

AT AUCKLAND

Appellant:	AC (Egypt)
Before:	B L Burson (Member)
Counsel for the appellant:	C Curtis
Counsel for the respondent:	No appearance
Date of hearing:	15 August 2011
Date of decision:	25 November 2011

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee and protection officer of the Refugee Status Branch of the Department of Labour, declining to grant either refugee or protected person status to the appellant, a citizen of Egypt.

[2] The appellant claims both refugee and protected person status on account of the discrimination, harassment and occasional physical violence he has encountered in Egypt because he is albino. The central issue to be determined is whether the appellant's predicament constitutes 'being persecuted' or, alternatively cruel, inhumane or degrading treatment.

[3] Given that the same account is relied upon in respect of all three limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[5] The appellant was born into a middle class family in Z, situated in Y Governorate. He lived there with his family all his life prior to coming to New Zealand. His father worked as a production manager until his retirement 10 years ago. His mother worked in a professional capacity until two years ago. Since then this parents have lived off their pensions. He has three older siblings. The eldest has lived and worked in Europe for a number of years in a creative industry. Another has been a teacher in a Gulf state for a number of years. His third sibling remains living in Z, and is a lawyer.

[6] The appellant has lived a life of social marginalisation for as long as he can remember. In the two decades he lived in Z he never saw another albino in Z, a city of some four million people. He has not heard of an albino having a job of any kind. There are no organisations or support groups for albino people.

[7] The appellant explained that 40 per cent of the population in Egypt are illiterate. Their attitudes to albinism and the problems he has encountered are shaped by this lack of education. Even as a young child he recalls being shunned by the general population. From a young age he experienced children crying at his appearance or overheard mothers telling their small children to stay away from the "ghost" or the "monster".

[8] None of the neighbourhood children played with him. At school the appellant's social isolation only increased. No schoolchildren befriended him. Although he applied for school sports and cultural teams, he was never chosen. He was never selected to go on school trips. He was constantly verbally abused. As he progressed from primary school into high school, when aged 12 or 13, the abuse at school now also became physical in nature. On one occasion, a rock was thrown at his head causing an injury to just above his eye. On another occasion, he was pushed off a first floor balcony from behind causing him to break his arm.

[9] The appellant received minimal or no protection from his teachers against his abuse and some were openly hostile towards him. On one occasion a teacher threw a book at him, breaking his glasses. During his final years at high school the appellant was suspended on a number of occasions for no reason for up to a

week by the dean of his year simply because he was albino. The dean always called him derogatory names such as “foreigner” or “white” or “enemy of the sun”.

[10] The appellant’s form of albinism has given rise to a visual impairment and he has difficulty seeing distances. While some teachers allowed him to sit at the front, others would not let him do so which made it difficult for him to read what was written on the blackboard.

[11] His parents complained about the more egregious forms of mistreatment the appellant suffered. They complained when the teacher threw the book at him and when his arm was broken. Although the principal said he would look into it, nothing happened. His parents also complained about him not being selected for school trips or class activities but, again, nothing happened.

[12] Also, from his teenage years onwards, he experienced more open antagonism. On approximately 10 occasions during his teenage years, drivers deliberately swerved their cars in his direction while he was walking down the street, forcing him to jump out of the way to avoid being hit.

[13] Despite these problems, with the encouragement and support of his parents, the appellant completed high school, albeit with lower grades than he was capable of due to the negative environment he encountered at school. The appellant dreamed of being an engineer but the grades he received were insufficient to allow him to study engineering. Instead, he enrolled at his local university in a Bachelor of Arts degree which he began in 1999.

[14] The discrimination he encountered at school was replicated at the university. No student spoke to him or sat by him in lectures. The appellant explained that it was at this time young men and young women met and relationships were formed. However, none of the female students spoke to him.

[15] In an effort to make friends, the appellant took up smoking. Approximately four to six months into his first academic year, the dean of the year came up to him and stubbed his cigarette out in the appellant’s neck. He went home and informed his parents of what happened. No complaint was made by them as, by now, they felt there was no point. Distressed, the appellant dropped out of university for the remainder of the year. He resumed his studies the following academic year. Towards the end of his degree, the appellant dyed his hair in an effort to blend in. This only increased the hostility from the dean who informed the appellant of his disapproval and threatened to dismiss the appellant from university if it caused

problems. Concerned the dean would seek to carry out his threat, the appellant stopped dyeing his hair.

[16] The appellant completed his undergraduate degree in 2004 and sought employment in the Governate's administration in areas related to his degree. Because of his visual impairment and absence of melanin in his skin, he is classed as disabled under Egyptian law. He obtained a certificate from the government ministry responsible for the disabled confirming he was qualified to work in such capacity. The appellant explained that, under Egyptian law, five per cent of jobs in the public sector had to be reserved for disabled people. Despite drawing express attention to this law in his letters of application, he was not offered any work at the local administration.

[17] The appellant tried to find other work in the private sector not related to his degree but was offered only one interview. The appellant explained that in Egypt photographs were attached to the front of curriculum vitae and he believes he never got an interview because his photograph showed him as an albino. In the one interview he did get, he was ridiculed and told that he could not do the job as he could not walk about in the sun.

[18] After receiving no favourable reply in his initial efforts to find employment, the appellant enrolled in a compulsory precursor course required for enrolment in a master's degree. He completed the precursor course in 2005. Towards the end of 2005, the appellant still had not found work. The appellant became despondent over his situation. Concerned about the appellant's wellbeing, his father lent him 20,000 pounds, comprising approximately 20 per cent of his pension entitlement, in order to open a store for the appellant to run. A shop was rented on a monthly basis and stock purchased.

[19] At around this time, having completed the precursor course, the appellant prepared a research proposal for a master's degree. In early 2006, he found a lecturer who agreed to supervise him but who sought to discourage him from undertaking the course. In particular, the lecturer gave him an onerous reading list to be incorporated into his draft proposal within a short period of time, something he later ascertained had only been required of him. Having completed this onerous task to the lecturer's satisfaction, the lecturer unilaterally and without explanation removed his research proposal from the list being put forward for acceptance by the relevant faculty committee. The appellant tried to see the

lecturer about this but she refused to see him. He had to abandon the master's course.

[20] Shortly after this, the appellant travelled to a village to speak to a family to seek their consent to his marriage to their daughter, who had been a student in one of his university classes. Although at the meeting the girl's family were polite, the following week the girl's mother telephoned the appellant and told him that she did not consent to his marriage proposal. Her view was that the appellant could not protect himself and would be unable to protect her daughter. She also said that she did not want her daughter's children to grow up looking like the appellant.

[21] The proximity in time of this rejection to the problems he encountered with enrolling in the master's course caused the appellant to become depressed and withdrawn. He did not go to the shop for two months during which time his father ran the business. When he did return to the shop he went in the evenings when it was less busy. Business was poor. On most occasions, when customers entered the shop and saw him behind the counter, they walked out without purchasing anything. Towards the middle of 2007, in an effort to improve sales, he employed a girl to work in the shop but as the shop was known to be his, business did not significantly improve. Towards the end of 2007, having exhausted the funds given to him by his father, the shop could no longer continue and shut.

[22] Seeing the business founder, his family now encouraged him to seek a career in creative industries as an alternative. The appellant paid for private lessons in a creative role gaining proficiency in a number of web and graphic programs. In early 2008, the appellant was offered a one-month unpaid trial period in a creative role. Relieved to be given a job of any kind the appellant agreed. Despite performing well, after one month, the employer informed him he needed to work unpaid for a further month. Again, the appellant agreed. At the end of a further two months the employer still had not paid him any salary and, aware he was being exploited, the appellant left.

[23] The appellant explained that, alongside opening the shop and seeking employment in the private sector, he had over the four or five years after completing his undergraduate degree, continued to apply yearly to the Governate administration for employment in advertised vacancies for positions related to his degree. In his letters of application, he referred to the law requiring vacancies to be reserved for disabled persons and enclosed the certification he had received from the relevant government ministry as to his suitability for such roles. Each

year, he received a written response advising that no jobs suitable for the disabled had been identified. One year he was informed the administration were conducting a survey to identify the jobs that can be occupied by disabled people but no job was ever identified as far as he is aware.

[24] After five years or so of being rejected for employment the appellant's father wrote to the under secretary of the relevant Governate Directorate demanding that his son be given employment in accordance with the law. He received no reply. The appellant's father then went to the Governate in person but was told by an official that no disabled person had been employed by the government for over twelve years.

[25] Frustrated by all these events, in late 2009, the appellant decided that he would have to leave Egypt to have a life of any kind. His parents supported him and he began looking for places to travel. He heard about New Zealand and decided to come here to study. He remained in Egypt for approximately a year after leaving the graphics job prior to arriving in New Zealand. During this time he stayed in the family home and hardly ventured outside. He spent his time on the computer and sleeping during the hours when people were ordinarily awake to avoid all contact.

[26] Since being in New Zealand the appellant has been enjoying a life denied to him in Egypt. He has made friends at his course and has found and gained employment. He has registered with a number of professional associations dealing with social work. He has been in a relationship.

[27] He believed the situation would be worse now given the breakdown in law and order following the revolution which ousted the Mubarak regime. He has spoken to his family and they told him there were very few police on the streets in his area.

Documents and Submissions

[28] On 11 August 2011, the Tribunal received a letter enclosing a memorandum of counsel of the same date. Attached to this memorandum were a number of documents relating to the appellant's medical condition and education in Egypt, country information regarding the civil unrest occurring in Egypt, and a news article concerning albinism in Egypt. Also submitted were various documents relating to his work in New Zealand.

[29] During the course of the hearing, the Tribunal received from the appellant documents concerning his membership of various professional associations related to social work. Counsel made closing oral submissions. Subsequent to the hearing, on 31 August 2011, the Tribunal received a certified translation of an undated newspaper article titled "Enemy of the Sun", a fictitious account of the life and difficulties of an albino youth in a rural village. On 26 September 2011, the Tribunal received a translation of a medical report confirming a fracture to the appellant's right hand in the early 1990s.

ASSESSMENT

[30] Under section 198 of the Immigration Act 2009 ("the Act"), the Tribunal must determine whether to recognise the appellant as:

- (a) a refugee under the Refugee Convention (section 129); and/or
- (b) a protected person under the Convention Against Torture (section 130); and/or
- (c) a protected person under the International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

Credibility

[31] The appellant presented as a credible witness. His evidence was detailed, spontaneous and consistent with what he had said previously. The appellant's account of facing official discrimination in seeking public sector employment on account of his disability status was corroborated by credible documentary evidence in the form of a number of letters from the Y Governorate between 2005 and 2010. These letters variously state that the Governorate did not have any job opportunities or that an audit was being done. A copy of the complaint filed by his father in July 2010 was filed with the Tribunal. Documents have been filed to show that as he has not been in employment he is not entitled to free public health care. The appellant's account is also consistent with country information. His account is therefore accepted in its entirety.

Findings of Fact

[32] The Tribunal accepts that the appellant is an Egyptian national suffering from oculocutaneous albinism which affects his pigmentation and his hair. It also substantially affects his vision and he is partially blind as a result of his albinism. He is registered with the relevant government ministry as a disabled person not because he is an albino *per se*, but because of these physical effects.

[33] Throughout his life the appellant has been subjected to harassment, discrimination and social marginalisation. Local children refused to form friendships with him and he encountered discrimination and harassment at school. On isolated occasions he was subjected to physical violence. On one occasion this resulted in him suffering a fracture to his arm. Harassment and discrimination continued while at university and, on one occasion, a member of staff stubbed out a cigarette on his neck. From time to time, unknown drivers have attempted to run him over when he is walking in the street. His marriage proposal has been rejected on account of his condition.

[34] He has encountered discrimination in the field of education. The appellant obtained his undergraduate degree but was discriminated against by his supervisor at a master's level who withdrew his proposed thesis from consideration without any explanation.

[35] The appellant has tried unsuccessfully to obtain work in both the public and private sector. His attempts to rely on the affirmative action legislation establishing employment quotas for disabled persons has been unsuccessful. A business he started with his father's assistance also failed due to discrimination from customers who would not buy from an albino.

THE REFUGEE CLAIM

The Issues

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

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

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

“... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

[38] In terms of *Refugee Appeal No 70074* (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?

Relevant legal principles

[39] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective.

[40] The question of whether the claimant faces a well-founded fear of being persecuted involves an assessment of whether the appellant will suffer a sustained or systemic violation of his/her core human rights. Put another way, persecution can be seen as the infliction of serious harm, coupled with the failure of state protection; see *Refugee Appeal No 71427* (16 August 2000), at [67]. This approach, grounded in human rights norms derived from treaties of wide state acceptance (if inconsistent observance in practice), is reflected in what has come to be known as ‘the human rights approach to being persecuted’. See generally: *Refugee Appeal No 74665* [2005] NZAR 60 at [36]-[125] per Haines QC. At [58], the Refugee Status Appeals Authority (the Authority) observed that under this approach “core norms of international human rights law are relied on to define forms of serious harm within the scope of “being persecuted”.

[41] The appellant’s predicament derives both from the discrimination he has encountered as an albino and his frustrated attempts to find public-sector employment by means of domestic legislation establishing employment quotas for

disabled persons. It is therefore necessary to consider the international law framework in respect of both non-discrimination and disability rights.

[42] Neither the ICCPR nor the International Covenant on Economic Social and Cultural Rights 1966 (the ICESCR) make any explicit mention of discrimination on grounds of genetic traits such as albinism or because of disability. However, both the ICCPR and the ICESCR contain general non-discrimination guarantees. More recently, the Convention on the Rights of Persons with Disabilities 2006 (the CRPD), which entered into force on 3 May 2008, signals an explicit concern in the international community with ensuring the rights of persons with disabilities. These points will be considered in turn.

Non-discrimination and the ICCPR

[43] Article 2(1) of the ICCPR provides for a general obligation on states to ensure enjoyment of the rights recognised in the ICCPR without discrimination:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

[44] Additionally, Article 26 of the ICCPR provides for a general guarantee of equality before the law:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

[45] Whereas Article 2 is of an accessory character in that it can be violated only in conjunction with some other right guaranteed under the ICCPR, Article 26 creates a free-standing, autonomous right to equality; see, W Kalin and J Kunzli *The Law of International Human Rights Protection* (Oxford University Press, Oxford, 2010) pp 349-350; M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kiehl, 2005) pp 604-605. Nowak comments, at pp 632-633, that:

“The primary significance of protection against discrimination lies in the obligation on states parties to provide effective protection against discrimination by private parties to those subject to their laws.”

[46] While discrimination in purely private relations was protected by the right to privacy, outside this narrow bound, Article 26 requires the state to protect against

discrimination in “quasi-public sectors” such as employment, schools, accommodation and restaurants. Nowak further notes that the Committee on Civil and Political Rights (the Committee) practice in state reporting procedures:

“...shows that Art 26 is recognised as having such horizontal effects in, e.g. the workplace or with respect to traditional cultures.”

[47] In *General Comment No 18: Non-discrimination* (10 November 1989), the Committee noted, at [1]:

“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

[48] At [7], the Committee make clear that the prohibition on discrimination is of broad scope:

“While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply **any distinction**, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

[49] However, The Committee has stressed, at [13], that not every differentiation in treatment will constitute discrimination. Whether the differentiation in treatment is justifiable or not depends on whether the criteria for differentiation are reasonable and objective and whether the differentiation is proportionate to a legitimate aim. See also; W Kalin and J Kunzli (*op cit*) at p352; Nowak (*op cit*) at pp 46 and 628-629; and D Moeckli “Equality and Non Discrimination” in D Moeckli, S Shah, and S Sivakumaran (eds) *International Human Rights Law* (Oxford University Press, Oxford, 2010) at p 201.

[50] The use of the terms “such as” in both Articles 2 and 26 ICCPR suggests that the listed grounds of prohibited discrimination are not closed. Furthermore, both articles expressly contemplate that some “other status” could potentially fall within their scope. The Committee has not given any detailed guidance as to the

meaning of “any other status” in either Articles 2 or 26 of its decisions on individual complaints under the First Optional Protocol; see, S Joseph, J Schultz and M Castran *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (2nd, ed, Oxford University Press, Oxford 2004) at [23.22]; D Moeckli (*op cit*) at p 197.

[51] For example, in *C v Australia* Communication No CCPR/C/72/D/832/1998 (31 July 2001), the complaint of discrimination on grounds of disability was rejected on the basis the differentiation in treatment was reasonable in the circumstances: see [6.2]. The issue of whether the disability could constitute an ‘other status’ was not directly addressed. Nor has the Committee specifically address the applicability of Article 2 and 26 to disabled persons in any General Comment.

[52] Nevertheless, in *Vuolanne v Finland* Communication No 265/1987 (7 April 1989), the Committee, at [2.3], observed that the general prohibition on discrimination under Article 2 is of broad application. It stated :

“The all-encompassing character of the terms of this article leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the Covenant to be applicable in one case but not in the other. ... Furthermore, the travaux préparatoires as well as the Committee's general comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment. **It is, therefore, clear that the Covenant is not, and should not be conceived of in terms of whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent.**” (Emphasis added)

[53] W Kalin and J Kunzli (*op cit*) at p 352, argue that the list of prohibited grounds of discrimination is non exhaustive and the list:

“Can be extended by jurisprudence to include characteristics-such as age or disability - that are structurally similar to the enumerated grounds because they are an essential component of a person’s identity and cannot be relinquished.”

[54] Similarly, Joseph *et al* (*op cit*) at [23.9] argue that the Committee “probably view certain grounds of distinction as inherently more suspect” and thereby deserving greater scrutiny. They list disability as one such ground. They observe at [23.25] that in its *Concluding Observations: Ireland A/55/40* (24 July 2000), the Committee, at 29(e) recommend that further action be taken to ensure “the full and equal enjoyment of Covenant rights by disabled persons, without discrimination, in accordance with Article 26”.

[55] In terms of genetic traits such as albinism, the closest case in the Committee’s jurisprudence to the present situation appears to be *Wackenheim v*

France Communication No 854/1999 (26 July 2002) where the Committee considered the situation of a complainant with a similarly immutable physical characteristic. The complainant, who suffered from dwarfism, argued that a ban on 'dwarf tossing' in places of entertainment constituted discrimination as it only applied to dwarfs. The States Party argued that the differentiation in treatment based on the appellant's status as a dwarf was based on objective criteria: see [4.4]. Although not expressly addressing the point, the CCPR appears to accept that dwarfism was a relevant status, but agreed with the States Party that the ban on dwarf throwing did not amount to discrimination in breach of Article 26 of the ICCPR.

Disability and the ICESCR

[56] Article 2 of the ICESCR provides for a general obligation on states to ensure enjoyment of the rights recognised in the ICESCR without discrimination on specified grounds. Unlike the Human Rights Committee, the Committee on Economic Social and Cultural Rights (CESCR) has expressly dealt with the application of its constituent treaty to disabled persons. See: *General Comment No 5: Persons with Disabilities* (9 December 1994) E/1995/22, at [5], where CESCR note:

"The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, in so far as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 (2) of the Covenant that the rights "enunciated ... will be exercised without discrimination of any kind" based on certain specified grounds "or other status" clearly applies to discrimination on the grounds of disability."

[57] Commenting more particularly on the obligation to eliminate discrimination on the ground of disability, CESCR, at [15], define disability-based discrimination:

"... as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights."

CESCR goes on to observe that:

"Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based

discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.”

[58] At [35], CESCR addresses the issue of persons with disabilities in the context of the right to education, commenting that states should act to ensure the right to education of disabled persons to a level equal to their non-disabled peers in an integrated setting.

[59] CESCR has reaffirmed that disability constitutes a relevant status for the purpose of the prohibition on discrimination in subsequent General Comments dealing with specific ICESCR rights. See, for example: *General Comment No 13: The Right to Education* (8 December 1999) E/C.12/1999/10 at [36]; *General Comment 18: The Right to Work* (6 February 2006) E/C.12/GC/18 at [17]; *General Comment 19: The Right to Social Security* (4 February 2008) E/C.12/GC/19 at [29]. That disability status is a prohibited ground of discrimination akin to the grounds enumerated in Article 2(2) and further reinforced by observations in *General Comment No 20: Non-discrimination in economic, social and cultural rights* (2 July 2009) E/C.12/GC/20 at [28].

[60] It is clear CESCR see the CPRD as part of an interlocking series of multilateral human rights treaties which serve to give binding content to the prohibition on discrimination set out in both the Charter of the United Nations and the Universal Declaration of Human Rights. At [5], CESCR state:

“The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights, while other treaties require the elimination of discrimination in specific fields, such as employment and education.”

The Convention on the Rights of Persons with Disabilities 2006

[61] Given the appellant is regarded as a disabled person under Egyptian domestic law for some employment purposes, it is necessary to have regard to the CRPD to determine how the problems he has encountered in relying on the relevant domestic legislation informs the being persecuted inquiry.

[62] The CRPD is more than a non-discrimination convention: W Kalin and J Kunzli (*op cit*) at p 354. As Rosemary Kayess and Ben Fogerty “The Rights and Dignity of Persons with Disabilities: A United Nations Convention” *Alternative Law Journal* Vol 32(1) at p 23, note:

“The Convention is the first ever binding international instrument concerned exclusively with disability rights. It is a thematic convention that articulates the fundamental rights and freedoms within the *International Bill of Rights* and places them in a disability context.”

[63] Fredric Megret “The Disabilities Convention: The Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30 *Human Rights Quarterly* at p 494 similarly argues that the CRPD involves a “subtle mix of the old and the new, which confirms existing rights even as it amplifies upon, evolves from and even departs from them in the sort of creative ways required by the issue of disability”. Megret observes at p 503:

“Why should this affirmation of previous rights be necessary in the case of persons with disabilities? The simple answer is that it has not always been, and certainly still is not, in many instances, obvious. For a long time, some persons with disabilities were hardly considered human and were, as a result, denied basic rights. Persons with disabilities may have always been theoretically entitled to human rights, but in both law and practice they have often been denied them. Persons with disabilities have been victims of genocide, eugenism, and have suffered from massive discrimination resulting from a denial of their basic rights.

In this respect, the Convention's contribution is more than conveniently bringing the human rights of persons with disabilities under the same roof. Rather, there is a more fundamental and principled push to make it clear that existing rights are applicable to persons with disabilities. The Convention stands in affirmation of the "right to have rights:" an official, unambiguous and long overdue solemn recognition of the absolute equality of persons with disabilities with all other persons.”

[64] The CRPD has been characterised by both the Chairman of the Ad-Hoc Committee that developed its text, and the United Nations High Commissioner for Human Rights, as embodying a paradigm shift away from a social-welfare model of disability in which persons with disabilities are seen as objects of charity, to a model which recognises them as “rights holders able to claim those rights as active members of society; see, Rosemary Kayess and Phillip French “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities” (2008) 8(1) *Human Rights Law Review* at p 3; Amita Dhanda “Constructing a new human rights lexicon: Convention on the Rights of Persons with Disabilities” (2008) 8 *International Journal on Human Rights* at p 45.

[65] Reflecting the lack of a consensus around both the desirability and substantive terms of a definition of disability, Article 2 CPRD contains no definition of disability. Rather, the CPRD’s purposive article, Article 1, states that for the purpose of the Convention:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

This recognition that disability is a *function of the relationship between physical impairment and societal conditions* is important when considering the downstream issue of whether disabled persons are capable of constituting a particular social group for the purposes of the Refugee Convention.

[66] Article 2 defines discrimination on the basis of disability as:

“... any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

[67] Article 4 is the CPRD’s general obligations clause, and provides “States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”. Article 4 proceeds to then enunciate a comprehensive set of specific obligations. Article 5 addresses equality and non-discrimination. It provides:

- “1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.”

[68] ‘Reasonable accommodation’ is defined in Article 2 as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

[69] Academic observations around the CRPD both affirming and reformulating general human rights obligations within a disability context can be observed in relation to the right to work under Article 27 CRPD, which sets out a range of disability specific obligations to ensure states respect, protect and fulfil the right to work for persons with disabilities:

“Article 27 - Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

- (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
- (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
- (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
- (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
- (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
- (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
- (g) Employ persons with disabilities in the public sector;
- (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
- (j) Promote the acquisition by persons with disabilities of work experience in the open labour market;
- (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.“

[70] As at the date of this decision, some 105 states have ratified or acceded to the CPRD including states from the geographic north and south. States parties

embrace a variety of political systems and religious traditions; see, <http://treaties.un.org>. Egypt itself ratified the CRPD on 14 April 2008. Taking these factors into account, it is therefore appropriate that the Tribunal treat the CRPD as an international law treaty which identifies forms of serious harm and failures of state protection for the purposes of refugee status determination; see, *Refugee Appeal No 74665* [2005] NZAR 60 at [68]-[69].

Objectively, on the Facts as Found, Does the Appellant Have a Well-Founded Fear of Being Persecuted?

Country information

[71] Country information on the situation of albinos in Egypt is difficult to come by. In an email dated 19 July 2010 on the file from Mr G Suleiman, the Executive Director of the Houqouqi Association for Special Needs Rights advises that Egyptian law does not classify albinism as a category of the disabled and there is therefore a lack of official statistics about the group.

[72] On the issue of disability more generally, in a subsequent letter dated 5 September 2009, Mr Suleiman is critical of reports of the National Council for Human Rights of Egypt which ignore the rights of people with disabilities. In this letter he confirms that ingrained negative attitudes towards those with disabilities exist at both official and popular levels.

[73] As to the policy landscape, country information paints something of a mixed picture. On the positive side, Heba Hagrass "Definitions of Disability and Disability Policy in Egypt" in C Barnes and G Mercer (eds) *The Social Model of Disability: Europe and the Majority World* (The Disability Press, Leeds, 2005), at p 156, notes that since the 1950s several laws and policies concerning disabled people have been introduced in Egypt. In the 1970s, the Egyptian Ministry of Social Affairs introduced Rehabilitation Law 39 (1975), which brought disability policy together under one statute and raised the previously existing employment quota for disabled persons from two to five per cent. Social Welfare Law 79 (1975) functions to ensure persons who acquire disability through work-related injury or illness received appropriate compensation and pensions, although concerns remain regarding the scope of compensation.

[74] The United States Department of State *Country Reports on Human Rights Practices: Egypt 2010* (8 April 2011) (the 2010 DOS report) at section 6, notes that

the government “worked closely with UN agencies and other international aid donors to design job-training programs for persons with disabilities”. Disabled persons can ride government-owned mass transit buses without charge and also received special subsidies to purchase household products, wheelchairs, and prosthetic devices. Customs duties are reduced for specially equipped private vehicles.

[75] Further details of state cooperation with United Nations agencies in improving the lives of disabled persons in Egypt can be found in United Nations Development Group, Inter-Agency Support Group for the CRPD Task Team, *Including the Rights of Persons with Disabilities in United Nations Programming at Country Level: a Guidance Note* (July 2010) which, at p20 notes that the UN Egypt Country Team has developed a joint Integrated Programme to Promote the Rights of Persons with Disabilities, running from 2009 to 2013, with a budget of US\$1.15 million. Under this programme, the Egyptian Ministry of Social Solidarity, with various United Nations and international agencies such as UNDP, UNICEF, ILO, and WHO are working together to:

- (a) support the capacities of law-makers (duty-bearers) to incorporate the CRPD into the Egyptian legal framework;
- (b) support the Government of Egypt in the formulation of a National Disability Action Plan that will serve as an overarching policy statement;
- (c) implement a pilot project targeting persons with disabilities (rights-holders) at the community level; and
- (d) promote awareness on the rights of persons with disabilities among media, and at the community level.

[76] However, progress appears slow. Despite almost two years of such initiatives, the 2010 DOS report observes that:

“The law provides that all businesses must designate 5 percent of their positions for persons with physical or mental disabilities; however, there are no laws prohibiting discrimination against persons with disabilities in education, access to health care, or the provision of other state services, nor are there laws mandating access to buildings or transportation. Widespread societal discrimination continued against persons with disabilities, particularly mental disabilities, resulting in a lack of acceptance into mainstream society. Government-operated treatment centres for persons with disabilities, especially children, were poor.”

[77] Often the law establishing the five per cent employment quota is given only superficial application if it is complied with at all. Disabled persons in employment are even instructed not to approach the workplace and simply receive their salaries or are given meaningless roles: see, A Hassan “Egypt: The disabled protest for more rights, better jobs” *Los Angeles Times* (6 April 2010); G Abdel-Kader “Ways forward for the blind” *Al-Ahram Weekly* (14-20 January 2010); S El-Sirgany “Deck stacked against visually disabled” *Daily News Egypt* (19 September 2006).

[78] Commenting on this law, Hagrass, (*op cit*) at p157, argues that the law’s application is “restrictive” in that it tends to alienate disabled persons from their non-disabled colleagues and does not promote equal opportunity in the workplace. Commenting on wider legislative framework, Hagrass notes, at p158, there is no reference to disability issues in other Egyptian legislation and that:

“Consequently there is a tendency for policy makers generally to ignore disability issues; they are viewed as a rehabilitation issue and someone else’s problem.”

Further, Hagrass argues:

“By continually re-enforcing the orthodox essentially negative views of disability and, by implication, people with impairments, the interpretations of both disability and rehabilitation in Egyptian law inadvertently perpetuate discriminatory attitudes and prejudice toward people with impairments. Furthermore, some sections of the disabled population are treated more favourably than others. For example, Article 3 specifies that disabled citizens on a ‘low income’ are entitled to free rehabilitation. Those on higher incomes are not. It is worth noting that there have been no further amendments to these laws since the 1980s. As a consequence Egyptian disability policy is still encapsulated within a traditional individual, medical model of disability framework. The underlying assumption is that disabled people’s experiences and life chances are determined exclusively by their impairment. At the societal level, the individualisation, medicalisation and objectification of disabled people’s lives remains intact. As a result the powerlessness that characterises the experience of many disabled people’s lives goes unchallenged.”

Application to the Facts

Appellant the victim of past persecution

[79] It is clear from the documents on the file that the appellant is considered to be a disabled person by the Ministry of Social Affairs Office for Social Rehabilitation of the Disabled which has issued a certificate listing his disabilities as a visual impairment and suffering from congenital absence of skin and retina dye.

[80] The appellant's personal history has been one of substantial discrimination both in the public and private spheres. As a result of this discrimination, the appellant grew up in a highly isolated environment intermingling only with his immediate family. Despite his efforts to socialise, he had no friends or social networks and lived in complete isolation from wider Egyptian society.

[81] Although he obtained a higher school certificate and went on to complete an undergraduate degree, the discrimination he encountered from both the pupils and teaching staff contributed to a negative learning environment which adversely affected his grades, depriving him of the opportunity to pursue his chosen career as an engineer. His parents' complaints to the school authorities about his treatment were unsuccessful. Discrimination he has encountered from his supervisor has prevented him from completing his master's level degree.

[82] In addition to his total social exclusion, the appellant has encountered occasional physical harm. He has had his arm fractured and a cigarette stubbed out on his neck. While these incidents were isolated, he has on at least 10 occasions been the victim of attempts to run him over by unknown drivers of vehicles which swerve towards him when they encounter him on the street.

[83] The evidence before the Tribunal establishes that he has been denied the very core of the right to work. What is significant in the context of this case is that the appellant has *exhaustively* sought to enjoy this right but has been effectively shut out or refused access to employment in both the public and private sectors. The one occasion when he was offered work in the private sector resulted in unjust conditions of work and exploitation. Efforts by the appellant and his family to use private income to establish the appellant in secure self-employment have foundered in the face of entrenched negative societal attitudes towards albinos.

[84] In addition to the discrimination he has encountered in seeking employment in the private sector, it is significant that his repeated efforts to have public sector employers comply with domestic affirmative action legislation designed to facilitate entry of disabled persons into the workforce in the face of negative societal attitudes have also been met with indifference.

[85] The exhaustive attempts by the appellant over a number of years to enjoy the right to work, significantly distinguishes this appeal from the situation that arose in *Refugee Appeal No 76015* (14 November 2007).

[86] It is clear from the country information that there is some legal protection available to persons with disabilities. Country information makes clear that there is a law in place requiring public sector employers and some in the private sector to retain five per cent of their staff vacancies for persons with disabilities. The very fact that the relevant government ministry has issued the appellant with a certificate to facilitate his employment shows that there are some administrative structures in place to assist persons with disabilities in accordance with the law. Furthermore, the Government of Egypt is working with United Nations agencies on a range of policy initiatives designed to combat discrimination against persons with disabilities.

[87] However, the evidence before the Tribunal makes clear the existing legislative framework, administrative structures and policy initiatives have been ineffective in the appellant's case. Country information filed establishes that the law regarding employment quotas for disabled people is routinely not applied or applied in a superficial manner, and this has been the appellant's experience. As late as mid- 2010, the appellant's father was making an official complain as to the failure by the local Governate to comply with legal obligations.

[88] Individually, the discrimination the appellant has encountered in his education, employment and the isolated physical violence and intended hit and runs may not have caused the Tribunal to consider his past predicament amounted to his being persecuted. However, when the cumulative effect of these matters is weighed the Tribunal finds that the appellant has suffered serious harm within the meaning of the Refugee Convention. The net effect of these matters has been to deny the appellant any chance of a meaningful life through gaining any form of employment and self-worth. As F Coomans "Education and Work" in D Moeckli, S Shah, S Sivamumaran and D Harris (eds) *International Human Rights Law* (Oxford, Oxford University Press, 2010) at p 301 notes:

"When people earn money through work, they are in a much better position to get access to food, medical care, housing and education. Income generated through work is instrumental in acquiring property such as housing or land. In addition, decent work, not any kind of work, and just and favourable working conditions contribute to living in dignity."

[89] In respect of both the failure by the Egyptian state to take effective measures to combat discrimination against the appellant in education and in seeking private sector employment, and its failure to ensure the implementation of the disabled person employment quota, there has been a failure of state protection.

[90] There has been a sustained and systemic failure to protect his core human rights which have undermined the appellant's dignity in a key way. Accordingly, the appellant has been the victim of past persecution in Egypt; see, J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) at p 108.

The forward looking assessment of risk

[91] The Refugee Convention, however, is forward looking in its orientation and requires an assessment of the *future* risk of serious harm and a failure of state protection. The existence of past persecution is not determinative although absent any material change in the country conditions it can be a reliable indicator of future risk; see, Hathaway (*op cit*) at p 88.

[92] The Tribunal acknowledges that Egypt is now a signatory to the CRPD and that consistent with its obligations, steps are being taken in collaboration with United Nations agencies to improve the lives of disabled citizens since 2009. Nevertheless, this has had no effect in improving the appellant's situation prior to his departure. His attempts to access existing affirmative action legislation have been met with, at best, indifference. The advice that his father received about the non-employment of *any* disabled person for 12 years suggest a deep-seated discrimination within the local administration. There is little to suggest that the official and societal discrimination the appellant encountered will improve in the short to medium term or by his moving elsewhere in Egypt. There is a real chance the appellant will continue to encounter discrimination both in the public and private sector denying him the core of his right to employment.

[93] If the appellant were to be returned to Egypt he would continue to remain wholly reliant on his parents for support. Concerned about the appellant's predicament, his father has already used a significant portion of his pension in the failed attempt to secure employment for the appellant by providing him with some start-up capital to open the store. However, his parents are both elderly, retired persons. While in the short-term the appellant may well be able to rely on his parents for financial support, their ability to assist him financially on an ongoing basis is limited.

[94] Any future denial of the core of his right to employment will have a significant impact on his ability to live a life of dignity and worth in Egypt. This discrimination he encountered in seeking work and in his attempts to better his position through education, coupled with his almost total social isolation outside

his immediate family relations, has caused him considerable depression. This is likely to be so in the future. The Tribunal does not overlook that in his final year in Egypt the appellant lived a hermit's life sleeping during the day and waking only late in the evening, rarely venturing outside so as to avoid potential harm.

[95] As an albino, the appellant is highly visible in Egyptian society. The appellant must live in fear of not just verbal abuse but the occasional attempts to intentionally endanger his life through drivers deliberately steering their car in his direction. It is by good fortune that none of these crude attempts at harm were successful.

Conclusion on well-founded fear of being persecuted

[96] In conclusion, considering the above matters cumulatively, the Tribunal finds that the appellant faces a real chance of suffering the sustained and systemic denial of his core human rights, demonstrative of a failure of state protection.

[97] To be clear, however, the Tribunal finds the appellant's predicament extends far beyond social ostracism and prejudice, matters which on their own would not bring him within the scope of Refugee Convention protection. Furthermore, this case does not concern the question of whether Egypt is able to provide him with the level of medical care and treatment he can obtain in New Zealand to which different statutory considerations would apply: see section 131(5)(b) Immigration Act 2009. Rather, the appellant has provided clear and compelling evidence of a failure of state protection, most acutely but not limited to, compelling evidence of repeated failure by the state to comply with its own domestic legislation designed to ensure the appellant's equal enjoyment of his right to work.

[98] For these reasons, the Tribunal finds that the appellant does have a well-founded fear of being persecuted.

Nexus to a Convention Reason

Relevant legal principles: Nexus

[99] In *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 at [112] the Authority observed that the nexus requirement can arise through the serious harm or failure of state protection limbs. In *Refugee Appeal No 72635/01* (6 September 2002) at [173] the Authority held that it was not necessary for the

Convention ground to be the sole cause, main cause or direct cause of the appellant's predicament. It was sufficient that a Convention ground was identified as being relevant to the cause of the risk of being persecuted. As long as it was a contributing cause the nexus was established.

Relevant legal principles: particular social group

[100] In *Refugee Appeal No 1312/93 Re GJ* (30 August 1995); [1998] INLR 387 at 422, the Authority rejected the 'objective observer' approach to the interpretation of the Convention ground of 'particular social group' by which the external perceptions of the society at large or the agents of persecution were determinative. It instead adopted the "protected characteristics approach" which looks at the internal characteristics of the group and the extent to which the relevant characteristic is linked to the Refugee Convention's core concern with the avoidance of discrimination.

[101] In *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 at [93]-[102], the Authority noted developments in the superior courts of a number of overseas jurisdictions, and observed that a large measure of inter-jurisdictional consensus had developed in understanding of the nature and scope of the particular social group category. This jurisprudential consensus can be summarised as follows:

- (a) The scope of the 'particular social group' Convention ground must be determined by reference to the basic principles underlying the Refugee Convention, in particular, the international community's commitment to the assurance of basic human rights without discrimination. The particular social group category is therefore limited in its scope by anti-discrimination notions inherent in civil and political rights. Accordingly, "the manner in which groups are distinguished for the purposes of discrimination law can be appropriately imported into this area of refugee law".
- (b) Applied to particular social group category, the *ejusdem generis* rule means persecution directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. That characteristic must be either beyond the power of an individual to change, or so fundamental to individual identity or conscience that it ought not be required to be changed. While an

open-ended ground, the social group category is not an all encompassing category. Not every association bound by a common thread is included. A typology of groups possibly included identifies:

- (i) groups defined by an innate or unchangeable characteristic;
 - (ii) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
 - (iii) groups associated by a former voluntary status, unalterable due to its historical permanence.
- (c) The particular social group must exist independently of and not be defined by the persecution. Nevertheless, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.

[102] Applying these principles, the Authority has found that, in appropriate fact situations, sexual orientation and gender have constituted particular social groups. See: *Re GJ* (30 August 1995); [1998] INLR 387 and *Refugee Appeal No 71427/99* [2000] NZAR 545; [2000] INLR 608 respectively.

Disability status as a particular social group

[103] From the forgoing, it is plain that the group needs to be cognisable in society as a social group. The characterisation of disability in the CRPD as having both a physical and social component lends support to the notion that disability status can, in principle, be considered a social group in societies where persons with a disability are treated as a distinct group. Societal attitudes in Egypt towards the disabled are noted in Hagrass (*op cit*) at p 154:

“The Islamic faith explicitly encourages Muslims to help the poor and less fortunate in society, including disabled people. In most Muslim societies giving ‘*zakah*’, which may be understood as a form of income tax but in a religious context, is considered an obligation of duty. Moreover, many Muslims give part of their ‘*zakah*’ to various charities, nongovernment organizations, and disability groups in accordance with their religious beliefs. The extended family is still prevalent throughout the Middle East, and family ties and responsibilities remain strong. The conventional division of labour in this type of family structure requires women who do not go to work to be responsible for the care and support of children and older and disabled family as and where necessary. Moreover, because in countries like Egypt social policies are not well developed, or in some cases non-existent, disabled and frail older people have little alternative but to rely on their families for care and support.”

[104] The popular conception of disabled persons as being the subjects of formal obligations of charitable assistance deriving from the dominant societal religion points towards disabled persons being a clearly cognisable social group in Egypt.

[105] Furthermore, the entry into force of the CRPD signals a broad consensus in the international community that disability status forms a prohibited ground of discrimination under international human rights law. As noted by Megret (*op cit*) at p 501:

“Although the Convention is not specifically described as an anti-discrimination Convention in the same mould as CEDAW and CERD, there is no doubt that a concern about discrimination is at its core. As the 2002 UN Report states: “the disability rights debate is not so much about the enjoyment of specific rights as it is about ensuring the equal effective enjoyment of all human rights, *without discrimination, by people with disabilities*”. The Preamble of the Convention mentions the “need for persons with disabilities to be guaranteed their full enjoyment without discrimination” and stresses that “. . . discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person”. Non-discrimination, furthermore, is presented as one of the Convention’s “General Principles”. States are to ensure and promote the full realization of the human rights for persons with disabilities without discrimination.” (emphasis in original)

The fact that a substantial number of states have acceded to or ratified the CPRD which makes explicit obligations hitherto regarded as implicit in more universal guarantees of non-discrimination in the enjoyment of rights, supports the proposition that disability status can, in appropriate fact circumstances, be regarded as a particular social group for the purposes of the Refugee Convention.

Relevant case law

[106] In her review of the jurisprudence, M Foster *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (Cambridge University Press, Cambridge, 2007) notes, at pp318-323, that decisions from refugee tribunals across the common law world have found that persons with disability can, in some circumstances, constitute a particular social group. However, the issue appears to have received little direct attention in the higher common law courts.

Canada

[107] In *Liaqat v Canada (Minister of Citizenship and Immigration)* 2005 FC 893 at [29] the matter was not disputed by the parties and the court agreed that a mentally ill person was a member of particular social group in Pakistan. The claimant was not found to be a refugee on the specific facts. *Ampong v Canada (Minister of Citizenship & Immigration)* 2010 FC 35, 87 Imm L R (3d) 279,

concerned a Ghanaian citizen who as the result of a serious spinal cord injury, was paralysed in his lower extremities and had only limited use of his upper extremities. He was unable to stand or walk, and was incontinent. Noting evidence that approximately 10 per cent of the Ghanaian population was disabled, the court held, at [43], that “it is certainly possible that the applicant may belong to a particular social group in Ghana”. The decision was overturned on review because the officer failed to conduct an adequate investigation of country conditions for persons with disabilities in Ghana.

Australia

[108] In *Salem Subramaniam and Others v Minister for Immigration and Ethnic Affairs* [1998] FCA 483, the court, at p 3, noted without adverse criticism the finding of the tribunal under review that one of the appellants who suffered from a disability may be part of a particular social group on account of that disability, his caste, or combination of both.

United States

[109] Foster, (*op cit*) at p 321 observes that the jurisprudence across appeal circuits varies on this issue. Foster notes, however, that courts in appeal circuits which apply the protected characteristics approach, persons with disabilities have been held to be members of a particular social group; see, for example, *Tchoukhrova v Gonzales* 404 F 3d 1181 (9th Cir 2005) at 1189.

Application to the facts

[110] The appellant’s predicament is a function of his physical appearance which clearly identifies him as an albino and of his status as a disabled person.

[111] It is his physical appearance as an albino which has in substantial measure driven the discrimination he has encountered in society. Albinism is an immutable characteristic which is beyond the power of the appellant to change. It is an internal defining characteristic which serves to define the group independently of the persecution. Albinos are properly considered a particular social group in Egypt.

[112] Although albinism itself does not appear to be considered a disability *per se*, its physical effects are treated as such in Egypt. His status as a disabled person in Egypt has further contributed to his predicament as it underscores the

failure by the Egyptian state to comply with the positive obligations it owed to him under affirmative action legislation. The failure of the local officials to employ any disabled person for 12 years implies they are strongly conditioned by prevailing societal attitudes towards persons with disability. It may be that as a disabled person he forms part of a wider social group in Egypt, but having regard to the finding that his predicament is being contributed to by his membership of a narrower social group, namely albinos, it is unnecessary to reach any final conclusion on this point.

[113] The Tribunal finds that the appellant's predicament is contributed to by his membership of a particular social group in Egypt, namely albinos. The second principal issue is therefore answered in the affirmative.

Conclusion on Refugee Claim

[114] Having answered both the first and second principal issues set out in [38] above in the affirmative, the appellant is entitled to be recognised as a refugee. The Tribunal does so.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[115] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

Assessment of the claim under the Convention Against Torture

[116] Section 130(5) of the Act provides that torture has the same meaning as in the Convention against Torture, Article 1(1) of which states that torture is:

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Conclusion on claim under Convention Against Torture

[117] Because the appellant is recognised as a refugee he is entitled to the protection of New Zealand from *refoulement* to Egypt. The recognition of the appellant as a refugee means that he cannot be deported from New Zealand to Egypt; see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act. The exception to section 129 which is set out in section 164(3) of the Act does not apply. Therefore, there are no substantial grounds for believing the appellant would be in danger of being subjected to torture in Egypt.

THE ICCPR – THE ISSUES

[118] Section 131(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.”

[119] Pursuant to section 131(6) of the Act, “cruel treatment” means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

- (a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards; and
- (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

Assessment of the claim under the ICCPR

[120] Again, because the appellant is recognised as a refugee he is entitled to the protection of New Zealand from *refoulement* to Egypt. For the reasons already given in relation to the claim under section 130 of the Act, there is no prospect of the appellant being deported from this country. Therefore, there are no substantial grounds for believing that the appellant is in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment or punishment in

Egypt. Accordingly, the appellant is not a person who requires recognition as a protected person under the ICCPR.

CONCLUSION

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

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture; and
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[122] The appeal is allowed.

“B L Burson”

B L Burson
Member

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Member