fiscal ability to respond, or where it excludes a minority of its population from their enjoyment. Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter, or health care will at an extreme level are tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution."

[80] That ICESCR rights may found a valid claim for refugee status has, in any event, been recognised in New Zealand's refugee law jurisprudence for a number

of years. This broad framework has been adopted by the Authority in its decisions as to the meaning of persecution - see in particular the decision in *Refugee Appeal No 74665/03* (*supra*); see also *Refugee Appeal No 2039/93 re M*N (12 February 1996) and *Refugee Appeal No 71427/99* [2000] NZAR 545. However as noted in *Refugee Appeal No 74665/03* (7 July 2004), at paragraph [80], while it is possible to identify the distinct categories of obligation, the question of whether anticipated harm rises to the level of being persecuted:

> "depends not on a rigid or mechanical application of the categories of rights, but on an assessment of a complex set of factors which include not only the nature of the right threatened, but also the nature of the threat or restriction and the seriousness of the harm threatened."

[81] Overly rigid categorisations of rights in terms of hierarchies are therefore to be avoided. It must be recognised that be that non-enjoyment of ICCPR rights may affect enjoyment of ICECSR rights. Thus for example, marginalised groups in society will be less able to influence the process of resource allocation which has lead to a differential enjoyment of ICESCR rights – for a general discussion of the inherent relationship between political freedoms and economic needs see Sen *Development as Freedom* (Anchor Books, New York, 1999) at chpt 6, pp146-159.

The framework of state obligations under the ICESCR

[82] The operative Article in terms of establishing the basic obligations of State parties in relation to the Part III enumerated rights is Article 2 ICESCR. This relevantly provides:

> "1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available reasons, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> 2. The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[83] The basic emphasis is thus on the state as the primary driver of human development, expressed in terms of rights to various socio-economic determinants.

[84] Under Article 3 States are required to undertake to ensure the equal right of men and women to enjoy ICESCR rights. Although not necessary for present purposes to discuss in any detail, it is to be noted that Article 4 permits limitations

on ICESCR rights by States subject however, to the criteria specified – see generally Alston and Quinn (*supra*) at 192–206.

Article 2(1) – the duty to take steps

[85] State obligations under the ICESCR, have been the subject of comment by the Committee on Economic Social and Cultural Rights (the Committee), a group of appointed experts established pursuant to UN Economic and Social Council Resolution ECOSOC 1985/17. The Committee has issued general comments from time to time dealing with ICESCR matters. While not binding upon the Authority, the comments of the Committee are highly persuasive and, in the Authority's view, ought not to be lightly disregarded.

[86] The issue of "taking steps" has been addressed by the Committee in General Comment No 3. At paragraph 2 the Committee notes:

> "… the undertaking in article (2(1) is 'to take steps', which in itself, is not qualified or limited by other considerations… . Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."

[87] In General Comment No 3, the Committee addressed concerns that reference to "progressive achievement" would allow State parties to postpone the realization of rights indefinitely or otherwise entirely avoid obligation of the Covenant. At paragraph 9 the Committee observes:

> "The principal obligation of result reflected in article 2(1) is to take steps 'with a view to achieving progressively the full realization of the rights recognised' in the Covenant. The term 'progressive realization' is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."

[88] The critical point to note is that, regardless of any temporal latitude implicit in the concept of "progressive realisation" of ICESCR rights, States parties to the Covenant are under a positive duty to act, to take steps, to ensure that ICESCR rights are enjoyed by the greatest possible number of their population, having regard to resource constraints at the time.

Article 2(2) - The duty to promote non-discrimination in the enjoyment of ICESCR Rights

[89] State obligations under Article 2(2) differ from those under Article 2(1) in that, it requires States to guarantee that the ICESCR rights will be exercised without discrimination on the enunciated basis. This, as Craven (*supra*) at p181 observes, creates an immediately binding obligation to end discrimination; something both advocated during the drafting of the ICESCR and subsequently endorsed in the practice of the Committee. Craven notes however, correctly, that while States are capable of elimination and are obliged to eliminate *de jure* discrimination immediately by legislative measures, it is wrong to suggest the elimination of discrimination will always be capable of being achieved immediately. This reflects the operation of the Covenant on both vertical and horizontal planes between individuals and the state apparatus (vertical), and between individual citizens (horizontal).

[90] *De jure* (vertical) discrimination can and must be dealt with expeditiously by the state. *De facto* discrimination, in the form of material inequality and individual prejudice cannot however simply be legislated away and are matters that necessitate longer term social and educational programmes. As Craven observes, it is relevant to note in this context that international instruments on discrimination all imply that States are entitled to eliminate discrimination gradually. But take steps they must. In this context, immediate legislative steps eliminating *de jure* discrimination will be a necessary first step. State action cannot stop the door of legislative measures. Beyond this, affirmative action programmes will be required to address the underlying prejudices and promote equality of opportunity.

Taking steps - the duty to monitor, implement, and evaluate pursuant to a coherent plan/programme

[91] The Committee's General Comment No 1 sets out the objectives of the reporting procedures. The objectives give some insight into what the concrete

steps required by State parties can be said to be. One stated objective (at paragraph 3) is regular monitoring of the actual situation with respect to each of the rights on a regular basis so that States are aware of the extent to which the various rights are or are not being enjoyed. Recognising that monitoring in itself will not lead to full realization of ICESCR rights, a further objective of the reporting process is to enable the government to demonstrate that principled policy-making has been undertaken.

[92] Therefore the Committee, as noted by Craven (*supra*) at p118, has demanded that State parties establish national yardsticks or benchmarks, by which they evaluate the domestic situation and to implement a coherent policy to overcome the problems revealed by the ongoing monitoring process – see for example General Comment No 4 at paragraphs 12 and 13 as to the right to adequate housing. The requirement of an ongoing, coherent process of implementation, monitoring and evaluation under the ICESCR, is supported by the decision of the Constitutional Court of South Africa in *Government of the Republic Of South Africa et al v Grootboom and Others* 2001 (1) SA 46. The case concerned the right to housing under the South African Constitution in circumstances where a significant number of the country's population lived in poor housing conditions, with basic or no amenity provision.

[93] The Court observed that, while textual differences existed, nevertheless South Africa's constitutional provisions were clearly derived from the ICESCR and the observations of the Committee in General Comment No 3 as to state obligations to progressively realise ICESCR rights over time were apposite to the interpretation of the constitutional obligation of the South African state – see p70, paragraph [45]. Dealing with the measures required to be taken by the state the Court at p68 had stated:

> "[40] Each sphere of Government [national/provincial/local] must accept responsibility for implementation of the particular parts of the programme but the national sphere of government must accept responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's… obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met… .
>
> [41] The measures must establish a coherent public housing programme directed towards the progressive realisation of the right to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable… .
>
> [42] The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve

> the intended result, and the legislative measures will invariably have to be supported by appropriate, well directed polices and programmes implemented by the executive. These programmes must be reasonable in both their conception and implementation."

[94] As to the content of a reasonable programme of action in this context, the Court continued*:*

> "[43] In determining whether a set of matters is reasonable, it will be necessary to consider… problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crisis and to short, medium and long term needs, a program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.
>
> [44] … society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out the degree and extent of the denial of the right they seek to realise. Those whose needs are most urgent, and whose ability to enjoy all rights is most at peril, must not be ignored by measures aimed at achieving the realisation of the right."

[95] The Court held (at p79, paragraph [66]) the national housing programme made no provision for the needs of those in the most desperate need in the particular area of South Africa the case concerned. This proposition, that to be reasonable the programme requires balance and flexibility so as to take account of those in urgent need was further endorsed by the Court in *Minister of Health et al v Treatment Action Campaign* (No2) 2002 (5) SA 721,747–748.

Core minimum standards

[96] The Committee has in General Comment No 3, introduces the idea that within the corpus of the ICESCR Part III rights, there are core minimum levels which States parties to the ICESCR must ensure are met. The Committee puts it thus:

> "10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic form of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être."

[97] However, the Committee go on to recognise that there may be resource related reasons why States are unable to ensure that all of its population enjoy

core minimums of each ICESCR right. In such cases however, the state will be under an obligation to ensure as wider enjoyment of the core minimum content as its resources allow:

> "By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.
>
> 11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."

[98] In fact the Committee has in other general comments, begun to expand on what, at least in relation to certain of the rights, the normative core minimum standards should be. So far as is relevant for present purposes, the following general comments have been issued:

(i) <u>The right to adequate housing (General Comment No 4)</u>

This right means more than shelter and encompasses the "right to live somewhere in security, peace and dignity" (paragraph 7). Core minimums are stated (paragraph 8) to include legal security of tenure; availability to essential services and resources; affordability; habitability; accessibility; location to secure access to employment, schools, and health care and cultural adequacy.

(ii) <u>The right to the highest attainable standard of health (General Comment No 14)</u>

This right is not to be understood as the right to be healthy (paragraph 8). Core minimum standards are stated to include availability of adequate levels of functioning health and health care facilities in the state; physical accessibility of everyone, particularly marginalized or vulnerable groups without discrimination to these facilities; affordability and cultural appropriateness of health services.

(iii) The right to education (General Comment No 13)

The Committee recognises that the right to education while a human right in its own terms, is also "an indispensable means of realising other rights" (paragraph 1). It states (at paragraph 6) that essential features of this right include availability of educational institutions and programmes that are physically and economically accessible to all without discrimination, of acceptable content and sufficiently adaptable. The Committee (at paragraph 59), sets out examples of violations of the right as including failure to repeal discriminatory legislation or failure to address *de facto* discrimination and the failure to introduce compulsory primary education, available free to all.

(iv) The right to adequate food (General Comment No 10)

This right encompasses notions of food sustainability and security, and that "adequate food is available for present and future generations (paragraph 7); food must be available in a quantity and quality to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture (paragraph 8). The general comment suggests a very low threshold for state compliance, stating (paragraph 17) violations may occur "when a state fails to ensure the satisfaction of, or at the very least, the minimum level required to be free from hunger". The Committee notes that any discrimination in access to food would however be a violation of the right (paragraph 18).

[99] There are a number of broad points of relevance. Firstly, as noted in General Comment No 3, States are obliged to ensure a level of enjoyment of some ICESCR rights at a basic subsistence level. In *Minister of Health et al v Treatment Action Campaign* (No2) (*supra*), the Court, at p738 para [28], after referring to core minimum obligations under General Comment No 3 observed:

> "This minimum core might not be easy to define, but at least includes the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence."

[100] There is thus on all States an obligation to ensure provision of such food, shelter and health care that is essential for life at a basic level. This obligation

applies regardless of any resource constraints factors – see Maastricht Guidelines at paragraph 9.

[101] Secondly, while the full realisation of ICESCR rights is subject to the progressive realisation provisions in Article 2, where there is a situation of urgent need, such that non-enjoyment of an ICESCR right means such a basic subsistence level existence is not being enjoyed by some or all of a population, the time frame for the taking by the state of effective steps will be that much shorter; in extreme cases will be immediate. In all cases however, States are required to act to the maximum of their ability, having regard to their available resources. It is for this reason States are required to monitor enjoyment so as to implement a coherent and co-ordinated plan that is flexible enough to deal with situations of urgent need.

[102] In simple terms, the closer the level of non enjoyment of any ICESCR right brings an individual to a below subsistence level of existence, the more quickly the state will be required to act so as to realise the right's core minimum content. Furthermore, the closer the nexus between non-enjoyment of an ICESCR right and a basic subsistence existence, the more demonstrable and cogent any resource based explanation for state failure to meet this minimum obligation must be.

[103] Thirdly, beyond this core minimum obligation, it is clear the Committee do not set out particular manifestations of the right in question. Thus there is no core minimum right to any particular type of housing or housing construction, to any specified school curriculum or to any particular type of food. So long as what is provided meets the core minimum obligation, the precise manifestation of the right is country and context specific; there is no "one size fits all" manifestation by which to evaluate an appropriate level of enjoyment – see for example General Comment No 4, paragraph 8; General Comment No 14, paragraph 12.

[104] While all States must ensure a basic subsistence level of enjoyment as a core minimum obligation, those States with greater resources and capacity will however be under a duty to ensure more advanced manifestations of enjoyment, such as better housing, more advanced health care, than those States where resource constraints mean they struggle to attain more basic manifestations. What may constitute adequate levels of enjoyment in counties of relatively economically advanced countries such as New Zealand will therefore be different

from counties at lesser developmental stages with a more limited resource base and different pressures on what resource base exists.

[105] In broad terms, the core minimums are therefore to be noted for their "enabling" character, rather than for specification of universally applicable manifestations of the rights. The minimum level of enjoyment is to be evaluated by whether the particular manifestation of the right enables the individual to live with a basic level of security and dignity his or her common human condition demands. It is this enabling quality that applies regardless of the country and culture in question, not any particular manifestation.

[106] Fourthly, while the possibility of state limitation of ICESCR rights is contemplated under Article 4 ICESCR, to be permissible, any limitation imposed by the state on the enjoyment of the right must be compatible with the "nature of the right" as expressed through this enabling character. Furthermore, the limitation must also be "solely for the purpose of promoting the general welfare in a democratic society". Beyond these injunctions on state action limiting enjoyment of the right, the ICESCR, in general terms, specifies no particular political or economical structure as the appropriate vehicle for attainment of ICESCR rights. As the Limburg Principles of the Implementation of the Covenant on Economic Social and Cultural Rights (U.N. Doc. E/CN.4/1987/17) at para 6, note:

> "The achievement of economic social and cultural rights may be realised in a variety of political settings. There is no single road for their full realisation. Successes and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures."

[107] Finally, and following from the enabling character of their core minimum content, it is clear from the general comments that there is a great deal of overlap between ICESCR rights. Thus, the rights to adequate food and housing are parts of the wider right to an adequate standard of living guaranteed under Article 11(1); General Comment No 14, paragraph 4, states that rights to adequate health embrace a wide range of socio-economic factors including food, housing and safe and healthy working conditions. Part III ICESCR rights are not hermetically sealed from each other.

Conclusion on state obligations under the ICESCR

[108] The Authority thus finds that in light of the above matters, States parties are under an obligation to respect, protect and fulfil ICESCR rights. This involves obligations of negative and positive conduct (respect and protect) and result (fulfil).

In practical terms, the obligation of a State party under the ICESCR is to undertake an ongoing, coordinated and coherent programme of action so as to ensure that a core minimum level of each of the ICESCR rights are enjoyed by the widest possible population, having regard to the resource constraints of the country as a whole. The programme must be designed to lead over time to the full realisation by all of their ICESCR rights. It must be sufficiently flexible so as to deal with any situations of urgent need.

[109] This obligation will require, where needed, immediate legislative measures to rectify existing *de jure* discrimination in the enjoyment of ICESCR rights. Such measures, however, in no way themselves constitute sufficient action so as to meet the basic positive duties owed by States to ensure the progressive realisation of the Part III ICESCR rights. Rather, it is to be seen as the first of an ongoing series of coherent and integrated steps, that States parties are required to take to ensure, at the very least, that core minimum standards are enjoyed as widely as possible.

"BEING PERSECUTED" AND CLAIMS BASED ON THE ICESCR

[110] While States do have binding obligations under the ICESCR that are quasi-justiciable under the Refugee Convention, it is important to emphasise that the refugee status determination jurisdiction is not a *de facto* ICESCR individual complaints procedure. This is critical. Claims such as this, which rely on the freedoms and rights contained in the ICESCR, must establish not just a breach of one or more ICESCR right, but that there is a real chance of the claimant being persecuted in the country of origin or former habitual residence.

[111] It must be borne in mind that under New Zealand refugee jurisprudence, persecution is defined by the presence of two distinct factors: serious harm plus the failure of state protection – see Lord Hoffman in *R v Immigration Appeal Tribunal, ex-parte Shah and Islam* [1999] 2 AC 629, 653; expressly adopted by the Authority in *Refugee Appeal No 71427/99* [2000] NZAR 545, 569. Thus, while it is right that breaches of the ICESCR are in law capable of founding a claim for refugee status, as with any other claim, such claims must satisfy the Article 1A(2) legal criteria to establish a well-founded fear of being persecuted. As to the "being persecuted" component, the evidence must establish each of persecution's two constituent elements. Absent one, the claim cannot succeed.

[112] Therefore, without evidence that there is a real chance the state concerned will fail to protect a national through a breach of any duty owed under the ICESCR, a situation of harm or even serious harm would not suffice so as to found a successful claim to refugee status. This is to say that the individual concerned is without remedy; rather, only that the person does not fall within that limited class of persons to whom the international community owes surrogate international protection as a refugee under Article 1A(2) of the 1951 Refugee Convention.

[113] The issues of whether the evidence established a real chance of failure of state protection and serious harm will be considered in turn.

THE APPLICATION OF THE ABOVE TO THE APPELLANTS' CASE

Is there a failure of state protection by India in terms of its obligations under Article 2 ICESCR?

[114] It is clear from country information that the Indian state has taken immediate steps to end *de jure* discrimination in compliance with its Article 2(1) ICESCR obligations. The Indian Constitution itself expressly deals with the problem, by ascribing caste status to those who were hitherto without caste.

[115] That the drafters of the Indian Constitution were acutely aware of the need to take this fundamental step to improve the situation of groups such as the Ad Dharmi, emerges from the *travaux preparatiores* to the ICESCR which records that the Indian representative was concerned to ensure that the constitutional and other legal provisions enacted prior to the ICESCR for the benefit of previously casteless groups such as the Ad Dharmi, would not offend the principle of non-discrimination under Article 2(2) ICESCR; measures which the Indian government believed were "essential for the achievement of true social equality" – see Craven (*supra*) at 184–185.

[116] The Constitution of any country represents the normative framework of that society. The provision for scheduled caste thus reflects the desire of modern India's founders to address in a fundamental manner, the inequities inherent in the ancient caste system the modern state inherited.

[117] Furthermore, the country information shows that beyond this, various legislative measures have been implemented over time. The USDOS Report

refers to the Civil Rights Act 1955 outlawing caste-based discrimination and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 which lists specific offences and provides for stiffer penalties.

[118] Further country information also establishes that other measures and policies have been taken beyond the formal ending of *de jure* discrimination, as also required under Article 2 ICESCR. Thus:

(a) A National Commission for Scheduled Castes and Scheduled Tribe has been established – see HRW report (*supra*) at chpt 3 part 1, at p3);

(b) There are government supported schemes and discounted rations for those deemed below an officially designated poverty line – see Asian Human Rights Commission Urgent Action *India: Imminent starvation among Dalits classed as Above Poverty Line by Authorities in Gorakhpur District of Uttar Pradesh* (22 September 2004);

(c) There operates a "reservation" policy whereby certain positions within the public sector are reserved for persons from scheduled castes or tribes; – see the NCDHR report at p3. Indeed, the government has announced that it is considering extending the scheme into the private sector drawing criticism from industrialists – see "Caste System thwarts "untouchables" in India" *Taipei Times* 4 October 2004;

(d) The HRW report (*supra*) at Chpt 3 p2, refers to a 1996 review by the United Nations Committee on the Elimination of Racial Discrimination of the periodic report submitted by India. The report notes the prevalence of "untouchability" practises despite the existence of:

> "constitutional provisions and legal texts to abolish untouchability and to protect the members of the scheduled castes and tribes, *and social and educational polices [that] have been adopted to improve the situation of members of the scheduled castes and tribes and to protect them from abuses…*" (emphasis added)

[119] That the practice of untouchability continues despite these various matters is unsurprising; given its history, it is entirely unrealistic to expect that all caste based discrimination will be legislated away within a short time frame. It is similarly unsurprising that despite these various matters, Dalits remained discriminated against in every aspect of their lives and remain the victims of

violence as stated above – see USDOS Report (*supra*); Amnesty International *World Report 2004: India* at p3.

[120] The NCDHR report is cited by counsel in support of the appellant's claim which asserts that the Indian state is in breach of a number of its ICESCR obligations. The report states these as including the rights to livelihood, education, "land and labour" life and security and employment. The report states that between 1961 and 1991, the literacy gap between the Dalits and the rest of the population barely fell. It cites the selective installation in many villages of electricity, sanitation and safe drinking water which bypass Dalit areas and the increase in divestment of land. The NCDHR report also refers to the problems with the Reservation policy whereby many positions reserved under the scheduled caste reservation quota remain unfilled, sometimes for years.

[121] It is clear from country information that many problems remain for some Dalits in enjoying the full realisation of their ICESCR rights. This is accepted. Yet it is also clear from country information that the Indian state has taken steps to address the *de jure* and *de facto* discrimination against Dalits and it is taking steps to progressively realise their rights under the ICESCR.

[122] Over time, some improvements in their socio-economic condition have been made. Thus, the NCDHR report itself notes that while the number of Dalits in poverty increased by 5 per cent as a result of the economic policies of the government between 1987 and 1993, this reversed a declining trend of the previous 15 years. This 15 year reduction in Dalit poverty suggests economic and social policies designed to benefit Dalits were having some positive effect. There is no evidence to establish that any recent increase in poverty is due to what the Committee in General Comment No 3 termed "deliberately retrogressive measures" which might suggest a breach.

[123] Having regard to the above, the Authority finds there is no sufficient evidential basis before it to establish that the Indian state is in breach of any obligation owed to the appellants as Dalits under the ICESCR, from which it can be found there is a real chance of failure of state protection of their ICESCR rights occurring in the future. Steps by legislative and other measures, designed to realise over time, the full enjoyment by Dalits of their ICESCR rights, have been taken. There is no evidence to establish a real chance that such measures will not continue to be taken in the future. The steps that have been taken appear to be

bearing some fruit although plainly the socio-economic condition of Dalits remains in many cases a desperate one.

[124] That a refugee claimant may be able to establish that they have not or do not presently enjoy a right guaranteed under the ICESCR, does not in itself establish that the state is in breach of its ICESCR obligations. This is because it is implicit in the very notion of progressive realisation of ICESCR rights, that the attainment of core minimum standards is not something which States are obliged to achieve immediately albeit the time frame for realisation flexible depending on the relationship between the non-enjoyment and a basic level of subsistence. Mere evidence of the non, or partial, enjoyment of one or more ICESCR right, does not therefore necessarily evidence a failure of state protection.

[125] Simply adducing country information as to socio-economic conditions, even one contributed to by societal discrimination, is therefore insufficient to establish a failure of state protection. Such an evidential base fails to address the complexity of the issues raised by claims for refugee status based on ICESCR rights. States parties are not represented before the Authority. Bearing in mind that pursuant to s129P of the Act a claimant is required to establish their claim, the burden lays upon counsel relying on ICESCR rights to found a claim for refugee status, to present sufficient evidence as to the relevant State's actions, to contextualise any non-enjoyment in terms of the state's ICESCR obligations.

[126] The evidence before the Authority in this case, comes no where near establishing that the Indian state has failed to meet its obligations to the appellants as Dalits such that there is a real chance of their suffering serious harm as a consequence. There has been presented no evidence to establish that the Indian state has failed to address *de jure* discrimination or has no coherent plan or programme to address *de facto* discrimination in the enjoyment of ICESCR rights by its Dalit population. There has been no evidence presented to establish that national yardsticks or benchmarks do not exist or where they do, the monitoring is so inadequate as to demonstrate a substantive failure to take steps. There has been no evidence presented to establish that such problems that exist cannot be attributable to resource constraints. Much more is required to establish to even the low standard in this jurisdiction, that there is a real chance that the Indian state will be in breach of its obligations to "respect, protect and fulfil" the ICESCR rights of the appellants.

Does the appellants' situation evidence non-enjoyment of core minimum standards resulting in a real chance of serious harm?

[127] The Authority finds that the actions of the Indian state have resulted in the enjoyment by these appellants, of a sufficient level of enjoyment of core minimums of a sufficient number of ICESCR rights, such that it cannot be said that the appellants face a real chance of serious harm in the future.

[128] In relation to housing, they have security of tenure. Their housing, while modest, was rebuilt in permanent materials some 30 years ago. While it has no sanitation facilities, it has provided them with access to employment, health facilities and water. The family have been able to obtain sufficient employment to afford a basic standard of living. The husband owns some land on which he is able to grow crops for use by the family.

[129] They have in the past been able to obtain sufficient employment to sustain themselves and their dependants. It has not been suggested that their food is not adequate in the sense contemplated by General Comment No 10.

[130] Indeed, they were sufficiently wealthy to be able to save some funds to partly finance their travel to New Zealand. The husband told the Authority that in those periods when he was out at work, he could go to a local shop and obtain the necessary food stuffs and other requirements for the necessities of life on credit, with a promise to pay what was owed when he obtained work. This he did without problem.

[131] The husband received primary and some secondary education. While the wife did not this was not as a result of her being denied education system by the state, but rather, because of the abuse she encountered at the hands of other students which caused her to leave. At best, this could point to a historical failure to protect her right to education, although again no evidence has been presented to contextualise what happened by reference to state action or inaction.

[132] The Authority accepts that the wife has experienced isolated instances of discrimination in accessing public health. She may face similar discrimination in the future. Again however, there is no objective evidence to contextualise this in terms of a failure of state protection. The family had sufficient economic recourses to be able to have her treated privately and there is nothing to establish that this

will not be the case in the future. The chance her suffering serious harm is therefore conjectural. The husband reported no such problems and there is nothing to indicate the chance of this occurring in the future reaches the real chance threshold.

[133] No doubt the socio-economic condition of these appellants is, in relative terms, poor. Their past experiences indicate however, that although of a scheduled caste, these appellants had a sufficient economic base with which to ensure for themselves the basic necessities of life. Overall, their socio-economic condition cannot be said to be so precarious as to fall below "the basic level of dignified human existence" such that a return to it, amounts to a real chance of future serious harm.

[134] Counsel refers to the appellant having become accustomed to the rights and freedoms they have enjoyed in New Zealand. That a refugee claimant comes from and may have to return to a situation of poverty will not, without more, (such as the state initiated, sanctioned or tolerated deliberate denial of food, shelter, essential medical treatment to a particular religious or ethnic group) make that person a refugee. We live in a highly imperfect world. Injustice, poverty and hardship abound. Although progress has been made in poverty reduction in absolute terms, there is still considerable room for improvement in achieving the Millennium Development Goals by 2015 as agreed by the international community – see generally Sachs *Investing in Development: a Practical Plan to Achieve the Millennium Development Goals* (Earthscan, London, 2005) at chapter 2, pp13–27.

[135] The Refugee Convention is not, and was never intended by its drafters to be, a panacea for all the ills of the world; it was not intended to provide a haven from the suffering of all those in need – see *Canada (Attorney General) v Ward* [1993] 2 SCR 689. 732; *Applicant A and Anor v Minister of Immigration and Ethnic Affairs and Anor* (1997) 142 ALR 331, 345; *Horvath v Secretary of State for the Home Department [2001] AC 489, 494*. While ICSCR rights can form the basis of a claim for refugee status, it is important to recognise that the Refugee Convention is not however, an anti-poverty treaty; its function is much more limited. Although the preamble to the Refugee Convention denotes its broad humanitarian nature, this broad humanitarian concern does not permit a departure from its core object and purpose of providing a mechanism for surrogate international protection from those whose maltreatment "evidences a breakdown in national protection" – see Hathaway (*supra*) at pp103-104.

[136] The NCHDR report cites that only 31 per cent of Dalits households have electricity and that only 10 per cent of Dalit or scheduled caste households have sanitation. Yet the same report shows that lack of basic amenity provision are issues not just faced by Dalits in India. It records that only 61 per cent of non-scheduled caste households have electricity and only 27 per cent have sanitation.

[137] India's population exceeds 1 billion people. Taking the 2001 census data, of this figure, 250.9 million are of scheduled caste or tribe and 749.1 million are non-scheduled caste. On the NCDHR figures, 39 per cent of non-scheduled caste households have no electricity and 63 per cent have no sanitation. This amounts to 292.15 million and 471.94 million people respectively, who share these same basic conditions as Dalits, even though they have a traditional caste. The fact is that much of the Indian population lives in poverty without access to basic amenities. Thus, while in comparative terms, a greater percentage of non-scheduled caste household enjoy these basic amenities, it simply cannot be said that it is only Dalits who face basic living conditions such that their mere existence, evidences a breakdown of national protection.

[138] Counsel in his closing submissions referred to people being able to live with dignity and referred to paragraph 25 of the UNHCR Handbook in particular to the statement:

> "The High Commissioner (The United Nations High Commissioner for Refugees) has always pleaded for a generous asylum policy in a spirit of the Universal Declaration of Human Rights... ."

[139] The Authority agrees that all persons should be able to live with the equality and dignity that the common human condition demands. The Authority's jurisprudence is predicated on the premise that refugee law ought to concern itself with action that undermines human dignity in a key way – see *Refugee Appeal No 2039/93 Re MN* (*supra*).

[140] However, these broad underlying principles cannot operate so as to effectively emasculate the definition of persecution by removing one or both of its constituent elements of serious harm and a failure of state protection to persecution, or to stretch the reach of the Convention beyond its proper bounds.

Summary of Findings – a well-founded fear of being persecuted

[141] The Authority finds that for the reasons set out above, there is no real chance that the appellants will suffer breaches of their rights under either the ICCPR and ICESCR which individually or cumulatively amount to serious harm in respect of which there can be said to be a failure of state protection.

[142] As to the claims based on the risk of violence, their claims are wholly speculative; the risk to them falls below the real chance threshold.

[143] As to the claim based on the ICESCR their claims fail for two discrete but interrelated reasons:

(i) There is no evidence to establish that there is a real chance that the Indian state will fail to respect protect and fulfil their ICESCR rights; and

(ii) Their socio-economic condition does not establish a real chance of a risk of serious harm befalling them.

[144] The Authority answers the first question as framed in paragraph [33] in the negative. The need to consider the second does not therefore arise.

CONCLUSION

[145] The appellants are not refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is denied. Their appeals are dismissed.

.....
B Burson
Member