AT AUCKLAND

Before: R P G Haines (Chairman) J C Moses (Member) A Wang Heed (UNHCR, Member)

Counsel for the Appellant: R J McKee

Appearing for the NZIS: No appearance

Date of Hearing: 29 August 1996

Date of Decision: 17 September 1996

DECISION

This is an appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a national of both the Republic of Peru and of the United States of America.

THE APPELLANT'S CASE

The appellant is a 36 year old single woman who was born in Lima, Peru. She holds a Bachelor's degree in Communication Sciences from the University of Lima and in Peru has worked as a publisher's assistant. In the United States she has been employed as a waitress. Her parents, two sisters and a brother live in Lima. She has one sister living in Miami.

In 1980, while attending university, the appellant noticed two people sitting in a car in the university carpark. They had in their possession pictures of the leader of the terrorist group known as the Sendero Luminoso together with books and pamphlets published by the Sendero Luminoso. She made an anonymous phone call to the police reporting what she had seen. A few days later she read in the newspaper that the two people had been arrested.

Three years later, in October or November 1983 she began receiving threatening telephone calls accusing her of being an informer and threatening her life. Later while at a beach, her car was damaged and a threatening note left on it.

In 1984 the appellant went to Miami, Florida as an English language student and she subsequently married there. The marriage did not last and there was a subsequent divorce. The appellant acquired United States citizenship in July 1990 and was issued a United States passport on 17 June 1992.

From 1984 to 1993 while living in Florida, the appellant encountered no difficulties.

However, in 1993 she began receiving threatening phone calls in which she was advised that she had been found and that her days were numbered. There was a further incident in which her car was damaged and a threatening message left on it.

In 1993 the appellant moved to North Carolina. In September she visited Peru for three months, returning to the United States in November 1993. She returned to Peru once more in June 1994 and, after a stay of four months, went back to the United States in October 1994. She experienced no further difficulties with the Sendero Luminoso either in the United States or in Peru until early June 1995 when she was assaulted in a North Carolina supermarket carpark by assailants who spoke Spanish. From their accent the appellant believes that they were Peruvians. She says that she required medical treatment for minor injuries sustained. She also claims that the incident was reported to the police, but they did not do anything.

Following this attack the appellant went to Peru on holiday in June 1995 and after a stay of six months returned to the United States in December 1995. She had no difficulties during her stay in Peru until December 1995 when she began receiving threatening phone calls again. She returned to Miami on 12 December 1995 and began working in a hotel as a waitress. A week

later she was approached in the hotel carpark by three individuals who shouted Sendero Luminoso slogans at her but because people in the carpark came to her assistance, the three individuals left. The incident was not reported to the police. The appellant decided to come to New Zealand and left Miami on 24 December 1995, arriving in New Zealand on 26 December 1995. She travelled on her United States passport.

On these facts the appellant claims that both in Peru and in the United States of America she faces a real chance of persecution at the hands of the Sendero Luminoso.

THE REFUGEE STATUS BRANCH DECISION

The Refugee Status Branch interview took place on 22 April 1996. Subsequently, in a decision dated 15 May 1996, the appellant was advised that her refugee application had been declined on the grounds that her fear of persecution in Peru was not well-founded. In making this finding an objective test was applied. However, in relation to the other Inclusion Clause criteria, the Refugee Status Branch applied a subjective test, finding that the appellant believed that she faced persecution both in Peru and in the United States of America on account of an imputed political opinion. We will return to this aspect of the decision shortly.

As to that part of her claim which related to the United States of America, it was found that the appellant would be able to find effective protection from the government of the United States of America.

MULTIPLE NATIONALITY AND THE REFUGEE CONVENTION

It is first necessary to dispose of the issue of multiple nationality and the Refugee Convention. Most refugee applicants are citizens of one country only, namely, the country in which the persecution is feared. Ordinarily, the issue of nationality does not surface in such cases as a significant issue. Where, however, the refugee claimant possesses more than one nationality, two interrelated but distinct principles must be kept in mind:

1. First, the terms of Article 1A(2) specifically require the claimant to establish a well-founded fear of persecution in ***each*** country of nationality. Unless this can be established, the claimant must first avail herself of the protection of the country of nationality in respect of which there is no well-founded fear of persecution, before calling upon the surrogate protection of the international community afforded by the Refugee Convention.

2. Second, there is a presumption that the country of nationality in respect of which there is no well-founded fear of persecution is able to afford effective protection.

These principles flow directly from the refugee definition. The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

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

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national"

As observed in *Refugee Appeal No. 1/92 Re SA* (30 April 1992) 77, the second paragraph in this quote recognizes that those who have a well-founded fear of persecution for a Convention reason potentially fall into three categories:

(a) Those who have single nationality.

(b) Those who have more than one nationality.

(c) Those who have no nationality at all (ie those who are stateless).

Persons in each of the three categories must satisfy the common requirement of a well- founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Thereafter, the requirements vary:

(a) A person who possesses single nationality must be outside the country of nationality and be unable, or owing to the well-founded fear of persecution, be unwilling to avail herself of the protection of that country.

(b) A person who has more than one nationality is required, in effect, to first avail herself of the protection of all of the countries of which she is a national. Only if she establishes a well-founded fear of persecution in each and every of such countries does she come within the Refugee Convention.

(c) A person who has no nationality must be outside the country of her "former habitual residence" and must be unable or, owing to the well-founded fear, be unwilling to return to it.

Professor James C Hathaway in *The Law of Refugee Status* (1991) 57 explains the protection principle in the following terms:

"It is an underlying assumption of refugee law that wherever available, national protection takes precedence over international protection. In the drafting of the Convention, delegates were clear in their view that no person should be recognized as a refugee unless she is either unwilling or unable to avail herself of the protection of ***all*** countries of which she is a national. Even if an individual has a genuine fear of persecution in one state of nationality, she may not benefit from refugee status if she is a citizen of another country that is prepared to afford her protection."

[emphasis in text]

The protection principle has rightly been described as the "lynch-pin" of the Inclusion Clause: *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 722 (Can:SC):

"It is clear that the lynch-pin of the analysis ***is*** the state's inability to protect, it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality."

[emphasis in text]

At 724 the Supreme Court of Canada held that the onus was on a refugee claimant to provide "clear and convincing confirmation" of a state's inability to protect. Absent such evidence, the refugee claim should fail, as nations should be presumed capable of protecting their citizens.

This principle was incorporated into New Zealand refugee jurisprudence by *Refugee Appeal No. 523/92 Re RS* (17 March 1995) at 35-37. The relevant passage bears repetition:

"The decision of the Supreme Court of Canada in *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 709 (SC:Can) delivered by La Forest J emphasizes the principle that international protection under the Refugee Convention is intended as a surrogate form of protection:

"At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects

from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see The Law of Refugee Status (1991), at p 135."

At 752, La Forest J stated:

"The rationale underlying international refugee protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option."

The impact of this principle on the objective component of the "well-founded fear" required by the Refugee Convention is that if a state of nationality is able to protect the claimant, then his or her fear is not, objectively speaking, well-founded: 712, 722.

Addressing the issue whether the claimant must first seek out the protection of his or her state before claiming refugee status, the Supreme Court at 723 accepted that in principle there cannot be said to be a failure of state protection when a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming. However, recognizing that some states are willing, but unable to protect their citizens from harm, La Forest J continued at 724:

"Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state."

[...]

Addressing the issue how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals, as well as the issue of the reasonable nature of the claimant's refusal to actively seek out this protection, the Court placed an onus on the claimant to provide clear and convincing confirmation of a state's inability to protect. If this cannot be done, the claim should fail: 724-725:

"... clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant."

We see no reason why this statement of principle should not also apply in the New Zealand context.

And at 726, La Forest J concluded:

"Although this presumption increases the burden on the claimant, it does not render illusory Canada's provision of a haven for refugees. The presumption serves to reinforce the underlying rationale of international protection as a surrogate, coming into play when no alternative remains to the claimant. Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already."

The present significance of this passage lies in the fact that even were the Authority to assume that each and every of the appellant's claims is credible, and we expressly make no finding in that regard, and even further assuming in her favour a well-founded fear of persecution in Peru (and again we make no finding in that regard), she is required by the Refugee Convention to establish, vis-a-vis ***the United States***, a well-founded fear of persecution for a Convention reason before seeking refugee status in New Zealand.

THE PRESUMPTION OF PROTECTION

The United States of America is an open and democratic society, possessing an efficient and multi-layered system of law enforcement, both at state and federal level. It would be incongruous, to say the least, for New Zealand to accept that citizens of the United States are able to satisfy the criteria of the refugee definition. There is every reason, therefore, to require of the appellant that she provide "clear and convincing confirmation" of the inability of the United States to protect her from the Sendero Luminoso.

In this regard the appellant's case was doomed to fail. With only one exception, none of the incidents which occurred in the United States were reported to the authorities. The exception relates to the incident in the carpark in North Carolina. In this regard the appellant's refugee application merely asserts that "the police couldn't do anything either". However, a single approach to the authorities over a period of 18 months hardly amounts to clear and convincing confirmation of a state's inability to protect. Furthermore, the appellant fails to appreciate that no state can guarantee protection against any or all forms of harm. That is why persecution is appropriately defined as the ***sustained*** or systemic failure of state protection in relation to one or more of the core human rights entitlements which has been recognized by the international community: Hathaway, *The Law of Refugee Status* (1991) 112. In the circumstances, it would be appropriate to refer to what was said by the Authority on this point in *Refugee Appeal No. 523/92 Re RS* (17 March 1995) at 86 - 87:

"... it is as well to bear in mind, in the refugee context, the observations made by Hugessen JA in *Canada (Minister of Employment and Immigration) v Villafranca* (1992) 18 Imm LR (2d) 130, 132 (FC:CA) adopted and applied in *Mendivil v Canada (Secretary of State)* (1994) 23 Imm LR (2d) 225, 231 (FC:CA):

"No government that makes any claim to democratic values or protection of human rights can *guarantee* the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however, much they may merit our sympathy, do not become Convention refugees simply because their governments have been unable to suppress the evil. Where, however, the state is so weak, and its control over all or part of its territory so tenuous as to make it a government in name only, as this court found in the case of *Zalzali v Canada (Minister of Employment and Immigration)* [1991] 3 FC 605, a refugee may justly claim to be unable to avail himself of its protection. Situations of civil war, invasion or the total collapse of internal order will normally be required to support a claim of inability. On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection."

To similar effect see Hathaway, *The Law of Refugee Status* (1991) 105:

"It is axiomatic that we live in a highly imperfect world, and that hardship and even suffering remain very much a part of the human condition for perhaps the majority of humankind. It is also true that there is no universally accepted standard of quality of life, nor of the role that a government should play in meeting the hopes and needs of its citizenry. This plurality of experience and outlook restricts any attempt to define in absolute terms the nature of the duty of

protection which a state owes to its people, as is clear from the deference that international law consistently pays to both cultural distinctiveness and sovereign autonomy."

The short point is that where a refugee claimant comes from an open democratic society with a developed legal system and which makes serious efforts to protect its citizens from harm, the presumption of state protection as formulated in *Ward* has particular application. Unless the refugee claimant is in possession of evidence establishing clear and convincing confirmation of such a state's inability to protect ***the claimant***, the claim should fail. It could even be said that in the absence of such evidence, the claim is manifestly unfounded or clearly abusive. There is every justification for expediting such claims and for confining the hearing to an initial determination as to whether clear and convincing evidence of the kind required by *Ward* is present. The failure to focus the enquiry in this way lends to the hearing an air of unreality as the facts of this case only too clearly show, as do the facts of *Refugee Appeal No. 2144/95 Re KRR-C* (25 April 1996) which was also a claim to refugee status by a citizen of the United States of America.

OBJECTIVE TEST FOR REFUGEE STATUS

In view of the fact that the Refugee Status Branch appears to have misunderstood the objective focus of the refugee definition, it is necessary to return to the terms of Article 1A(2).

Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

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

It is quite clear that the adjectival phrase "well-founded" qualifies both the word "fear" as well as the word "persecuted" and thus decisively introduces an overriding objective test for determining refugee status.

However, since the Authority's very first decision in *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991) it has been the custom of the Authority to formulate the principal issues arising from the Inclusion Clause in the following terms:

1. Is the appellant genuinely in fear?
2. Is it a fear of persecution?
3. Is that fear well-founded?
4. Is the persecution he fears persecution for a Convention reason?

Experience has shown that this initial formulation may have outlived its usefulness. It might even on occasion lead to a material misdirection as to the nature of the objective component of the refugee definition. For example, issue two is too often read as requiring an assessment whether, ***in the opinion of the appellant***, persecution awaits in the country of origin. The Convention, however, requires the issue to be determined on the objective facts as found by the decision maker. Likewise, issue four is too often read as requiring an assessment of whether, ***in the opinion of the appellant***, a Convention reason is present for the anticipated persecution. This too is erroneous. In the result, by "subjectivising" issues two and four it is quite possible for a refugee claimant to receive an affirmative answer to issues one, two and four even though the claim to refugee status may have no objective basis whatsoever. Such misdirections are in fact occurring at both first instance (as in the present case) and on appeal. See for example *Refugee Appeal No. 2373/95 Re SDS* (22 June 1996) where the issues of persecution and Convention reason were erroneously determined in favour of a Hindu woman from Fiji because the Authority concentrated only on what the appellant ***feared***, rather than on what the objective facts justified.

On this approach, a person who sincerely believes herself to be in fear of persecution for a Convention reason, even though entirely mistaken, would have the first, second and fourth issues determined in her favour. The latter two findings would, of course, be erroneous.

These errors may stem from the fact that the test, as currently formulated, potentially places an unnecessary focus on the subjective fear of the appellant by prefacing each issue with the word "fear". In the result, a considerable part of the enquiry can be erroneously conducted from the standpoint of the claimant.

The fallacy of this approach, as indicated earlier, is that the focus of the Convention is not on the facts as subjectively perceived by the appellant, but on the objective facts as found by the decision maker. Before the Convention criteria can be satisfied, there must be a ***well-founded*** fear of persecution. As explained by Lord Keith in *R v Secretary of State for the Home Department, Ex Parte Sivakumaran* [1988] AC 958, 992G (HL):

"... the question whether the fear of persecution held by an applicant for refugee status is well-founded is likewise intended to be objectively determined by reference to the circumstances at the time prevailing in the country of the applicant's nationality. This inference is fortified by the reflection that the general purpose of the Convention is surely to afford protection and fair treatment to those for whom neither is available in their own country, and does not extend to the allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question."

Lord Goff made the same point at 1000D :

"In truth, once it is recognized that the expression "well-founded" entitles the Secretary of State to have regard to facts unknown to the applicant for refugee status, the expression cannot be read simply as "qualifying" the subjective fear of the applicant - it must, in my opinion, require that an enquiry should be made whether the subjective fear of the applicant is objectively justified. For the true object of the Convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people whose fear of persecution is in reality well-founded."

Lord Templeman at 996D concurred:

" ... in order for a "fear" of "persecution" to be "well-founded" there must exist a danger that if the claimant for refugee status is returned to his country of origin he will meet with persecution. The Convention does not enable the claimant to decide whether the danger of persecution exists. The Convention allows that decision to be taken by the country in which the claimant seeks asylum."

The significance of *Sivakumaran* lies in the paramount importance given to the objective element of the definition. The subjective element, in the view of the House of Lords, is of marginal relevance.

In so holding the House of Lords expressly rejected the suggestion in paras 37 and 42 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) that determination of refugee status primarily requires an evaluation of the applicant's statements rather than a judgment on the situation prevailing in the country of origin. As noted by McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 429 (Mason J at 385 agreeing):

"In *Sivakumaran* the House of Lords, correctly in my view, held that the objective facts to be considered are not confined to those which induced the applicant's fear. The contrary conclusion would mean that a person could have a "well-founded" fear of persecution even though every one else was aware of facts which destroyed the basis of his or her fear."

We are of the view that the *Sivakumaran* decision should be followed in New Zealand on the issue of the objective component of the refugee definition. We are fortified in this view by the fact that the primacy of the objective element has also been recognized by the Supreme Court

of the United States in *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 94 L.Ed 2d 434 and by the High Court of Australia in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

The only qualification we need add is that on the issue of the standard of proof of the well-founded fear, we have preferred the "real chance" test adopted by the High Court of Australia in *Chan* to the "reasonable possibility" test of *Cardoza-Fonseca* and the "reasonable likelihood" test of *Sivakumaran*. See further in this regard the Authority's decision in *Refugee Appeal No. 523/92 Re RS* (17 March 1995) 23-26. A helpful discussion of the issues is to be found in James C Hathaway, *The Law of Refugee Status* (1991) 75- 80.

In the light of these considerations the Authority is of the view that the formulation of the issues generally arising for consideration under Article 1A(2) can be more accurately expressed in the following terms:

On the facts as found by the decision-maker:

1. Objectively, is there a real chance of the refugee claimant being persecuted if returned to the country of nationality?

2. If the answer is Yes, is there a Convention reason for that persecution?

In those cases where relocation arises, it will be necessary to examine, in relation to the first issue, whether the real chance of persecution is localised. For if that is the case the secondary issue, as explained in *Refugee Appeal No. 523/92 Re RS* (17 March 1995) at 24 - 47 is one of state protection. That is:

(a) Can the claimant genuinely access domestic protection which is meaningful?

(b) Is it reasonable, in all the circumstances, to expect the claimant to relocate elsewhere in the country of nationality?

We believe that the issues as thus re-formulated not only identify with greater precision the components of the refugee definition, they also bring to the fore the essentially objective nature of the enquiry. The subjective component of the definition, if in truth there is one, can usually be presumed from the lodging of the refugee application itself. In the words of Atle Grahl-Madsen in *The Status of Refugees in International Law* Vol 1 (1966) 174, the frame of mind of the individual "hardly matters at all".

ASSESSMENT OF THE APPELLANT'S CASE

Even if we were to assume in the appellant's favour that each and every of her claims is true (and we have expressly made no finding in that regard), this claim must fail. That is, even were we to assume that she holds a well-founded fear of persecution in Peru for a Convention reason, no such finding is possible in relation to the country of her second nationality, namely the United States of America. The appellant has failed to adduce any evidence at all, let alone clear and convincing evidence, of the inability of the United States to protect her from the Sendero Luminoso. Indeed counsel for the appellant conceded that there was no such evidence. The United States of America is a country hyper-sensitive to terrorism and the chance of the appellant coming to harm there at the hands of the Sendero Luminoso is at best exceedingly remote. This falls well short of the "real chance" test adopted by the Authority. The carpark incidents in North Carolina and Miami were of an isolated nature and the appellant did not come to any serious harm.

We in any event find on the facts in relation to Peru that there is no real chance of persecution. Such interest as the Sendero Luminoso have in the appellant in Peru has been at a minimal, if not inconsequential level. Three years elapsed between her anonymous telephone call to the police and the threatening phone calls. Ten years later, when she returned to Peru from the United States in September 1993, she encountered no difficulties for the three month period of

her stay. Similarly, her stay of four months in 1994 passed without incident. When she returned in June 1995, the phone calls only resumed six months later in December 1995. If the Sendero Luminoso truly intended to do her harm, they had ample opportunity to do so between 1980 and 1983, in 1993, in 1994 and in 1995. All that the appellant has been subjected to, however, is threatening phone calls. This cannot be described as persecution.

CONCLUSION

The appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention because:

(a) She has not availed herself of the protection of the United States of America, a country of which she is a national.

(b) In the alternative, objectively, there is no real chance of her persecution at the hands of the Sendero Luminoso either in Peru or in the United States of America.

For these reasons we find that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"R P G Haines" [Chairperson]