FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural Affairs v Farahanipour

[2001] FCA 82

MIGRATION – definition of “refugee” – refugee sur place – whether fear well-founded when sole ground for apprehension based on self-generated conduct in country of residence – conflicting Full Court decisions – one decision favouring constructional approach implying good faith condition – later decision to the contrary – whether primary judge in error in following most recent Full Court decision

WORDS AND PHRASES – meaning of word “pretext”

Migration Act 1958 (Cth) s 476(1)(e)

1951 United Nations Convention Relating to the Status of Refugees, Art.1A and Protocol

UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979)

New Shorter Oxford English Dictionary

The Macquarie Dictionary

A Grahl-Madsen, *The Status of Refugees and International Law* (1966), Vol 1

Cambridge International Documents Series, Vol 7

Minister for Immigration and Multicultural Affairs v Mohammed (2000) 98 FCR 405, followed

Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 100, distinguished

Heshmati v The Minister for Immigration, Local Government & Ethnic Affairs (Federal Court of Australia, Lockhart J, 22 November 1990, unreported), referred to

Minister for Immigration and Multicultural Affairs v Prathapan (1998) 86 FCR 95, applied
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485, applied
Qantas Airways Ltd v Cornwall (1998) 84 FCR 483, applied
Bank of Western Australia v Commissioner of Taxation (1994) 55 FCR 233, applied
Danian v Secretary of State for the Home Department [2000] Imm A.R 96, followed

Bastanipour v Immigration & Naturalization Service (1992) 980 F 2d 1129, referred to

Secretary of State for the Home Department v Ahmed [2000] 1 NLW 1, referred to

Wang v Minister for Immigration and Multicultural Affairs (unreported [2000] FCA 1599), referred to

Omar v Minister for Immigration and Multicultural Affairs [2000] FCA 1430, followed

Iftikhar Ahmed v Secretary of State for the Home Department [2000] 1 NLR 1, referred to

Mohammed v Minister for Immigration & Multicultural Affairs [1999] 56 ALD 210, referred to

Somaghi v Minister of Immigration, Local Government and Ethnic Affairs (22 November 1990, unreported), referred to

Re HB Refugee Appeal 2254/94, referred to

Batcheller v Batcheller [1945] Ch 169, referred to

Minister for Immigration & Multicultural Affairs v Ibrahim [2000] HCA 55, followed

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS v GHOLAMREZA FARAHANIPOUR and MOJGAN GHASEMPOUR

W 85 of 2000

RYAN, TAMBERLIN and R D NICHOLSON JJ

16 FEBRUARY 2001

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 85 of 2000

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Appellant
AND:	GHOLAMREZA FARAHANIPOUR First Respondent MOJGAN GHASEMPOUR Second Respondent
JUDGES:	RYAN, TAMBERLIN and R D NICHOLSON JJ
DATE OF ORDER:	16 FEBRUARY 2001
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondents' costs of appeal, such costs to be taxed in default of agreement

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

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 85 of 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS Appellant
AND:	GHOLAMREZA FARAHANIPOUR First Respondent MOJGAN GHASEMPOUR Second Respondent

JUDGES:	RYAN, TAMBERLIN and R D NICHOLSON JJ
DATE:	16 FEBRUARY 2001

PLACE: PERTH

REASONS FOR JUDGMENT

Ryan J:

1 This appeal raises a narrow issue of the application of the definition of "refugee" in Art.1A of the 1951 United Nations Convention Relating to the Status of Refugees and the subsequent Protocol ("the Convention"). The definition applies the term "refugee" to any 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."

2 The facts which have given rise to the issue in the present appeal are fully set out in the respective reasons for judgment of Tamberlin J and R D Nicholson J and it is unnecessary for me to rehearse them in full.

3 The question at issue between the parties is whether effect should be given to the principle acknowledged by the majority (Spender and French JJ) of a Full Court of this Court in *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405 *("Mohammed")* or whether that principle should be discarded in favour of the views expressed by Gummow J as a member of another Full Court of this Court in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 *("Somaghi").*

4 In *Somaghi* Gummow J endorsed the reasoning which had "provisionally" commended itself to Lockhart J at first instance in that case. The relevant passage from the reasons of Gummow J, including the extracts from Lockhart J's reasons, commences at 117 and is in these terms:

"I have referred to the conclusion recorded in para. 33 of the statement of reasons of 5 July 1990, that the despatch of the letter to the Iranian Embassy and to others was not a step taken in good faith, and was undertaken for the sole purpose of enhancing the appellant's claim for refugee status. In that regard, Lockhart J. said:

> "There is some conflict of opinion as to whether an applicant for refugee status who has deliberately created circumstances in the country of residence exclusively for the purpose of subsequently justifying a claim for refugee status is entitled to be treated as a refugee sur place and this division of opinion is referred to in some of the material before the decision-makers in this case. I cannot accept that a

> person who has deliberately created the circumstances to which I have just referred is entitled to recognition as a refugee sur place, for to accept it would be to place in the hands of the applicant for refugee status means of unilaterally determining in the country of residence his status as a refugee and deny to the sovereign state of his residence the right to determine his refugee status. The true position is in my view as is stated in para. 96 of the United Nations Handbook. It is this position which was adopted by the decision-makers in this case. The view was taken that, after examining the relevant circumstances surrounding the sending of the letter by the applicant to the Iranian Embassy in Canberra and the other persons and bodies previously mentioned on 6 December 1989, the applicant had done this for the purpose of creating the circumstances which might endanger him in Iran.
>
> . . .
>
> That a person can acquire refugee status sur place is plain enough because if a person was not a refugee when he arrived in the country of residence, but events occurred there or in his place of origin which gave rise to a real or well-founded fear of persecution upon his returning to the country of origin, his status as a refugee may arise notwithstanding that the only relevant events that gave rise to it are those which occurred after he left his country of origin. Those events may result solely from his own actions such as expressing his political views in his country of residence. It is true that the expression of those views may in some cases justify a well-founded fear of persecution if he should return to his country of origin; but I am not persuaded as presently advised that a person whose sole ground for refugee status consists of his own actions in his country of residence designed solely to establish the circumstances that may give rise to his persecution if he should return to the country of origin is necessarily a refugee sur place."

Lockhart J. said that it was unnecessary for him to decide the legal issue as to which there was a conflict of learned opinion. Nevertheless, for the reasons which on a provisional footing commended themselves to his Honour, it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. The fear of persecution to which the Convention refers, in such cases will not be well-founded".

5 It is debatable whether what Gummow J, in the last paragraph just quoted, considered “should be accepted” constitutes the ratio of *Somaghi*. The result turned on whether the delegate of the Minister had accorded procedural fairness to Mr Somaghi. It does not appear from the reasons of the members of the Full Court that the appellant ever put in issue the question of principle which was later agitated in *Mohammed* and again in

the present case. So it was that Jenkinson J in *Somaghi* was able to observe, at 108:

"No complaint was made before the trial judge or before this court that the delegate's failure to enquire whether the appellant was claiming to be a refugee sur place by reason of his transmission or his publication of the letter constituted a ground for setting the decision aside. The delegate assumed that the appellant was making - or should be taken to be making - such a claim and proceeded to consider, on that assumption, whether the supposed fear was well-founded and whether the claim was inadmissible because the letter had been sent, not in good faith, but in order to gain the status of refugee sur place. The submissions on behalf of the appellant were not directed to criticise that course, but were directed to showing a failure by the delegate to accord the appellant procedural fairness while the delegate was following that course: the failure to offer the appellant an opportunity to dispel the delegate's impression that the letter had not been transmitted or published in good faith."

6 Similarly, Keely J who dissented in the result in *Somaghi*, although at 101 expressing himself *"on all other matters"* to be in agreement with Gummow J's conclusions and reasons, found it unnecessary to advert to the provisional views expressed at first instance by Lockhart J on the substantive question.

7 In *Mohammed* Spender J found a point of distinction in Gummow J's use in *Somaghi* of the word "pretext". However, it seems that Spender J was unable to endorse the provisional expression of principle essayed by Lockhart J in *Somaghi*.

8 The relevant passage from Spender J's reasons is in these terms:

"In answering the question which the Tribunal had to determine, post-flight activities of the applicant are not irrelevant. Such actions, of course, should be scrutinised to determine whether they are sufficient to justify a well-founded fear of persecution. Implicit in that careful examination of circumstances is the need for an enquiry as to whether the actions may have come to the notice of the authorities in the person's country of origin, and the likely view to be taken of that conduct by those authorities. In that context, Gummow J in Somaghi was right, in my respectful opinion, to point out that actions undertaken for the sole purpose of creating a pretext for claiming fear of persecution would not render a person a refugee "sur place". A pretext is something that is not real or genuine. It would follow that, subjectively, an applicant invoking a pretext would not have a genuine fear of persecution, and it may also be that any fear of persecution would not be well founded, because the opportunistic nature of the activities would be recognised by the country of origin and would not, as a matter of realistic assessment, involve any real chance of persecution for a Convention reason.

The element of "pretext" was introduced at the appeal level in Somaghi by Gummow J. Lockhart J, in his reasons in Heshmati v Minister of Immigration, Local Government and Ethnic Affairs (Lockhart J, 22 November 1990, unreported) – which also applied to his judgment at first instance in Somaghi v Minister of Immigration,

Local Government and Ethnic Affairs (Lockhart J, 22 November 1990, unreported) - focussed on:

> "…a person whose sole ground for refugee status consists of his own actions in his country of residence designed solely to establish the circumstances that may give rise to his persecution if he should return to the country of origin…"

Such conduct does not necessarily involve a "pretext" of invoking a claim to well-founded fear of persecution.

Conduct engaged in for the purpose of establishing the circumstances which might endanger an applicant on return, is not necessarily the same as conduct "undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution," which is the description used by Gummow J on appeal in Somaghi.

In my opinion, the Tribunal's approach in regarding the question of whether the respondent was "acting solely out of desire to put himself in a position where he could claim to be endangered" as determinative of the question of whether that person was a refugee, was to erect a false test as to who is a refugee "sur place". Whether or not the circumstances were engineered by the respondent and whether or not they were engaged in good faith, the necessity remains for the Tribunal to address the central question: whether the respondent held a genuine fear that he would be persecuted and whether, if he were returned to Sudan, there was a real risk that serious harm would befall him by acts of persecution within the meaning of the Convention."

> 9 In the other majority judgment in *Mohammed*, French J analysed the reasoning of Lockhart J at first instance in *Somaghi* and of the same learned Judge, also at first instance, in *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs* (unreported VG149 of 1990, 22 November 1990) where similar views were expressed. French J concluded his analysis by saying, at 419:

"As can be seen from the passages to which reference has been made, [Lockhart J's] observations about the good faith question were provisional and expressed to be provisional and in any event were obiter as the applicants had failed to make out their entitlement to Convention protection even were it to be assumed that their actions in sending the letters were in good faith. His Honour also found that there was no want of procedural fairness in the way that the applicants were dealt with."

> 10 French J, moreover, was unable to subscribe to Gummow J's absolute requirement of good faith. After quoting the passage from Gummow J's judgment in *Somaghi*, which is set out at par 4 above, French J continued, at 419:

"The last sentence of that passage suggests a constructional basis for the good faith requirement not expressed in the reasoning of Lockhart J but perhaps implicit in the qualified proposition set out in the second passage cited from his judgment at first

instance. If the question of good faith is linked to the existence of a well-founded fear then it is not an implication or gloss on the words of the Convention. Rather it is evidentiary of the existence of the well-founded fear necessary to attract Convention protection. On the facts of the case it seems the delegate had uncontroverted advice that the sending of the letters in question, being a common tactic, might not lead the Iranian authorities to impute a political opinion to the senders.

The question to be answered in the case of political refugees remains always the same – is there, at the relevant time, namely the time of determination of refugee status, a well-founded fear of persecution by reason of the applicant's political opinion or an opinion attributed to the applicant. The passage quoted from the judgment of Gummow J reflects that approach. The so-called "good faith" restriction enunciated in that passage may be regarded as derived from the requirement that the fear be well-founded. So far as good faith is relevant in any case it should be seen to emerge from the practical operation of the words of Article 1A rather than be laid upon them as an "implication" of general application."

11 Carr J, who dissented in *Mohammed*, then regarded Gummow J's statement of principle as part of the ratio of *Somaghi* and applied it as correct in any event. The relevant part of his Honour's analysis is at par 77:

"In my view, that conclusion formed part of the ratio decidendi in Somaghi. It was an essential building block in the conclusion of the Full Court (by majority) that procedural fairness had been denied to the appellant. The statement of principle can be seen, as I have explained above, to have had the endorsement of the other two judges comprising the Full Court. If, contrary to my view, Gummow J's conclusions were merely obiter dicta (endorsed by the other two judges) then I would respectfully adopt them as correctly reflecting the law. They were, as senior counsel for the appellant submitted, expressly endorsed by Drummond J at first instance in Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs (1994) 35 ALD 557 at 580, implicitly accepted by the Full Court on appeal in that case (1994) 35 ALD 225 and again, expressly accepted by Lockhart J in Khan v Minister for Immigration and Multicultural Affairs (1997) 47 ALD 19 at 26."

12 However, at first instance in the present case, Carr J acknowledged that Gummow J's observations in *Somaghi* may have been obiter. His Honour said, at par 17:

"It is true that the judgment in Somaghi was unanimous. However, the decision under appeal in that case was set aside because the Tribunal had denied procedural fairness to the appellants. It is arguable that Gummow J's observations on the refugee sur place point were obiter dicta (although I expressed my view in Mohammed that they were part of the ratio decidendi). I do not think that the fact that the decision in Somaghi was unanimous would justify me, sitting at first instance, in following it in preference to Mohammed because the latter was a majority decision. If it is permissible to count judicial heads, then (when Lee J is counted) the numbers are even. I acknowledge (as indeed I pointed out in Mohammed) the line of subsequent decisions applying Somaghi."

13 Accordingly, his Honour concluded, at par 20:

"There being no relevant factual distinction between the facts of this matter and the facts in Mohammed, in my opinion, I am quite clearly bound to apply Mohammed to the decision in this case, despite the fact that I continue to hold the views which I expressed in dissent in that case.

I must therefore dismiss the application"

14 I can discern no error in the approach which led his Honour to that conclusion. Moreover, from the point of view of this Full Court, the decision of another Full Court in *Mohammed* should be followed unless it be thought to be plainly wrong; see *Minister for Immigration and Multicultural Affairs v Prathapan* (1998) 86 FCR 95 per Lindgren J (with whom Burchett and Whitlam JJ agreed) at 104 citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *Qantas Airways Ltd v Cornwall* (1998) 84 FCR 483 at 489-490 and other authorities referred to in *Bank of Western Australia v Commissioner of Taxation* (1994) 55 FCR 233 at 255.

15 For my part, I am not persuaded that the reasoning of the majority of the Full Court in *Mohammed* is "plainly wrong". The reasoning of Lee J at first instance in *Mohammed* was expressly considered by the Court of Appeal in *Danian v Secretary of State for the Home Department* [2000] Imm A.R 96 *("Danian")*. Brooke LJ in *Danian* quoted with approval this passage from the judgment of Lee J in *Mohammed* (1999) 56 ALD 210 at 214:

"[24] Recognition that refugee status may be attracted by the conduct of a person outside his country of nationality presents the risk that the purpose of the Convention may be abused by persons purporting to rely upon it when not really in need of protection. Such applicants for refugee status have been described as "bootstrap refugees": J C Hathaway, The Law of Refugee Status, Toronto, Butterworths, 1991, at 37.

[25] To counter the perceived risk of abuse in such cases, claims of refugee status will attract close scrutiny: see Gummow J in Somaghi v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 100 at 118; 24 ALD 671; 102 ALR 339). The principle described by Gummow J adopts a discrimination suggested by A Grahl-Madsen in The Status of Refugees in International Law (Leyden: A W Sitjhoff, 1966), at 252:

> [W]e may have to draw a distinction . . . between those who unwittingly or unwillingly have committed a politically pertinent act, and those who have done it for the sole purpose of getting a

pretext for claiming refugeehood. The former may claim good faith, the latter may not.

[26] As Gummow J stated in Somaghi, actions undertaken for the sole purpose of creating a pretext for claiming fear of persecution, do not make a well-founded fear of persecution. In Somaghi, Jenkinson J (at FCR 109) and Gummow J (at FCR 118) make it clear that actions undertaken to create the pretext of such a claim cannot support a conclusion that there is a genuine fear of persecution.

[27] What is acknowledged in Somaghi is that actions designed to give colour, or plausibility, to a claim that is no more than a pretence, are to be disregarded in determining whether a fear of persecution exists and is properly based, having regard to subjective and objective elements. In other words, a fraudulent claim of fear cannot be a well-founded fear: see Khan v Minister for Immigration and Multicultural Affairs and Refugee Review Tribunal (1997) 47 ALD 19.

[28] At all times, however, the determination to be made is whether there isa genuine fear of persecution and whether that fear is well-founded. A person will have a well-founded fear of persecution if it may be shown that there is a real chance that the persecution feared may occur: see Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379; 87 ALR 412 per Mason CJ at ... 389, Dawson J at ... 398, Toohey J at ... 407 and McHugh J at ... 429. Consistent with the terms of the Convention, and the obligations undertaken by a contracting state thereunder, recognition of refugee status cannot be denied to a person whose voluntary acts have created a real risk that the person will suffer persecution occasioning serious harm if that person is returned to the country of nationality. In some cases, albeit extraordinary, fraudulent activity by an applicant for refugee status may, in itself, attract malevolent attention from authorities in the country of nationality, giving rise to a well-founded fear that serious harm will occur if that person is returned. In such cases, a determination must be made whether that person is to be accorded refugee status (Hathaway, The Law of Refugee Status, p 39):"

16 After quoting that extract, his Lordship noted that a similar conclusion had been reached by the United States Court of Appeals, Seventh Circuit, in *Bastanipour v Immigration & Naturalization Service* (1992) 980 F 2d 1129, and continued:

"In my judgment, the approach of Millett LJ in Mbanza and of Lee J in Mohammed correctly sets out the approach a court or appellate authority should adopt in the situation postulated by the Tribunal in its determination in the present case. I am

fortified in my view that this is the correct approach by the terms of a letter written by Mr Peter van der Vaart, the Deputy Representative in this country of the United Nations High Commissioner for Refugees, to the appellant's solicitors. We were told by Mr Blake that both parties approached his office for an expression of UNHCR's views on this point and that Mr van der Vaart consulted his Head Office in Geneva before responding. Although a letter of this type cannot be more than of persuasive effect, it does represent a distillation of the collective wisdom of the Commission which has been concerned with supervising the operation of the Convention on a world wide basis since it first came into effect."

17 Buxton LJ in *Danian* was inclined to doubt whether Gummow J's reasons in *Somaghi* supported the interpretation placed on them by Lee J in *Mohammed*. Nevertheless his Lordship reached the same conclusion as Brooke LJ, saying, at p 26:

"I venture respectfully to think that the Full Court in Somaghi may not in fact have intended to express itself as Lee J inferred. The force of Gummow J's judgment is much more in line with the interpretation adopted in Re HB and by the IAT in our case, that bad faith will deprive of protection from refoulement even a person who does have a well-founded fear of persecution. Nonetheless, like Brooke LJ, I consider that Lee J's analysis indicates that the approach of the Authority in Re HB does not follow of necessity from the terms of the Convention."

18 *Danian* and *Secretary of State for the Home Department v Ahmed* [2000] 1 NLW 1, which followed *Danian*, were cited with approval by Merkel J (with whom Wilcox and Gray JJ agreed) in *Wang v Minister for Immigration and Multicultural Affairs* (unreported [2000] FCA 1599) at pars 86-87. Another Full Court of this Court (Black CJ, Ryan and Moore JJ) in *Omar v Minister for Immigration and Multicultural Affairs* [2000] FCA 1430, referred to *Mohammed*, *Danian* and *Iftikhar Ahmed v Secretary of State for the Home Department* [2000] 1 NLR 1, and continued, at para 38:

"These cases, which reflect a common approach to the interpretation of a convention to which Australia and the United Kingdom are both parties, are determinative of the issue we are presently considering. They make it clear that questions such as those that are said to have arisen in the present matter are to be resolved by the practical operation of the words of Article 1A of the Convention. Putting to one side the issue of "bad faith" (which does not arise in this case and as to which differences of opinion have been expressed, particularly concerning the ratio of Somaghi and the related case of Heshmati v Minister for Immigration, Local Government and Ethnic Affairs (1991) 31 FCR 123), the recent cases in England and in this Court stand for the broader proposition that possible future conduct, including a so-called "spontaneous voluntary expression of political opinion", can provide an acceptable basis for a presently existing and well-founded fear of persecution for a Convention reason."

19 Independently of those authoritative expressions of opinion consistent with that of Lee J in *Mohammed*, I respectfully regard his Honour's conclusion

as endorsed by a majority of the Full Court in *Mohammed* as more likely to be correct. The argument in support of an implication of an exception where the circumstances of a genuine fear of persecution have been brought about by the applicant was comprehensively outlined by Carr J in *Mohammed*, where his Honour observed, at 433:

"In my opinion, where a person who is not a refugee, engages in particular conduct, not in order to exercise certain human rights which the Convention is designed to protect, but solely to create a pretext of invoking a claim to well-founded fear of persecution, it would be wrong to describe his fear of persecution as being "well-founded". The expression "well-founded" has been taken to describe the objective circumstances giving rise to a real chance of persecution. But, in my view, there is no reason why the expression "well-founded" should be confined only to such a meaning. It can have another meaning as well. In the present circumstances the respondent's fear of persecution is probably "well-founded" in the objective sense i.e. objectively he is likely to be persecuted on his return to Sudan. However, it is not "well-founded" in the sense of being properly founded within the meaning of the Convention. A claim having fraud as its foundation is not, in my view, "well-founded". What the respondent did was to attempt to upgrade his position by deliberately creating a higher perceived political profile than he had previously occupied, solely for the purpose of claiming refugee status. I would read the word "pretext" in this context as carrying the meaning of a false reason or excuse for summoning up (invoking) a real fear of persecution: The New Shorter Oxford English Dictionary at 2347 and 1412 respectively."

20 It would be unhelpful, given the present state of the authorities, to propose yet another gloss on the word "pretext" or to attempt to apply the elusive concept of "fraud" in this context. There is a clear finding that, in procuring the publication of the *"Arash"* article, the first respondent was actuated solely by the purpose of creating or reinforcing a fear of persecution were he to return to Iran. Such a fear may be no less genuine despite the artifice by which the circumstances which gave rise to it have been engineered. The epithet attached by the Convention to the requisite fear of being persecuted is "well-founded". As a matter of ordinary English usage, that connotes only that the fear have a sound or credible basis in fact. I am unable, without some process of implication, to accord the expression a secondary, moral, connotation to the effect that the fear have a basis in facts not tainted by fraud or bad faith on the part of the applicant. Nor, as I understand it, do the corresponding words "avèc raison d'etre" in the equally authoritative French version of the Convention support a secondary connotation of that kind.

Conclusion

21 For reasons which I have endeavoured to explain, and principally by reference to the trend of authorities in several jurisdictions concerned to interpret the same Article of an international Convention, I consider that the learned primary Judge was correct in regarding himself as bound to follow the majority in *Mohammed*. I would therefore dismiss the appeal with costs.

I certify that the preceding twenty one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Ryan.

Associate:

Dated: 16 February 2001

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY	W 85 of 2000

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS APPELLANT
AND:	GHOLAMREZA FARAHANIPOUR FIRST RESPONDENT MOJGAN GHASEMPOUR SECOND RESPONDENT

JUDGE:	RYAN, TAMBERLIN and R D NICHOLSON JJ
DATE:	16 FEBRUARY 2001
PLACE:	PERTH

REASONS FOR JUDGMENT

Tamberlin J:

22 This is an appeal from a decision of Carr J who dismissed an application by the Minister for Immigration and Multicultural Affairs ("the Minister") for review of a decision of the Refugee Review Tribunal ("the RRT"). The RRT had remitted the matter for reconsideration by a Ministerial delegate with a direction that the respondents were persons to whom Australia owed protection obligations. A Ministerial delegate had previously decided to refuse to grant a protection visa to the respondents.

23 The term "refugee" is defined in Art 1A of the 1951 United Nations *Convention Relating to the Status of Refugees* and the subsequent Protocol as any person who:

"Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or 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."

24 The first respondent claimed before the RRT that he was a refugee because he had a well-founded fear that if returned to Iran there was a real chance that he would be persecuted by reason of his anti-government political views as perceived by the Iranian authorities. His claim was partly based on his alleged anti-government conduct and expression of political opinion whilst in Iran. The RRT concluded that the applicant was not a credible witness and rejected his evidence as to these activities on the basis of inconsistencies and discrepancies in his case as indicated in the material and statements placed before it, including country information.

25 The conclusion of the RRT as to the first respondent's dissident activities in Iran was that:

"In summary, the Tribunal is satisfied that the Applicant fabricated his account of dissident activities in Iran. It concludes that he was of no interest to the Iranian authorities when he left that country because he had never participated in any activities that would bring him to their attention. It does not accept that his house was ransacked and property confiscated or that his father was detained soon after his departure because the authorities believed the Applicant had been involved in passing on information to an overseas publication. It is satisfied that he did not have

a subjective fear of persecution for the reasons he stated when he left Iran and that, accordingly, he did not have a well-founded fear of persecution."

26 The RRT then referred to the fact that on the day that the delegate refused the applicant's application a Sydney-based anti-Iranian Government newspaper published an article that purported to be a record of a telephone conversation between the applicant and the editor of the newspaper. This article was scathingly critical of the Iranian authorities and accused the Iranian leaders of gross human rights abuses and rampant corruption. An extract from the article reads as follows:

"Dear editor: For me and my wife who have reluctantly left the country and are staying together in this detention centre, this is the last resort and there is no way back. We have left an inferno in which murder occurs easily and forms part of rituals of Khomeini's Islam. He who kills and continues murdering more, would enjoy more respect. Present Iran has been occupied by a handful narrators of tragedies of Karbela, who sued to earn their daily living by people's charities and possess at present millions of dollars in foreign bank accounts through plundering the same people. [Mr Farhanipour reveals here a few bank accounts belonging to Mr Khamenei and Mr Rafsanjani]. These figures concern only two prominent leaders of The Islamic Republic of Iraq, others like MrRafighdoust have been gathering a wealth, no doubt, not less than those mentioned above. As for their crimes, it would be enough to mention that starting with the supreme leader of the regime, Mr Khamenei, from Parliament's speaker Mr Nateghnouri to the chief of the Judiciary. Mr Mohammad Yazdi all have their hands full of blood of innocent people. In this human slaughter house, most victims are writers and journalists. It is the younger generation who suffers most and enjoys no other rights than being alive and would experience the same destiny as others if it dares to protest."

27 The RRT concluded in relation to this article (112):

"In the current case the Tribunal is satisfied that the Applicant arranged for publication of the article in Arash in order to bring himself to the attention of the Iranian authorities. Prior to that time, his claims to be a refugee were based on false information. He undertook the act of publishing the article in Arash 'to make more plausible, or colourable, a pretended claim to a well-founded fear of persecution.' The article expresses views that he never expressed in Iran and are diametrically opposed to his history of employment in that country. They do, however, contain a kernel of truth in that the Tribunal accepts that the Applicant prefers freedom and democracy to the system that is in place in Iran, notwithstanding that he was a long-term servant of that system. As a consequence of the likelihood the views expressed in Arash have come to the attention of the Iranian authorities, the Tribunal is satisfied that the Applicant now has a genuine fear of persecution, although he did not harbour such a fear before the publication of that article, the artifice of which is apparent in the author taking the liberty to identify the Applicant, presumably at the latter's behest.

The tenor of the passage from Hathaway, cited with approval by Justice Lee, is that regardless of the motivation for an applicant's action, it is the consequences of that action that are determinative of whether that applicant falls within the

Convention. The Tribunal understands His Honour to have determined that it must have regard to the consequences of an applicant's action, notwithstanding that the action may be 'fraudulent' or that its purpose was solely to bring him or her to the adverse notice of his country's authorities, as the Tribunal finds was the case in the current matter. While the Tribunal has some difficulty in reconciling that determination with the principles discussed in Somaghi, it is a determination that was made in the context of those principles and the Tribunal is bound to apply it.

The Tribunal is satisfied that the consequence for the Applicant is that there is a real chance he faces persecution for reason of his political opinion as set out by the author of the Arash article. In all of the circumstances, the Tribunal does not accept that the Applicant had a genuine fear of persecution until the article in Arash was published but concludes that he has become a refugee sur place. It finds he has a well-founded fear of persecution for reason of his political opinion and that he is, therefore, a person to whom Australia has protection obligations under the Refugee's Convention and Protocol. As a member of his family unit, his spouse would also be a person to whom Australia has protection obligations."

28 The reference to the judgment of Lee J is to his Honour's reasons for judgment at first instance in *Mohammed v Minister for Immigration & Multicultural Affairs* (1999) 56 ALD 210 which was upheld on appeal by a majority of the Full Court in *Minister for Immigration & Multicultural Affairs v Mohammed* (2000) 98 FCR 405 (Spender and French JJ, Carr J dissenting). The reference to *Somaghi* in the above extract is to the decision of the Full Court in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100.

29 An application made to this Court to review the decision of the RRT was heard by Carr J but was dismissed by his Honour because he considered he was bound by the Full Federal Court decision in *Mohammed* where his Honour had been in dissent.

30 The present appeal from Carr J's decision calls into question the correctness of the decision of the majority in *Mohammed*. The Minister has asked this Court to hold that the majority in *Mohammed* misinterpreted the Full Court in *Somaghi*, and were wrong in deciding that conduct undertaken for the sole purpose of generating circumstances attracting Convention protection could be taken into account in determining whether an applicant comes within the definition of "refugee".

Legal principles

31 A convenient starting place for consideration of the development of the law in this area is the Full Court decision in *Somaghi*. That case concerned an Iranian applicant for refugee status who, while in immigration detention in Australia, sent a letter critical of the Iranian leadership to the Iranian embassy. In the Full Court Gummow J, with whom Keeley and Jenkinson JJ relevantly agreed, referred (at 117-118) to the following remarks made by

Lockhart J at first instance in *Somaghi v Minister of Immigration, Local Government and Ethnic Affairs* (22 November 1990, unreported):

"There is some conflict of opinion as to whether an applicant for refugee status who has deliberately created circumstances in the country of residence exclusively for the purpose of subsequently justifying a claim for refugee status is entitled to be treated as a refugee sur place and this division of opinion is referred to in some of the material before the decision-makers in this case. I cannot accept that a person who has deliberately created the circumstances to which I have just referred is entitled to recognition as a refugee sur place, for to accept it would be to place in the hands of the applicant for refugee status means of unilaterally determining in the country of residence his status as a refugee and deny to the sovereign state of his residence the right to determine his refugee status. The true position is in my view as is stated in par 96 of the United Nations Handbook (1979). It is this position which was adopted by the decision-makers in this case. The view was taken that, after examining the relevant circumstances surrounding the sending of the letter by the applicant to the Iranian Embassy in Canberra and the other persons and bodies previously mentioned on 6 December 1989, the applicant had done this for the purpose of creating the circumstances which might endanger him in Iran.

…

That a person can acquire refugee status sur place is plain enough because if a person was not a refugee when he arrived in the country of residence, but events occurred there or in his place of origin which gave rise to a real or well-founded fear of persecution upon his returning to the country of origin, his status as a refugee may arise notwithstanding that the only relevant events that gave rise to it are those which occurred after he left his country of origin. Those events may result solely from his own actions such as expressing his political views in his country of residence. It is true that the expression of those views may in some cases justify a well-founded fear of persecution if he should return to his country of origin; **but I am not persuaded as presently advised that a person whose sole ground for refugee status consists of his own actions in his country of residence designed solely to establish the circumstances that may give rise to his persecution if he should return to the country of origin is necessarily a refugee sur place**." (Emphasis added)

32 Gummow J then said in relation to these remarks:

"Lockhart J said that it was unnecessary for him to decide the legal issue as to which there was a conflict of learned opinion. Nevertheless, for the reasons which on a provisional footing commended themselves to his Honour, it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken **for the sole purpose** of creating a pretext of invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. The fear of persecution, to which the Convention refers, in such cases will not be 'well-founded'. There was no error of law in the decision of 20 April 1990 in the treatment of the Convention." (Emphasis added)

33 A similar question arose before Lee J at first instance in *Mohammed.* In that case an applicant for refugee status had sent a letter to his brother in Sudan for the sole purpose of bolstering his claim to refugee status. The applicant claimed the letters were intercepted by the Sudanese authorities. At 214-215 Lee J said:

"What is acknowledged in Somaghi is that action designed to give colour, or plausibility, to a claim that is no more than a pretence, are to be disregarded in determining whether a fear of persecution exists and is properly based, having regard to subjective and objective elements. In other words, a fraudulent claim of fear cannot be a well-founded fear. …

At all times however, the determination to be made is whether there is a genuine fear of persecution and whether that fear is well-founded. …In some cases, albeit extraordinary, fraudulent activity by an applicant for refugee status may, in itself, attract malevolent attention from authorities in the country of nationality, giving rise to a well-founded fear that serious harm will occur if that person is returned. …"

34 His Honour concluded that the applicant in *Mohammed* held a genuine fear that he would be persecuted if returned to Sudan and that there was therefore a well-founded risk of persecution within the meaning of the Convention. In his Honour's view it was not open to the RRT to ignore the consequences of the interception by Sudanese authorities of the letter.

35 In 1994 the Refugee Status Appeals Authority of New Zealand ("the Authority") considered the question in *Re HB Refugee Appeal* 2254/94. The Authority cited with approval the passage of Gummow J noted above. However the Authority was of the view that acts of a claimant undertaken in bad faith should be excluded from consideration on policy grounds, not because a fear created by such action could not be a "well-founded fear". The Authority appears to have used the concepts "sole purpose" and "good faith" interchangeably.

36 Before the appeal in *Mohammed* was decided, the English Court of Appeal handed down judgment in *Danian v Secretary of State for the Home Department* [2000] Imm AR 96. The Court of Appeal decided that conduct undertaken for the purpose of attracting the Convention must be taken into account, and if in fact it generated a real risk of persecution it would provide a basis for finding that a person was a refugee notwithstanding that the sole purpose of the conduct was to achieve that status. Lord Justice Buxton, with whom Nourse LJ agreed, disagreed with Lee J's analysis of *Somaghi*. His Lordship considered that the remarks of Gummow J, referred to earlier, were more consistent with the interpretation adopted in *Re HB.* I agree with this conclusion as to the effect of *Somaghi.* This indicates that there is no clear international consensus on this question.

37 In *Danian* the third member of the Court, Brooke LJ, pointed out that the issue was not that the conduct of the asylum seeker had been wholly unreasonable but that the question was whether acts performed "solely to bolster" the asylum claim could provide a basis for such a claim. His Lordship

referred to a letter from a Mr van der Vaart of UNHCR which he accepted as correctly setting out the appropriate principles. That letter included the following:

"… even if the applicant has created a claim to refugee status by resorting to opportunistic post- flight activities, it would not be right to deprive him of international protection and return him/her to his/her country of origin if it is established that the consequences of such return may result in persecution for one of the reasons enumerated in the 1951 Convention."

38 Buxton LJ considered that because the Convention was concerned with the protection against extreme forms of danger, injury or even loss of life protection should be withheld only in specific and extreme cases. In addition, his Honour pointed out that the Convention itself provides specific exceptions and he considered that these exceptions should not be added to unless there was a clear international consensus to that effect or international practice required the addition. His Lordship considered that neither of these criteria were fulfilled in the case of a general "bad faith" exception, at least to the extent that a national court could properly assume that the meaning of the Convention in an international context required a "bad faith" exception. He referred, by way of example, to the different interpretations placed on "pretext" in the Federal Court. He expressly disagreed with the reasoning of the Federal Court in *Somaghi* and in the New Zealand decision of *Re HB*. Finally, his Lordship considered that the approach he favoured did not give the green light to "bogus asylum seekers" such that it might threaten to undermine the work of the immigration authorities.

The FULL COURT DECISION IN Mohammed

39 In the Full Court's decision in *Mohammed* Spender and French JJ, in separate judgments, held that the Full Court decision in *Somaghi* was correct but distinguished it. Justice Spender noted the use of the word "pretext" by Gummow J and contrasted the pretext of a claim with the situation where a refugee applicant's actions in Australia do in fact create the conditions necessary for protection. His Honour said (at 408):

"Conduct engaged in for the purpose of establishing the circumstances which might endanger an applicant on return, is not necessarily the same as conduct 'undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution,' which is the description used by Gummow J on appeal in Somaghi."

40 Spender J considered that whether or not the circumstances were "engineered" by the respondent and whether or not they were undertaken in good faith, the necessity remained for the RRT to address the question whether an applicant for a protection visa held a fear that he would be persecuted for a convention reason, and whether if returned to the country of nationality there was a real risk that such persecution would occur. His

Honour considered that a good faith exception imposed an unwarranted and unjustified requirement on those who genuinely hold political opinions which might support the grant of a protection visa if all other necessary elements were established.

41 Justice French undertook an extensive review of prior authority. After doing so his Honour concluded (at 401) that:

"The imposition of a good faith qualification for refugees sur place as a gloss on the Convention is not warranted by its language and is capable of eroding, in its practical application, the protection that the Convention provides. That is because of its very vagueness. Moreover the problem which that gloss seeks to address is more apparent than real. … The Convention must be given effect according to its language. Even those who, not withstanding their want of good faith, could show that the conditions for protection are satisfied are entitled to that protection. Want of good faith is a factual issue with evidentiary significance in the ultimate issue to be determined which is whether the applicant satisfies the conditions of Art 1A. It is not a rule of law to be laid over the words of the Convention."

42 His Honour found that the RRT in that case had erred by not factoring into its conclusion that the claimant's fear was not well-founded, any consideration of the reaction of the Sudanese authorities to the letter and whether the claimant held the fear asserted.

43 Justice Carr, in dissent, thought there was no relevant distinction between the facts before the Full Court in *Somaghi* and in *Mohammed*. His Honour, of course, acknowledged the factual differences but did not consider they provided a sufficient basis for distinguishing the two cases or the principles applicable to the question raised in them. His Honour did not see any necessity to imply a condition of good faith into the Convention or put a gloss to that effect on the Convention. He considered that the focus should be on the specific finding of the RRT that the letter had been sent for the sole purpose of coming within the Convention. His Honour emphasised the narrowness of the exception, namely a case which is based on fraud, and concluded (at 433):

"In my opinion, where a person who is not a refugee, engages in particular conduct, not in order to exercise certain human rights which the Convention is designed to protect, but solely to create a pretext of invoking a claim to well-founded fear of persecution, it would be wrong to describe his fear of persecution as being 'well-founded.' The expression 'well-founded' has been taken to describe the objective circumstances giving rise to a real chance of persecution. But, in my view, there is no reason why the expression 'well-founded' should be confined only to such a meaning. It can have another meaning as well. In the present circumstances the respondent's fear of persecution is probably 'well-founded' in the objective sense, that is objectively he is likely to be persecuted on his return to Sudan. However, it is not 'well-founded' in the sense of being properly founded within the meaning of the Convention. A claim having fraud as its foundation is not, in my view, 'well-founded'."

Reasoning in the present case

44 In the present case the only question for the Court is whether the conduct of a claimant, who otherwise has not made out any case for refugee protection, carried out for the **sole purpose** of attracting protection as a refugee can be relied upon to support the claim. On the unchallenged findings of the RRT the only basis on which protection can be claimed in the present case is the real chance of persecution by the Iranian authorities brought about by the first respondent's deliberate conduct which was engaged in by him with the sole purpose of producing a risk of persecution where there was otherwise none.

45 In considering this question it is important to bear in mind the following. This is not a case where the first respondent can rely on any conduct apart from the publication of the newspaper article to support his claim. It is not a case where the applicant is "bolstering" or reinforcing a genuinely held fear of persecution which he entertained before the conduct in question. No accumulating or weighing of this evidence against other evidence which supports his case is involved. Nor is it a case of mixed purposes, which involves a determination as to whether the purpose of his conduct was an operative or significant purpose. The RRT expressly found that the attraction of protection was the **sole** purpose for the conduct. This is not a case of imputed political opinion whereby a claimant *sur place* is wrongly or accidentally presumed to be hostile to national authorities although he is in fact not. For example where a person is photographed walking by a demonstration which is televised and displayed in the country of nationality. Such a person may have no political opinion or may not be associated with the opinion of any of the demonstrators. Nevertheless, by reason of a political opinion imputed to him by the overseas authorities he may be at risk of persecution in his country. Nor is this a case where a claimant *sur place* is unwilling or unable to refrain from publicly making known in Australia or elsewhere a political opinion or religious belief, or from engaging in an association with a particular social group. Furthermore, it is not a case where the Minister contends that there is a general qualification of "good faith" to be added as a gloss to the Convention, or that a claimant should be denied protection if they act unreasonably or carelessly. The narrow case sought to be made is that conduct engaged in by a claimant solely to create a previously non-existent risk of persecution, in the absence of any political or religious opinion held by the applicant, is not to be taken into account when determining refugee status.

46 In my view the decision of the Full Court in *Somaghi* cannot be distinguished from the Full Court decision in *Mohammed.* Nor are the two decisions consistent. I agree with Buxton and Nourse LJJ, in the Court of Appeal in *Danian*, that the principle expressed in *Somaghi* is that where the sole reason for conduct is to attract Convention protection, the consequences of such conduct should not be taken into account in deciding whether a claimant is a refugee. I consider that the analysis of the word "pretext" used by Gummow J in *Somaghi* does not advance the applicant's case.

47 I do not accept that the Contracting States ever envisaged or intended the Convention to provide protection to a claimant in circumstances such as this case. The words "well-founded fear" sit uneasily with the notion of a fear generated by a course of conduct carried out for no other purpose than to create a false perception as to political opinion and thereby claim refugee protection. On a fair and reasonable reading of the Convention, a fear or risk of persecution founded not on any political, religious, social or racial basis, but simply on a desire to attract protection is not in my view "well-founded".

48 Consideration of the Convention grounds for protection is of some assistance in determining the question. The Convention grounds are directed to characteristics of a person which are either beyond the control of that person such as race, ethnicity, social group or place of origin, or which involve entitlements to basic human rights such as political opinion, religious belief and freedom of association. In my view, an attempt to rely on an imputed political opinion generated by conduct designed solely to attract attention and refugee status is not within the Convention.

49 On the findings of the RRT none of these grounds apply in the present case. The ground which is said to attract the real chance of persecution here is the imputed political opinion generated as a consequence of the first respondent's conduct solely directed to that end. In fact, this political opinion is non-existent in the sense that the first respondent never held any such opinion. There can be no suggestion that this conduct was in any way actuated by a genuinely held political opinion. The circumstances have been "engineered" by engaging in conduct which produces the risk of persecution and at which the hostility of the authorities is directed. The reason for the fear of persecution in reality is not a Convention ground, but is conduct deliberately undertaken for no other reason than to invoke protection.

50 The other authoritative Convention text is the French text and that speaks in terms of "a person fearing with reason" persecution on a Convention ground. The concept which corresponds to "well-founded fear" in the French text is the expression *"avec raison d'être".* In the present case the reasons found by the RRT for the fear of a risk of persecution is the desire to remain in Australia. This is not a fear of persecution for a Convention reason.

51 For the above reasons I consider that the majority reasoning in *Mohammed* proceeded on a misapplication of *Somaghi.* In so doing it was plainly wrong and should not be followed. The Full Court reasoning in *Somaghi* applies in this case.

Conclusion

52 The Judge below, in my view, erred in deciding (notwithstanding his own reasoning) that he was bound to apply *Mohammed.* I consider that the appeal should be allowed with costs. The orders of his Honour and of the RRT should be set aside and the matter should be remitted to the RRT for decision in accordance with law. It would be appropriate for the Attorney-

General in the present case to authorise a payment to the respondent pursuant to s 6(3) of the *Federal Proceedings (Costs) Act 1981*.

I certify that the preceding thirty–one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.

Associate:

Dated: 16 February 2001

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 85 of 2000
ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA	

BETWEEN:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS APPELLANT
AND:	GHOLAMREZA FARAHANIPOUR FIRST RESPONDENT MOJGAN GHASEMPOUR SECOND RESPONDENT

JUDGE:	RYAN, TAMBERLIN and R D NICHOLSON JJ
DATE:	16 FEBRUARY 2001

PLACE: PERTH

REASONS FOR JUDGMENT

R D Nicholson J:

53 The issue raised by this appeal is whether the primary judge was in error of law in failing to apply *Somaghi v Minister for Immigration, Local Government & Ethnic Affairs* (1991) 31 FCR 100 and in following the decision of the Full Court in *Mohammed v Minister for Immigration & Multicultural Affairs* (2000) 98 FCR 405. Essentially, the issue is whether the primary judge was in error in not following the ratio of *Somaghi* that action taken outside the country of nationality of the respondents, arguably for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution, should not have been considered by the Tribunal as supporting their application for refugee status.

54 The respondents are citizens of Iran who arrived in Australia on 14 March 1999. They subsequently lodged applications for protection visas. The applications were refused by a delegate of the appellant. They applied to the Refugee Review Tribunal ("the Tribunal") for review. (The second-named respondent is the spouse of the first-named respondent and would qualify for protection as a member of his family unit. I will therefore refer in these reasons to him as the respondent).

Tribunal findings and reasons

55 In summary, the Tribunal was satisfied that the respondent fabricated his account of dissident activities in Iran. It concluded he was of no interest to the Iranian authorities when he left that country because he had never participated in any activities that would bring him to their attention. It was satisfied he did not have a subjective fear of persecution for the reasons he stated when he left Iran and that accordingly he did not have a well-founded fear of persecution.

56 The Tribunal then turned to the action taken outside Iran by the respondent. Evidence of it appeared on the same date that the delegate refused the respondent's application when the newspaper *Arash* published an article purporting to be a record of a telephone conversation between the respondent and the editor. The article stated that the respondent had revealed details of six bank accounts belonging to Iranian government members, Mr Khmenei and Mr Rafsanjani. The article also stated that in his employment in Iran the respondent had been in close contact with most of the writers and journalists and that he was under surveillance. Additionally it said he had become a target of abuse and intimidation by Fundamentalists. The Tribunal noted that the balance of the article was "a diatribe against the Iranian Government and Australian authorities for not recognising [the respondent] as a refugee".

57 The Tribunal did not accept that when the respondent was in Iran he had with him a book containing the details of the accounts of the two Iranian leaders. It was satisfied that the details of bank accounts was information provided by other persons. The Tribunal continued it was:

"… satisfied that the [respondent] had colluded with other parties to arrange for publication of the article in Arash, which does not accurately match his claims and contains information that was not within his knowledge, notwithstanding that it reports to be a record of a conversation between him and the editor of the paper. The article is self-serving in that it names the applicant, states he is an applicant for refugee status at the Port Hedland IDC and was a close colleague of people who are persecuted as opponents of the government… [T]he Tribunal is satisfied that the [respondent] sought out a suitable publisher through his adviser and then arranged to have it published to establish a refugee profile. Having regard to his history in Iran and the unacceptable claims he has made since he arrived in Australia, it is satisfied that he has acted to put himself at risk of serious harm if he returns to Iran."

58 The Tribunal considered there was ample evidence to demonstrate that the current Iranian regime is ruthless in its response to dissidents and would have little tolerance for expressions of opposition of the type published in the article in *Arash*. Consequently the Tribunal concluded the respondent faces a real chance that he will be severely punished for the comments attributed to him in that article and that such punishment would arise for reason of his political opinions, whether or not he actually provided the information to *Arash* or holds the views expressed in the article.

59 The Tribunal therefore turned to consider whether the respondent was a refugee *sur place* that is, whether or not he had a relevant fear as a consequence of events which happened since he left Iran. Having referred to par 96 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status,* the Tribunal said the relevant actions to determine that matter were the publication of the article in *Arash* and a possible consequent mistreatment of his father. This latter aspect arose because the Tribunal had concluded that the publication of the article may have had reasonably foreseeable adverse consequences for his father, a resident of Iran, as a result of it coming to the attention of Iranian authorities in Australia who may have reported it to officials in Tehran.

60 The Tribunal then referred to *Somaghi* stating that it found actions undertaken for the sole purpose of creating a pretext for claiming fear of persecution do not support a conclusion that the person taking that action has a genuine fear of persecution and, therefore, that person does not have a well-founded fear of persecution for Convention reasons (per Jenkinson J at 109 and Gummow J at 118). It then considered the discussion of *Somaghi* by Lee J in *Mohammed v Minister for Immigration & Multicultural Affairs* [1999] 56 ALD 210. It understood Lee J to have determined that regard must be had to the consequence of an applicant's action, notwithstanding that the action may be 'fraudulent' or that its purpose was solely to bring him or her to the adverse notice of his authorities. It said that while it had some difficulty in reconciling

that determination with the principles discussed in *Somaghi*, it was a determination which the Tribunal was bound to apply.

61 Turning to the action of the respondent in arranging for publication of the article in *Arash,* the Tribunal repeated its satisfaction that he took that action to bring himself to the attention of the Iranian authorities. It found he took the action "to make more plausible, or colourable, a pretended claim to a well-founded fear of persecution". It concluded that "as a consequence of the likelihood the views expressed in *Arash* have come to the attention of the Iranian authorities, the Tribunal is satisfied that the [respondent] now has a genuine fear of persecution, although he did not harbour such a fear before the publication of that article, the artifice of which is apparent in the author taking the liberty to identify the [respondent], presumably at the latter's behest". The Tribunal therefore concluded there was a real chance that the respondent faced persecution for reason of his political opinion and had become a refugee *sur place*. It therefore found he had a well-founded fear of persecution for reason of his political opinion and that he was therefore a person to whom Australia has protection obligations under the Refugees' Convention and Protocol. Those obligations also existed in relation to his spouse as a member of his family unit. Accordingly, the Tribunal decided to remit the matter for reconsideration with a direction that the respondents were persons to whom protection obligations were owed under the Refugee's Convention.

Decision of primary judge

62 The appellant sought review of the decision of the Tribunal on the ground that its decision involved an error of law, being an error involving an incorrect interpretation of the applicable law pursuant to s 476(1)(e) of the *Migration Act 1958* (Cth) ("the Migration Act"). That ground was supported by contentions that the Tribunal had erred in applying *Mohammed,* when that decision was contrary to the principle established by the Full Court in *Somaghi*; that it had incorrectly interpreted the applicable law as set out in *Somaghi*; and that it incorrectly interpreted the applicable law by finding that the fear of the respondents was "well-founded" within the meaning of the Convention.

63 Prior to the hearing of the application for review the decision of the Full Court in *Mohammed* was handed down. The primary judge described the effect of the Full Court decision in *Mohammed* as upholding the decision of Lee J at first instance in a case which was relevantly indistinguishable from the case before him.

64 His honour the primary judge had been the dissenting judge in the Full Court decision in *Mohammed*. As the majority in *Mohammed* did not regard *Somaghi* as being in conflict with their decision, he did not consider he could hold that the decision of the Full Court in *Somaghi* was in conflict with the decision by the majority of the Full Court in *Mohammed*. Alternatively, if it was open to him to find such conflict he considered he should still follow

Mohammed on the basis that the latter Full Court gave due consideration to *Somaghi* when reaching its decision. He therefore dismissed the application.

Grounds of appeal

65 The present appeal from the decision of the primary judge proceeds on the uncontested basis that the issue raised in the application before the primary judge was relevantly identical to that raised in *Mohammed*.

66 The essential issue which the appellant seeks to contest on this appeal is the conclusion of the majority in *Mohammed* that the decision of the Full Court in *Somaghi* stood for a principle which was not inconsistent with their honours' approach in *Mohammed*. The grounds therefore contend that the primary judge erred in failing to apply the principle in *Somaghi* and not holding that the Tribunal erred in applying the decision of Lee J in *Mohammed* and in requiring the Tribunal to correctly interpret the applicable law established in *Somaghi*.

Approach of the Full Court in *Somaghi*

67 The decision of the Full Court in *Somaghi* has been analysed and considered by Carr J in his reasons in dissent in *Mohammed* at 429 – 431. I respectfully agree with his analysis and his conclusion that the *ratio decidendi* included the following words of Gummow J at 118:

"It should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. The fear of persecution to which the Convention refers, in such cases will not be 'well-founded'."

68 A number of observations can be made on this *ratio*:

69 (1) The passage, which I have accepted forms part of the *ratio decidendi* in *Somaghi* uses the word "pretext". That is defined by the New Shorter Oxford English Dictionary at p 2347 as "a reason put forward to conceal the real purpose or object; an ostensible motive of action; an excuse, a pretence". "Pretence" is defined at p 2345 of the same dictionary to include the meaning of "an alleged (now usually trivial or fallacious) ground for an action".

70 The introduction of the word "pretext" would appear to have arisen from the writings of A Grahl-Madsen, *The Status of Refugees and International Law* (1966) vol 1, pp 251 – 252, par 95 where he said:

"If a person has committed some act and as a result is liable to persecution because the authorities of his home country read a political motivation into his action, we have

a repetition of the theme that the behaviour of the persecutors is decisive with respect to which persons shall be considered refugees: he is in fact a (potential) victim of persecution 'for reasons of (alleged or implied) political opinion' and may consequently invoke the Convention on an equal footing with those who were motivated by true political beliefs. But we may have to draw a distinction among the former, between those who unwittingly or unwillingly have committed a politically pertinent act, and those who have done it for the **sole purpose of getting a pretext for claiming refugeehood. The former may claim good faith, the latter may not. The principle of good faith implies that a Contracting State cannot be bound to grant refugee status to a person who is not a bona fide refugee**."(Emphasis added)

Gummow J cited this passage in the course of his reasons in *Somaghi* at 117.

> 71 The word "pretext" as it appears in the *ratio* in *Somaghi* would appear to be either inappropriate or surplusage. It is inappropriate if it suggests the claim for refugeehood is necessarily not well-founded in that the fear resulting from the action is a "pretence". That may not necessarily be the case. It is surplusage in that if the words "creating a pretext" are deleted, the *ratio* remains to the same effect and focuses attention on whether the action was done for the sole purpose of invoking a claim to a well-founded fear of persecution. I consider the reference to "pretext" in the reasons of Gummow J in *Somaghi* at 117, read in the context of what precedes it, is a short-hand reference to the actions of a putative applicant for refugee status made for the purpose of generating the very conditions that would otherwise give rise to the entitlement (cf French J at 413 in *Mohammed*). That understanding is consistent with the view of Buxton LJ in the final paragraph of point 6 on p 25 of his reasons in *Danian*. What the word "pretext" is intended to refer to, as I understand it, is what Lockhart J referred to in the related case of *Heshmati v The Minister for Immigration, Local Government & Ethnic Affairs* (Federal Court of Australia, Lockhart J, 22 November 1990, unreported), cited by Gummow J in *Somaghi* at 117 – 118, where he said he could not accept "that a person who has deliberately created the circumstances… is entitled to recognition as a refugee *sur place*". Lockhart J also said, although not finally deciding, it is the question of the effect of the action by the person designed solely to establish the circumstances which may give rise to the relevant persecution. As Spender J said in *Mohammed* in the Full Court at 408, such conduct does not necessarily involve a "pretext".
>
> 72 (2) *Somaghi* was viewed by the Court of Appeal in *Danian v Secretary of State for the Home Department* [2000] IMM AR 96 as supporting a good faith test. The reverse side of the good faith coin is the bad faith test. That was referred to in *Danian* where by bad faith it was intended to refer to acts which were performed solely to bolster the claim for asylum and for no other reason (see the reasons of Brook LJ at p 12).

73 It will be noted that neither in the formulation by Lockhart J referred to by Gummow J in *Somaghi* nor in the formulation of the *ratio* in *Somaghi* is there any reference in express terms to "good faith" or to its converse, bad faith. The closest the *ratio* in *Somaghi* comes to the concept of "good faith" is in a reference by Gummow J at 117 to the reasons of the delegate at par 33, referring to reasons of a former delegate having concluded the dispatch of a letter to the Iranian Embassy meant the act was not committed "in good faith". Although Gummow J at 117 referred to the writings of Grahl-Madsen at the paragraph previously cited, what he said was that the passage was to the same effect as par 96 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979). It is common ground in this appeal that par 96 in that Handbook does assist in resolving the issues raised in this appeal. It makes no reference to "good faith" but requires "a careful examination of the circumstances".

74 (3) Lee J in *Mohammed* at 215 par [28] referred to the "albeit extraordinary" case where the action arguably inducing the fear is fraudulent. Carr J in *Mohammed* in the Full Court said (at 433) that a claim having "fraud" as its foundation is not "well-founded". Fraud is defined in common parlance as "deceit, tricking, sharp practice, or breach of confidence, by which it is sought to gain some unfair or dishonest advantage". In law it is "an advantage gained by unfair means, as by a false representation of fact made knowingly, or without belief in its truth, or recklessly, not knowing whether it is true or false". (The Macquarie Dictionary, 693 – 4). Action of the type falling within the ratio in *Somaghi* would not necessarily be of this character. Nor do I consider there is anything in that ratio requiring such action to be of that character.

75 (4) The effect of the *ratio* in *Somaghi* is that the evidence of the relevant actions "should not be considered as supporting an application for refugee status" so that "the fear of persecution… in such cases will not be 'well-founded'." On one view, that does not state such evidence shall be disregarded. It is as well to be understood as describing the effect of the evidence. Certainly that is the case with the former phrase; less arguably with the latter phrase. French J in *Mohammed* in the Full Court accepted that a constructional basis for the good faith requirement was not expressed in the reasons of Lockhart J on which Gummow J relied (although he considered it may be implicit). The understanding of the *ratio* in *Somaghi* as espousing an evidentiary rather than constructional approach is consistent with the foundations on which Gummow J relied without any resort to implication and seems to me to be open on the language used by Gummow J.

76 (5) The view which I think is arguably open in relation to the *ratio* in *Somaghi* provides a possible explanation for the approach taken by Lee J in *Mohammed* at first instance, namely that it was not in conflict with a *ratio* requiring a constructional approach in *Somaghi*.

77 (6) However, as much as I think the *ratio* in *Somaghi* is arguably open to be regarded as not favouring a constructional approach, I accept it was not

so understood in the Full Court in *Mohammed* or by the Court of Appeal in *Danian*.

78 (7) Given the view I have that the *ratio* in *Somaghi* is not unarguably committed to a constructional approach, so that development of the *ratio* in more extensive terms would be required to address the above issues in detail, I am less inclined to consider *Mohammed* was "plainly wrong".

Reasoning in the Full Court in *Mohammed*

79 The majority in *Mohammed* were each of the opinion that there was nothing in the Convention imposing a requirement of good faith or founding a bad faith exemption: 407 per Spender J and 411 – 421 per French J. They each considered that the necessity remained for the Tribunal to address the central question of whether a respondent held a genuine fear that he or she would be persecuted and that, if he or she were returned to the country of origin, there was a real risk that serious harm would befall him or her by acts of persecution within the meaning of the Convention: at 408 per Spender J and at 422 per French J.

80 Carr J in dissent was of the opinion that where a person who is not a refugee engages in particular conduct, not in order to exercise human rights which the Convention is designed to protect but solely to create a pretext of invoking a claim to well-founded fear of persecution, it would be wrong to describe his fear of persecution as being "well-founded". He said at 433:

"The expression "well-founded" has been taken to describe the objective circumstances giving rise to a real chance of persecution. But, in my view, there is no reason why the expression "well-founded" should be confined only to such a meaning. It can have another meaning as well. In the present circumstances the respondent's fear of persecution is probably "well-founded" in the objective sense, that is, objectively he is likely to be persecuted on his return to Sudan. However, it is not "well-founded" in the sense of being properly founded within the meaning of the Convention. A claim having fraud as its foundation is not, in my view, "well-founded". What the respondent did was to attempt to upgrade his position by deliberately creating a higher perceived political profile than he had previously occupied, solely for the purpose of claiming refugee status. I would read the word "pretext" in this context as carrying the meaning of a false reason or excuse for summoning up (invoking) a real fear of persecution: the New Shorter Oxford English Dictionary, pp 2347 and 1412 respectively."

He continued:

"In my respectful opinion, Lee J erred in confining the principles explained in Somaghi and not properly applying them. I accept the appellant's submission that his Honour's approach was not acceptable in principle, because it fails to accord a purposive construction to the terms of the Convention. The protection granted by the Convention is, as the appellant submitted, designed for those who hold political views and may suffer persecution on that account. It is not designed to protect persons who have no bona fide need of such protection, but express political opinions

(whether they hold them or not) to create a basis for staying in a country in which they wish to reside. To grant protection in such cases would be to undermine the beneficial purposes of the Convention."

There are strong arguments in common-sense for this approach taken in dissent. The only difficulty I have with it is finding a satisfactory legal category in which to ground the approach, a matter to which I return below.

Were the majority in *Mohammed* correct?

> 81 I agree with the view of the majority in *Mohammed* that the Convention terms do not give rise to the implication of a good faith qualification or bad faith exemption. I agree in particular with the reasoning in that respect in the judgment of French J in *Mohammed* and I place reliance on the items 1 – 15 listed in the consideration of the issue in the reasons for judgment of Buxton LJ in *Danian* at p 24 – 27. However, I particularly rely and am influenced by the following matters :

(1) As it is the Convention which is being interpreted, it is appropriate to look to the Vienna Convention on the Law of Treaties signed 23 May 1969 and entering into force on 27 May 1980. Two matters arise:

> (a) Article 31.1 provides that a Treaty should be interpreted "in good faith", in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose. That is a good faith requirement applicable to the interpretation and does not assist in relation to whether the Convention imposes a constructional limitation in relation to evidence of the nature of the action taken by an applicant for refugee status in the absence of something in the Convention itself on which that constructional element can be grounded.
>
> (b) Article 32(b) of the Vienna Convention permits recourse to preparatory work of the treaty and the circumstances of its conclusion to determine whether the meaning resulting from the application of Article 31, inter alia, "leads to a result which is manifestly absurd or unreasonable". As was the case in *Danian* (see point 4 at p 25 in the reasons of Buxton LJ), we were not shown anything in the *travaux preparatoires* to indicate that the exclusion of a case of a person who has undertaken action for the sole purpose of invoking a claim to a well-founded fear of persecution was assumed or obvious because of its absurdity or any other reason. I have been unable, myself, to find any material to support any such assumption in the *travaux preparatoires* (Cambridge International Documents Series, vol 7). No argument was made on this appeal in any event. Absurdity has been equated with "repugnance to commonsense" – see *Batcheller v Batcheller* [1945] Ch 169 at 177. No argument based on this concept was made on the appeal.

(2) I agree with the reasons of French J at 421 for his conclusion that the imposition of a good faith qualification for refugee *sur place* is not something which

flows from the language of the Convention. As the reasons of Spender J and French J in *Mohammed* and the Court in *Danian* make apparent, authorities are divided on the issue of good or bad faith as a constructional pre-condition to the Convention.

(3) In the absence of anything deriving from the terms of the Convention Articles themselves and in the absence of binding authority I regard the issue of whether an applicant for refugee status qualifies as such solely on actions taken by him or her to invoke the claim to a well-founded fear of persecution as falling to be decided on an evidentiary basis. The actions of the applicant in that respect will be part of the pool of evidence to which the fact-finder must have regard.

(4) When the evidence of the conduct of the applicant for refugee status has fallen into the pool of available evidence it may have the effect of resulting in a finding that there is no "well-founded fear". See point (vi) of the reasons for judgment of Buxton LJ in *Danian* at p 28, where he points out that someone who changes his position or makes allegations inconsistent with the attitude that he or she adopted in his home country may not find it easy to discharge the burden of establishing the existence of a well-founded fear. Acts of refugees expressing political opinions outside the country of nationality may be done for a variety of reasons all of which may be consistent with existence of a well-founded fear of persecution: see the examples given by French J at 421 of *Mohammed* and item 5 in the categories of items listed by Buxton LJ at p 25 of *Danian*.

82 In relation to the dissenting view expressed in *Mohammed* in the Full Court, I make the following observations:

(a) I am not presently satisfied that the application of the reasoning in *Mohammed* would fail to accord a purposive construction to the terms of the Convention. Certainly that would not appear to be the case if the Convention itself, as a matter of construction, does not carry the good faith purpose with it. That issue was not argued in this appeal.

(b) Equally I am not satisfied that a grant of protection in cases of the stated actions by a putative claimant for refugee status for the sole purpose of invoking such a claim would necessarily undermine the beneficial purposes of the Convention where the effect of the evidence in the particular case required such an application. Again this particular aspect was not developed in argument in this appeal.

(c) I leave open the question whether "well-founded" could have a secondary meaning in the context of the Convention. If that concept is to act as the appropriate hinge for a constructional approach it would need further argument and analysis as it does not appear to follow from the plain language of the Convention or from existing authorities on it.

83 I am indebted to Tamberlin J for drawing attention during the hearing of the appeal to the arguable absence of the French equivalent of the word "well-founded" in the French translation of the Refugees' Convention. I have examined the French version of Article 1A. It uses the words "craignant avec

raison d'etre". "Raison" following "avec" can translate as "rightly". There may therefore be no relevant difference between the English and French texts in this respect. It is, of course, desirable that in the application of the Convention, regard be had to international practice and other decisions so that there is as far as possible avoidance of significant differences in the qualities of those who qualify for status as a refugee. In any event, Article 33 of the Vienna Convention makes clear that when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language unless the treaty provides, or the parties agree that, in a case of divergence, a particular text shall prevail. The Convention provides the English and French texts are equally authentic. There is, furthermore, pursuant to Article 33.3 a presumption created that the terms of the Convention have the same meaning in each authentic text. In those circumstances it would not be open to contend that a constructional requirement based on the word "well-founded" could not be read into the Convention because of the absence of an equivalent of that word in the other authentic text.

Should the appeal succeed?

84 As previously stated, the view reached by Carr J in dissent in *Mohammed* and the view reached here by Tamberlin J (whose draft reasons I have had the advantage of reading) has much in logic and commonsense to support it. However I do not consider it is a view this Court, as distinguished from the ultimate court, can uphold on this appeal, for the two reasons which follow. Expressed shortly, I consider the issue raised on the appeal is one which can only and should be resolved by the ultimate court.

85 The first reason why I consider this to be the case is that the view in question does not appear to have any usual contextual or conceptual foundation nor has full argument been made to establish that position. It relies ultimately on an assertion – which an ultimate court would be entitled to make – that the words "well-founded" are themselves in their context the appropriate foundation. This assertion exists side by side with both the doubts concerning the scope of the dicta in *Somaghi* previously referred to and the inability for it to be properly said the majority decision in *Mohammed* is "plainly wrong", particularly in the light of the decision of the Court of Appeal in *Danian*. In my view, if the *ratio* of *Somaghi* is to be the law it requires the ultimate court to reach that view after full argument on all relevant considerations so that the *ratio* and its foundation are articulated beyond equivocation. I am reinforced in this view after reading the reasons of the High Court in *Minister for Immigration & Multicultural Affairs v Ibrahim* [2000] HCA 55 which make apparent the breadth of considerations to be taken into account in understanding the purpose and terms of the Convention and which have not been the subject of submissions on this appeal.

86 Secondly, unless *Mohammed* can be found to be "plainly wrong", there was no error by the primary judge in failing to apply the principle in

Somaghi because he was bound to follow the Full Court in *Mohammed*. He followed the appropriate rules in that respect.

Conclusion

87 For these reasons I consider the appeal should be dismissed.

I certify that the preceding Thirty five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice R D Nicholson.

Associate:

Dated: 16 February 2001

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