

Department of Immigration and Multicultural Affairs

Office of the Secretary

Ms Jill Toohey
Registrar
Refugee Review Tribunal
Locked Bag No A3
SYDNEY SOUTH NSW 1235

Dear Ms Toohey

I refer to my letter of 26 May 1998 to the Acting Principal Member, Mr John Godfrey, indicating my intention to place a submission before the Tribunal to be taken into consideration in the review of applications from nationals of Indonesia.

Pursuant to section 423(2) of the *Migration Act 1958*, I provide the attached written argument (the submission) to be placed before the Tribunal constituted for each of the reviews listed in Attachment D to the submission. I should be grateful if you would ensure that the submission is put before the Tribunal as constituted to consider reviews involving nationals of Indonesia.

The submission is directed to the question of what does and does not constitute failure of state protection and whether Indonesian nationality provides protection for the purposes of the Refugees Convention. That was an issue dealt with in the decision of the High Court in *A & B v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 (*A&B*).

The submission discusses among other matters the further evidence that has been obtained from the Department of Foreign Affairs and Trade on the current situation in Indonesia.

Any queries on the attached submission can be directed to Alan Hutchinson, Acting Assistant Secretary, Onshore Protection and Review Branch on 02 264 4677.

Thank you for your co-operation in this matter.

Yours sincerely

W J Farmer

24 June 1998

SUBMISSION TO THE REFUGEE REVIEW TRIBUNAL ON THE EFFECTIVENESS OF THE PROTECTION PROVIDED BY THE INDONESIAN GOVERNMENT FOR ETHNIC CHINESE INDONESIAN APPLICANTS FOR AUSTRALIAN PROTECTION VISAS

PURPOSE

to provide written argument to the Refugee Review Tribunal ('the Tribunal') under section 423(2) of the *Migration Act 1958* on the issues arising in relation to the decision under review by the Tribunal as constituted for each of the reviews listed in Attachment D to this submission. The Tribunal is also urged to consider this submission and the attachments to it during reviews involving applications from persons of Indonesian nationality;

to address, in the context of the most recent country information, the issues of 'what does and does not constitute failure of state protection' where the applicant is an Indonesian.

BACKGROUND

2. The Refugees Convention provides for 'international protection' only where 'national protection' is not available. The Article 1A(2) of the Refugees Convention provides:

"...owing to well-founded fear of being persecuted for reasons of...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.."

(See also UNHCR Handbook at paragraphs 98-100, James C Hathaway, The Law of Refugee Status (Hathaway) at page 124 and *A & B v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 (*A&B*) at page 354)

3. The UNHCR Handbook at paragraphs 98-100 elaborates, particularly that:

"Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee."

ISSUES

Whether the State is Complicit?

4. In considering whether an Ethnic Chinese Indonesian is a refugee, particularly in the context of the recent riots, decision makers must determine whether the applicant has a well founded fear of persecution and if so whether the State is complicit in the persecution. If the agent of persecution is not the State and the State is not complicit then it is necessary to determine if protection is absent, whether it is due to a breakdown of a normal functioning police or judicial apparatus, or alternatively, an absence of such law enforcement in the particular area involving the persecution.

Presumption of Protection of State of Nationality

5. The necessary presumption here is that the country of nationality will look after its nationals. An applicant must rebut that presumption. Although the onus is not necessarily a heavy one, clear and convincing confirmation that the country of nationality is unable to provide that protection must be provided. (*Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1998) 151 ALR G85, *Ratnam v Minister for Immigration and Ethnic Affairs* (1997) 47 ALD 203, *Prathapan v Minister for Immigration and Multicultural Affairs* (1997) 47 ALD 41,48)

Failure of State Protection in General

6. In considering the failure of state protection, Hathaway in *The Law of Refugee Status* pages 124 ff, provides a particularly relevant comment:

"...refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming. Refugee law is therefore 'substitute protection' in the sense that it is a response to disfranchisement from the usual benefits of nationality. As Guy Goodwin-Gill puts it, '...the degree of protection normally to be expected of the government is either lacking or denied'. This means that in addition to identifying the human rights potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of 'persecution' must also comprehend scrutiny of the state's ability and willingness effectively to respond to that risk. Insofar as it is established that meaningful national protection is available to the claimant, a fear of persecution cannot be said to exist."

Failure of State Protection in Australian Case Law

7. McHugh J in *A & B v MIEA* (1997) 142 ALR 331 (*A&B*) at page 354 provides the Australian case law on the issue of failure of State protection:

The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with the tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or is or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the de jure or de facto protection of their governments, are unwilling to return to the countries of their nationality.'

8. It is clear from the decision in *A & B* that, in considering an Indonesian's claims for asylum, a decision maker must not only satisfy themselves that the discrimination and violence an applicant experienced or would be likely to experience would amount to persecution, for a Convention reason, but also that the Indonesian Government is either unwilling or unable to provide protection.

Application to Indonesian Situation

9. Some Indonesians, particularly ethnic Chinese, have been subject to petty harassment, incidents of violence and property damage, and various kinds of racial harassment over the past several months culminating in the civil unrest in May 1998. This has been sporadic and spontaneous, and in general terms has not amounted to persecution. Importantly, the protection of the State has been provided regardless of ethnicity.
10. In January 1998, Indonesia's economic crisis deepened, driven by substantial falls in the value of the rupiah, massive foreign debt, and unstable prices and food supplies. The following months saw an upsurge in violence including isolated and sporadic riots and looting. The riots and looting were directed at those seen to be wealthy, primarily against the shopkeepers, whom they blamed for imposing higher prices. Due to Indonesia's socio-economic and cultural circumstances a large number of these shopkeepers are ethnic Chinese. The targeting of shopkeepers exhibited a lack of understanding of the causes of the price rises and food scarcity, namely the economic downturn and the requirements of the IMF. The country information suggests that the rioting occurred due to large numbers of jobless being faced with rising prices and that it was not directed at the ethnic Chinese because of their ethnicity but rather was related to economic position and symbols of wealth.

Response of Indonesian Authorities

11. ABRI's Commander, General Wiranto, told the press on 9 February 1998 that "racial or ethnic prejudice must not be allowed to spread as a result of the economic crisis". This statement was widely reported and taken as an expression of ABRI's public policy in this area. The implication was that any disturbances beyond a certain point would not be tolerated.
12. It should be noted that immediately following General Wiranto's statement, rioting virtually ceased throughout the archipelago - there were no significant riots involving personal or property damage reported during March and April 1998.
13. In May 1998 six students were shot by security forces, during a political demonstration. This incident was followed by a three-day period of mob violence, rioting and looting in several areas of Jakarta. A number of shopping centres and business district precincts were looted and burnt, including business and residential areas predominantly occupied by ethnic Chinese Indonesians.
14. As a result of political pressure, President Soeharto resigned and Vice President Habibie was sworn in as President with the promise of an early election. On receipt of the news student protesters were jubilant, the nature of the protest at the Parliament changing from predominantly student participation to public, and from serious to more festive.
15. Subsequently, there has been a real degree of liberalisation of the climate of protest and dissent. Students in particular seem to have a greater degree of liberty to protest. The media has become much more open and some restrictive laws have been dropped. Reform has become the catch cry for government, ABRI and the media.
16. President Habibie has sought to provide some assurances to Chinese Indonesians by commenting that in his eyes all those committed to being good citizens of Indonesia are

"pribumis" (native sons). He has since made further positive statements along similar lines as recently as 20 June 1998.

17. Foreign Minister Ali Alatas announced on 10 June 1998, after meeting with President Habibie at the Presidential Office that Indonesia "hoped to impress the world with our sincere and strong will to move forward and protect human rights". This is part of a five year national Plan on Human Rights and includes ratification of several international covenants which had already been signed and promotion of human rights awareness in the community and amongst government officials.
18. Justice Minister Muladi has identified the ratification of the United Nations Convention Against Racial Discrimination as a priority for the Indonesian Government. The Deputy Governor of Jakarta has said publicly that the city administration will put an end to discriminatory practices in line with "universal human rights".
19. Military commanders have also made public statements indicating their determination to protect ethnic Chinese and since 22 May 1998 have replaced some military leaders to ensure this occurs. On 11 June the ABRI Commander General Wiranto made public his instructions to his army and police commanders that further unrest would be firmly handled. This follows Wiranto's comments on 18 May when he stressed that ABRI would protect all Indonesian citizens regardless of race.

Present Situation / Future Outlook

20. The Department of Foreign Affairs and Trade reports that the level of internal instability in Indonesia has settled down considerably since the second half of May. In particular, this has been evident since the resignation of President Soeharto. In June, there have been some riots in towns near Medan and a few places in East and West Java. These have had an anti-Chinese element although the trigger has usually been protests against corruption. Protests and demonstrations, including by students outside the Parliament, have been occurring frequently in Jakarta and elsewhere but the great majority are not violent.
21. It is clear from the country information that the rioting in February and May of this year was in reaction to the economic downturn and directed at groups mistakenly perceived to be the cause of the downturn, particularly ethnic Chinese shopkeepers. It is equally clear that these actions were not carried out "by or with the tacit acceptance of the Government". The Indonesian Government has taken significant action to restore normalcy to Indonesia. The Government in both February and May has made explicit statements relating to their willingness to protect all Indonesian nationals. An indication of the community acceptance of these assurances is the return to Indonesia from Malaysia and other countries including of some of the ethnic Chinese Indonesians who fled during the riots and the more recent public airing - which would not have happened during the Soeharto era - of human rights abuses that occurred during the unrest.
22. The country information strongly suggests that the Indonesian authorities were and are willing and able to protect the nationals of Indonesia. On accepting these facts the Tribunal is then required to be satisfied that this situation will persist into the "foreseeable future". The inclusion clause of the Convention requires the Tribunal to assess what may happen to applicants in the future. In the case of *Minister for Immigration, Local Government and*

Ethnic Affairs v Mok (1993) 47 ALD 433, the Full Federal Court established that the real chance test requires a decision maker to look into the immediately foreseeable future.

Outlook for the Immediately Foreseeable Future

23. In the context of the situation in Indonesia, whilst civil disorder reached a dangerous climax during the riots in May, all available evidence suggests that the Indonesian Government is embracing a reform agenda that is consistent with the re-establishment and maintenance of internal stability. In its statements the Government has also sought to reassure the ethnic Chinese, and increasingly its actions are consistent with this.
24. Furthermore, the evidence does not provide clear and convincing confirmation of Indonesia's inability to protect ethnic Chinese. In these circumstances it is submitted that the presumption that Indonesia is willing and able to protect its nationals should apply.