FEDERAL COURT OF AUSTRALIA

Ahmadi v Minister for Immigration and Multicultural Affairs [2001] FCA 1070

MIGRATION – Refugee application – Judicial review of decision of Refugee Review Tribunal affirming refusal of protection visa – Claim of fear of persecution by reason of religion – Applicant claimed to have long been critical of Islamic orthodoxy and practices – Applicant claimed to have been denied government employment for "not praying" and to have become a Christian since arrival in Australia – Reference in Tribunal's reasons to friend of applicant warning him he was *mortad* because of his comments about religious matters – Tribunal disbelieved evidence of the warning on the basis that applicant had "changed his evidence" – Whether there was evidence or other material to justify the finding of changed evidence – Tribunal accepted that applicant was excluded by reason of religion from public employment but said this was not "persecution" because applicant could obtain private employment in a different field – Whether Tribunal fell into error of law in failing to appreciate necessity of making a judgment of degree in relation to exclusion from public employment – Whether Tribunal erred in relation to finding about applicant's likely reception on return to Iran.

Migration Act 1958 s 476(1)(a), (g) and (4).

BABAK AHMADI v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

W 27 of 2001

WILCOX J

8 AUGUST 2001

MELBOURNE (HEARD IN PERTH)

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY	W 27 of 2001

BETWEEN:	BABAK AHMADI APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	WILCOX J
DATE OF ORDER:	8 AUGUST 2001
WHERE MADE:	MELBOURNE (HEARD IN PERTH)

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal be set aside.

2. The matter be remitted to the said Tribunal to be redetermined according to law and, for that purpose, the Tribunal be constituted by a member or members other than the member who made the decision set aside.

3. The respondent, Minister for Immigration and Multicultural Affairs, pay the costs (if any) incurred by the applicant, Babak Ahmadi, in connection with the application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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WESTERN AUSTRALIA DISTRICT REGISTRY		W 27 of 2001

BETWEEN:	BABAK AHMADI APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGE:	WILCOX J
DATE:	8 AUGUST 2001
PLACE:	MELBOURNE (HEARD IN PERTH)

REASONS FOR JUDGMENT

WILCOX J:

1 This is an application for review of a decision of the Refugee Review Tribunal affirming a decision of a delegate of the respondent, the Minister for Immigration and Multicultural Affairs, to refuse the grant of a protection visa to the applicant, Babak Ahmadi.

The applicant's claims

2 The applicant is a citizen of Iran. He arrived in Australia in July 2000. Almost immediately he applied for a protection visa, claiming to be a refugee within the meaning of the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol on Refugees*. The applicant claimed to fear persecution for reasons of religion if he were returned to Iran.

3 The applicant told the Tribunal he was aged 30 years. He had tertiary qualifications in engineering geology. Between 1996 (when he completed his military service) and January 1999, he held a succession of three positions

with public utilities. He lost two of these positions for "not praying" and the third because he was a supporter of candidate Khatami and left wing parties in the 1997 presidential election. Khatami was successful in the election. However, according to the applicant, his success occasioned a severe adverse reaction by many officials; this is why the applicant was dismissed from his position. In relation to "not praying", the applicant claimed to have been brought up in the Muslim Shia religion but to have long been critical of Islam orthodoxy and some Islamic religious practices.

4 The applicant said that, after he lost his third position, he found public companies would not employ him "because of his adverse file". So he went into a small business, with a friend, importing and selling shoes and clothing. He said the goods were sold at a market in Abadan, at which people would discuss various matters including religion. During discussions at the market, the applicant said, he referred to Salman Rushdie's *Satanic Verses*, using a Farsi book that criticised the novel. The applicant claimed he was reported to the intelligence service. He was detained by that service for two days, during which he was questioned and beaten.

5 As I understand the position, the applicant had not read the novel itself, but only the book of criticism. However, the members of the intelligence service believed or assumed he had read the novel.

6 A few weeks later, according to the applicant, he was again detained for questioning, but released after a few hours. He was told by a friend, who was in the intelligence service, that he was *mortad*, meaning the authorities were free to kill him. Asked by the Tribunal member why, if he was *mortad*, he was released from detention, the applicant said the authorities wished to find out if he was part of a larger group.

7 The applicant said he left Iran on a false Iraqi passport.

8 Whilst the applicant was in detention in Australia, he commenced attending a Christian study group. In a letter dated 11 December 2000, Ms Bev Fabb, a Minister of the Port Hedland Uniting Church, informed the Tribunal she met the applicant in late October 2000. Since that time, he had been a regular attender at Protestant worship at the detention centre, had attended daily prayer and bible study sessions and was completing a bible study course with a view to baptism in February 2001.

9 On 19 January 2001 the Tribunal issued a decision affirming refusal of a protection visa.

The nature of the applicant's submissions

10 The applicant was represented at the hearing in this Court by Mr DPA Moen, barrister, acting on a *pro bono* basis. I record the Court's appreciation of Mr Moen having assisted in this way.

11 Mr Moen made numerous criticisms of the Tribunal's decision. He also criticised the way in which the Tribunal hearing was conducted and the quality of the interpretation service provided. It seems the applicant and the Tribunal member were together for the hearing, in a room at the Port Hedland detention centre. However, they were able to communicate only through a Farsi-English interpreter who was located elsewhere and participated by telephone. Mr Moen claimed this arrangement resulted in numerous errors of interpretation.

12 In the absence of expert evidence about the accuracy of the interpretation, it is not possible for me to deal, in any general way, with these criticisms. However, as will become apparent, there is reason to be uneasy about at least one aspect of the interpretation in this case.

13 Most of Mr Moen's criticisms of the Tribunal's decision concern findings of fact which are outside the purview of the court. Only three criticisms raise points that arguably fall within the heads of review specified by s 476 of the *Migration Act* 1958. I think two of these points are made good; the third is not. I will deal separately with each of those three points.

The friend who warned the applicant

14 The first point concerns the friend who warned the applicant he was *mortad*.

15 In the course of summarising the evidence, the Tribunal said (at paras 37-38):

"It was put to the applicant that it was implausible that the head of the very organisation which had arrested him told him to flee. The applicant claimed that the person was not then the head, but used to be the head 50 years ago in Abadan. He worked in the Sepah and had friends in intelligence. It was put to the applicant that if he had so much influence with the security forces why did he not have the accusations dropped. The applicant said that the friend did not work in security and intelligence, that he just found out what happened to him. It was put to the applicant that he claimed on one hand to have a friend in security and intelligence, and then the Pasdaran, who had such influence and connections to find out what was happening within the intelligence organisation, but on the other hand, that this friend was not in a position to influence what was happening to the applicant. The applicant was asked to clarify this apparent contradiction.

The applicant claimed that the friend used to be head of the security and intelligence in Abadan. He just found out about the applicant's situation through co-workers. He just knew the reason the applicant was released because they wanted to know if the applicant had the Satanic Verses. Everybody knew that the applicant was a proven

‘mortad’. The applicant was asked if it was his evidence that he was ‘mortad’ if everybody knew that he was, rather than if a court had proclaimed him so. The applicant stated that before being convicted of it, everyone must know that the person is ‘mortad’. The person was then charged and convicted. The applicant claimed again that everyone knew that he was ‘mortad’. Therefore, some religious extremist could kill him in the street.”

16 The reference to the person having been head of intelligence in Abadan 50 years ago is startling. Not only would that make the friend very old at the time of the tip-off, a date 50 years ago would have long preceded the Iranian revolution in 1979. My immediate reaction was to think the figure of 50 years must be a typographical error, especially as the Tribunal gave no explanation about it. However, it was repeated later in the Tribunal’s reasons. In the course of setting out his findings and reasons, at para 95, the Tribunal member said:

“During the hearing of 1 November 2000, it was put to the applicant that it was implausible that the head of the very organisation which had arrested him should tell him about why he was arrested and released, and advise him to flee. The applicant changed his evidence at that stage, and claimed that this friend had been the head of intelligence 50 years ago, but now worked for the Sepah, but had friends in intelligence. When it was put to the applicant that if the friend had so much influence, why did he not have the accusations dropped, the applicant changed his evidence again, and said that the friend did not work in security and intelligence but just found out what had happened to him. The applicant’s explanation of who his friend was and to which organisation he belonged was so implausible as to be a nonsense. It was obvious that the applicant was fabricating his evidence.”

17 The repetition in this passage of the reference to 50 years causes me to wonder, first, about the quality of the interpretation service provided to the Tribunal in respect of its interview with the applicant; and, second whether the Tribunal member thought about what he was being told. The 50 year figure is so remarkable as to require some explanation.

18 It is interesting to note the reference to 50 years was one of the examples given by the applicant for his claim, in his application for judicial review filed in this Court on 1 February 2001, of “unfair interpretation which has created a many misunderstanding in the hearing and has badly contributed in the RRT member negative decision [sic]”.

19 Mr Moen suggested it was erroneous for the Tribunal member to have said, in the passage quoted at para 16 above, that the applicant “changed his evidence” in claiming his friend had been head of intelligence 50 years ago and now worked for the Sepah, but had friends in intelligence. Leaving aside the reference to 50 years ago, Mr Moen says this is what the applicant had always claimed; it is therefore apparent the Tribunal member misunderstood the position. The misunderstanding is important, according to Mr Moen, because the Tribunal member took a strong view about this aspect of the applicant’s story (“so implausible as to be a nonsense”) and used it to conclude the applicant was “fabricating his evidence”.

20 There is force in Mr Moen's argument. In his reasons for decision, the Tribunal member summarised what he understood the applicant to have stated at each stage of the processing of his claim to refugee status. Those summaries, and the primary material relating to stages earlier than the Tribunal hearing, demonstrate the Tribunal member's comment about Mr Ahmadi having "changed his evidence" regarding the friend at the Tribunal hearing is simply incorrect.

21 The applicant first told his story in an interview with an officer of the Department of Immigration and Multicultural Affairs on 16 July 2000. In para 17 of his reasons for decision, the Tribunal member summarised the applicant's then reference to the friend in this way:

"The applicant claims that he was arrested and detained by Iranian intelligence for two days for having a copy of a critique of the book Satanic Verses in February or March 2000. He claimed that they accused him of actually having the book Satanic Verses by Salman Rushdie. The applicant did not answer. After being released, he was called back a few weeks later for further questions. He was released after a few hours. He claims **he was told by a friend that he was under surveillance**. He was not arrested again but feared further problems. His family became very worried for him and wanted him to leave." [Emphasis added]

22 It will be noted no information is given about the friend. It is apparent from the record of interview, which is in the file of documents put before the Court, that the applicant was not asked anything about the friend.

23 On 24 July 2000 the applicant made a statement in support of his protection visa application. The Tribunal member summarised the relevant part of this statement in para 21 of his reasons for decision:

"The applicant started his own business and was active in his beliefs against the Islamic religion. During March 2000 he was arrested by the security forces and detained for two days, he was interrogated about which group he belonged to and accused of being a mortad (apostate, non believer). Mortad could be executed according to Islamic law. A few weeks later he was questioned for a few hours. **His friend, who used to work for the intelligence service, informed him he was on a monitored persons list.** His family suggested he should leave the country because he was being monitored and the intelligence service would find out he was a non believer." [Emphasis added]

24 It will be noted one further piece of information is here given about the friend, he "used to work for the intelligence service". The applicant is not quoted as claiming that the friend still worked for the intelligence service at the time of the warning. Once again, the Tribunal member's summary accurately reflects the terms of the applicant's statement, which is also in the file.

25 The third occasion on which the applicant dealt with this matter was at his interview with the delegate who refused his application for a protection visa. This occurred on 30 July. The Tribunal member recorded the applicant's evidence to the delegate in this way (par 27 of his reasons):

"The applicant went on holiday for two weeks. When he returned he was questioned again, but released after several hours. He was told **by a friend** that he was being monitored as a mortad, and that meant the authorities could kill him. **His friend was from Abadan and was in the intelligence service. He was now with the Sepah Pasdaran.** The applicant was asked why he was released if he was considered mortad. He said he was released and he thought he was free, however, they had released him to see if he was part of a bigger group. They wanted to discover more before arresting him." [Emphasis added]

26 The delegate's record of the interview records two questions, apparently put simultaneously: "who friend? How know re *mortad*?" The record shows the applicant responded with a name, which I will not reproduce, and words that the delegate noted in this way: "Abadan not big – he now in Sepah – before was in Intel – heard this through contacts".

27 It is apparent Mr Ahmadi gave four pieces of information to the delegate about the friend: first, his name; second, that he was from Abadan; third, that he used to be in the intelligence service; and fourth, that he is now in Sepah.

28 The final occasion on which the applicant gave information about the friend was at the Tribunal hearing. In para 36 of his reasons for decision, the Tribunal member recorded the applicant's evidence on this point in the following way:

"He was told by a family friend that the reason he was released was not because he was 'mortad' but because they wanted to see what group he belonged to. He was told he must leave the country otherwise they would get him for being 'mortad'. **The friend was head of security and intelligence, who might have been in the Sepah**. He told the applicant to flee." [Emphasis added]

29 It will be seen the member says the friend "was head of security and intelligence". It is uncertain whether he meant at the time of the warning, or earlier than that. The reference to the friend possibly having been in Sepah suggests the latter; in which case the applicant's evidence to the Tribunal was identical to his evidence to the delegate and not inconsistent with either of his two earlier statements. Even if the Tribunal understood the applicant first to claim that the friend was in the intelligence service, rather than Sepah, at the time of the warning, the second statement attributed to him (see para 37 of the Tribunal's reasons, quoted at para 15 above) was entirely consistent with what the applicant had told the delegate: "[The friend] worked in the Sepah and had friends in intelligence". I find it astonishing that the Tribunal member accused the applicant of having "changed his evidence" by saying to him exactly what he had said to the delegate.

30 Even if the Tribunal member thought the applicant had first told him the friend was still in the intelligence service, a little thought ought to have indicated to the member the possibility that he was wrong about that, or the victim of a poor interpretation. It seems to me it was a gross injustice for the Tribunal to have used the "change" of evidence as a ground for concluding the

applicant was fabricating evidence. The applicant's credibility was rejected, not because of any inconsistency on the applicant's part, but because of sloppiness by the Tribunal member in analysing the applicant's various references to the friend.

31 I also find it remarkable the Tribunal member should have thought it "so implausible as to be a nonsense" that the friend had sufficient "influence" to know of the accusations against the applicant, but not enough to have them dropped. The member does not seem to have contemplated the possibility that the friend was in the position, commonly encountered in any large organisation, of being a person who knows about things over which he or she has no control.

32 Although the detail about the friend was inherently unimportant, the Tribunal made the issue crucial to its decision. In para 96 of his reasons for decision, the member said:

"As I do not believe the applicant with regard to his 'friend', I am unable to accept that the applicant has been truthful in his evidence in regard to this claim."

33 This being the situation, the question arises whether the error of the Tribunal in relation to the applicant's various claims about his friend gives rise to any ground of review within the jurisdiction of the Court.

34 Section 476(1)(g) makes it a ground of review of a Tribunal decision "that there was no evidence or other material to justify the making of the decision". The ground must be read subject to subs (4) of s 476, to which I will refer in a moment. The "no evidence" ground provided by s 476(1)(g) was discussed in a recent Full Court decision, *Minister for Immigration and Multicultural Affairs v Al-Miahi* [2001] FCA 744. The Full Court (Sundberg, Emmett and Finkelstein JJ) observed, at para 36, that s 476(1)(g), as qualified by s 476(4)(b), "is capable of having application in relation to a finding of credit". The Full Court gave this illustration:

"For example, if a tribunal rejected a visa applicant's evidence because it attributed to that applicant the claim that event 'A' happened, when there was other evidence showing that event 'A' did not happen, the Tribunal might reject that applicant's evidence as not credible. If that applicant, by examination of the transcript upon which the tribunal relied, can show that he or she did not say that event 'A' happened, the ground of review may well be made out. The particular fact which was shown not to exist in that example is that the applicant claimed that event 'A' happened …"

35 In the present case, the Tribunal found the applicant not to be a truthful witness on the basis that he had "changed his evidence" concerning the employment of the friend who warned him he was *mortad.* The material before the Tribunal showed the claimed event had not happened; the applicant had not "changed his evidence". There was no evidence or other material before the Tribunal to justify the finding of change of evidence.

36 As I have noted, s 476(1)(g) is qualified by s 476(4). That subsection reads:

"The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

37 Paragraph (a) has no application to this case. Paragraph (b) is not easily satisfied. For that to be done, the person relying on s 476(1)(g) must not only show an absence of evidence or other material supporting the relevant finding but also point to material negativing the finding. Where there is no evidence either way, as often happens, the ground of review will not be established.

38 In the present case, the relevant factual finding concerns the claims made by the applicant, in relation to one detail of his story, at various stages of the processing of his claim for a protection visa. Those claims are documented in material that is before the Court. They demonstrate the applicant did not "change his evidence" in order to tell the Tribunal that his friend was previously in the intelligence service, but worked for Sepah at the time of the warning. This is one case where an applicant has the material needed to demonstrate the incorrectness of a factual finding made against him.

39 The ground of review provided by s 476(1)(g) is made out.

Dismissal from government employment

40 The second matter raised by Mr Moen concerns the Tribunal's treatment of the applicant's claim that he was unable to procure government employment because of his non-adherence to Islamic religious practices. The Tribunal seems to have accepted this claim. At para 92 of his reasons, the member said:

"The independent evidence … which I accept, indicates that when applying for jobs with Government organisations, applicants usually undergo an ideological screening process for their knowledge of Islam and basic adherence to Islamic practices. Promotional prospects are limited for those lacking good revolutionary credentials or connections and non-Muslims are not trusted in senior positions. It was the applicant's evidence that he failed to pass the 3 month probationary period

imposed when joining government run companies. I accept that the applicant was sacked from the government companies for non-conformity to Islamic practices encouraged within the company organisation. However, although the actions of sacking him may have been discriminatory, it was the applicant's evidence that he was able to gain employment in January 1998 or 1999, depending on the interpretation of the dates given by the applicant, as a [sic] overseas buyer in partnership with a shop-owner friend in Abadan. The applicant was not denied employment in this case, just employment where conformity with strict Islamic religious and political practices was required. It was the applicant's evidence that the companies he was working for were run by fundamentalist right wing groups. In light of this evidence, I am not satisfied that the discrimination constituted persecution for a Convention reason.

41 The source of the statement that the applicant became an "overseas buyer in partnership with a shop-owner friend in Abadan" is not clear to me. The Tribunal member does not record the giving of any information to him about this employment. The applicant's application for a protection visa relevantly states only: "Then I started a private business." The applicant told the delegate, according to the delegate's note, that he "[b]ought goods (clothing, shoes) and sold them in Abadan – friend was shop owner". He named the friend and stated his address. The delegate asked the applicant why he opened a business, if he was qualified as an engineer. The applicant is recorded as responding: "What point of being engineer if cannot be employed – govt. comp not employ him – adverse file follow him to all pot. employ"; presumably, potential employers.   If the file would "follow him", the potential employers were presumably all public employers.

42 Mr Moen argues paragraph 92 of the Tribunal's reasons indicates error of law; the Tribunal accepted the applicant had been dismissed on religious grounds from employment with "government run companies" and this "may have been discriminatory", and apparently accepted the applicant would not be able to obtain long term employment with other government companies; but the Tribunal thought this was not persecution for reason of religion because the applicant had been able to obtain work in connection with the shop at Abadan. Mr Moen says the Tribunal must have concluded that exclusion from government employment would not constitute "persecution", within the meaning of the Convention, if any kind of private employment was available.

43 I think Mr Moen accurately summarises the Tribunal's process of reasoning. I also think he is correct to criticise it.

44 In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, McHugh J (with whom Mason CJ agreed on this point) discussed at some length the concept of "persecution". His Honour pointed out (at 429) that not every harm to a person, or interference with his or her rights for a Convention reason, constitutes persecution. He said: "[t]he notion of persecution involves selective harassment". He said the persecution may be a single act of oppression or harm resulting from a course of systematic conduct. At 430

McHugh J made the point that "persecution" need not involve loss of life or liberty. He went on:

"Other forms of harm short of interference with life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol. Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution: Weis, 'The Concept of the Refugee in International Law', Journal du Droit International, (1960), 928, at p. 970. Thus the U.N.H.C.R. Handbook asserts that serious violations of human rights or one of the reasons enumerated in the definition of refugee would constitute persecution: par. 151. In Oyarzo v Minister of Employment and Immigration [[1982] 2 FC 779 at p 783] the Federal Court of Appeal of Canada held that on the facts of that case loss of employment because of political activities constituted persecution for the purpose of the definition of 'Convention refugee' in the Immigration Act 1976 (Can), s 2(1). The Court rejected the proposition that persecution required deprivation of liberty. It was correct in doing so, for persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason …"

45 The question whether particular adverse treatment of a person constitutes "persecution", within the meaning of the Convention, is a question of degree. There may be cases – indeed they will probably be common – in which denial of access to government employment is no more than an irritation and nuisance; reasonably satisfactory, comparable employment is available in the private sector. On the other extreme, there may be cases where the denial has the effect of wasting a person's training and qualifications and destroying any prospect of the person following his or her chosen occupation. It may be small consolation that the person has access to less satisfying, and less remunerative, employment in the private sector.

46 The present applicant claims to have completed 16 years education, emerging with qualifications in a specialised field. As I understand the position in Iran, opportunities in his field are substantially, if not wholly, confined to the public sector. The Tribunal seems to have accepted that, for the foreseeable future at least, he was likely to be totally excluded from that sector. This means that his training and qualifications would be substantially wasted and he would be denied a career in his chosen field. And this would be because of his unwillingness to accept traditional Islamic religious beliefs and practices. It seems to me that, upon those facts, a real question arose before the Tribunal as to whether the harm suffered by the applicant amounted to "persecution" within the meaning of the Convention.

47 The Tribunal member did not address that question of degree. He disposed of the matter simply on the basis that the applicant obtained work in connection with the shop. It seems to me that was erroneous.

48 There is a question how the error should be categorised. It may fall into more than one category: see *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 per McHugh, Gummow and Hayne JJ at para 82. However, whether or not the error also falls into another category, it seems clear that the Tribunal's approach involved an error of law involving an incorrect application of the law to the facts found by it: see s 476(1)(e) of the *Migration Act*. It was not in law an answer to the applicant's claim to have suffered persecution for reason of religion, in being excluded from public employment in Iran, that he was able to earn a living as a buyer for a shop in a market at Abadan. The Tribunal needed to consider the effect of that exclusion on his career – taking into account both job satisfaction and remuneration – and to determine, as a matter of degree, whether the exclusion amounted to persecution within the meaning of the Convention. It is apparent the Tribunal failed to perceive that need. That failure constituted an error of law.

Return to Iran

49 The third matter raised by Mr Moen relates to the applicant's position if he is returned to Iran, especially now he is a Christian. The Tribunal recorded the evidence of Ms Fabb about the applicant's conversion to Christianity but did not state whether or not it accepted the evidence. The Tribunal dealt with this third matter in the following way, at paras 104-105:

"The applicant has claimed that he has converted to Christianity, and, if he returned to Iran, would be considered 'mortad' and killed. The independent information … which I accept, indicates that it is difficult to make general assessments about the treatment of apostates. Under traditional Muslim law, a Muslim leader must issue a formal decree identifying an apostate and allowing his/her blood to be spilt before that individual can be physically harmed. While it is popularly believed that the penalty for apostasy under Islamic law is death, this seems open to interpretation, as indicated by comments of senior judicial authorities at a human rights seminar held in Teheran in 1994. Death sentences for apostasy have traditionally been issued to Baha'is and occasionally Christian converts who have been active in proselytising.

However, the death sentence has rarely been carried out for apostasy alone. The majority of religious judges appear reluctant to deliver an execution order for this 'offence' alone. People who do publicly convert away from Islam would however, be harassed, possibly imprisoned and threatened with death, if they had been found to be active in proselytising among Muslims. This is not the applicant's case. He has not indicated that he will or intends to proselytise to Muslims if he returns to Iran. The independent information indicates that those who worship privately and maintain a low profile will be very unlikely to suffer any adverse attention from the authorities for their conversion, unless they are involved in other activities which would attract security interest. Therefore, I am not satisfied that the applicant has a well founded fear of persecution in the foreseeable future if he returns to Iran by reason of his conversion to Christianity."

50 I have considered whether the approach demonstrated in these paragraphs satisfies the need for the Tribunal to ask itself whether there is a "well founded" fear the person will be persecuted for a Convention reason if returned to his or her country of nationality, even though the chance of persecution may be well below 50 per cent: see *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572. With some hesitation, but bearing in mind the approach mandated in *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 271-272, I have concluded the Tribunal's words "very unlikely to suffer any adverse attention from the authorities" were intended to negative the existence of a well-founded fear of persecution on account of the applicant's conversion to Christianity. Although the Tribunal did not make a factual finding about the alleged conversion to Christianity, it seems to have decided this issue upon the assumption that the conversion had in fact occurred.

51 There is room for concern about the appropriateness of disposing of this aspect of the case purely by reference to general country information, and without undertaking any assessment of the character, and likely future behaviour, of the applicant himself. However, the Tribunal's conclusion was based on evidence. It was a conclusion of fact and is not subject to review in this Court. The third arguable point fails.

Disposition

52 As the applicant has succeeded in respect of the first and second arguable points, the decision of the Tribunal must be set aside. The matter should be remitted to the Tribunal for redetermination, the Tribunal being constituted for that purpose by a member or members other than the member who made the decision under review. Any costs incurred by the applicant should be paid by the Minister.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 8 August 2001

Counsel for the Applicant:	D P A Moen
Counsel for the Respondent:	R L Hooker
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	3 July 2001