REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 74665/03

AT AUCKLAND

Before:	MA Roche (Chairperson) RPG Haines QC (Member) S Murphy (Member)
Representing the Appellant:	D Mansouri-Rad
Date of Hearing:	22 July 2003
Date of Decision:	7 July 2004

DECISION OF THE AUTHORITY
DELIVERED BY RPG HAINES QC

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INTRODUCTION

[1] This is an appeal against the decision of a refugee status officer given on 9 May 2003 declining the grant of refugee status to the appellant, a twenty-five-year-old citizen of the Islamic Republic of Iran.

[2] The facts are unusual in that two days before the appeal hearing the Authority received from the appellant notice that he wished to add a wholly new ground to his refugee claim, namely that if he returned to Iran he would be at risk of being persecuted for reason of his sexual orientation. At the same time he continued to advance the original ground of his refugee claim which was that he is wanted by the Iranian authorities because of his alleged intentional killing of a member of the Sepah (Revolutionary Guards) in a motor vehicle accident. In addition he did not wish to perform military service.

[3] During the hearing of the appeal the appellant admitted that the claim relating to the motor vehicle accident was false and that the true basis of his application was his sexual orientation. As will be seen, the Authority is satisfied that the evidence given by the appellant at the appeal hearing in support of his new claim is credible, that he is a homosexual and that recognition of refugee status is appropriate. However, delay in the delivery of the Authority's decision was anticipated as the Authority was aware that on 8 April 2003 the High Court of Australia had heard argument in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 and that the decision in that case would have potential bearing on the jurisprudence relating to claims to refugee status based on sexual orientation. In view of the anticipated delay and in further view of the appellant's medical condition, the Authority directed the Secretariat to advise the appellant that a decision had been made that he be recognised as a refugee and that a written decision containing the Authority's reasons would be published later. The appellant was so advised (through his solicitor) by letter dated 5 August 2003. The decision of the High Court of Australia was not published until 9 December 2003.

[4] To complete the record it is to be noted that at the conclusion of the hearing on 22 July 2003 the solicitor for the appellant sought and was granted leave to file further evidence and submissions. That material was filed promptly on 28 July 2003. The appellant has also been afforded an opportunity to make submissions

on *Appellant S395/2002*. The submissions of his solicitor dated 22 March 2004 have been taken into account by the Authority.

THE APPELLANT'S CASE

[5] As indicated the appellant's case underwent substantial transformation a few days before the appeal hearing and it was on the basis of the new claim that the Authority decided that it was appropriate to recognise the appellant as a refugee. In the circumstances, the claim as originally advanced by the appellant (but from which he later resiled) will be given in outline only.

The original claim

[6] In its original form the appellant's claim was that although born in [A] his parents separated when he was one-year-old and he and his mother moved to [B] where his maternal grandparents lived. In 1996, when the appellant was seventeen years of age, he and his mother moved back to [A]. After leaving school in 1998 he worked first in a motorcycle spare part shop and then in a sport-clothing shop. In October or November 2001 he began working as a taxi driver.

[7] In approximately January 2002 he was involved in a motor vehicle collision. The other vehicle was an unmarked Sepah car. The two passengers in the Sepah vehicle survived but the driver was killed. The appellant was arrested at the scene and accused of being part of an anti-regime group and of having planned to kill the Sepah driver. During repeated interrogation the appellant was tortured. After two months (ie in February or March 2002) he was taken to a court in [A] where, after a brief appearance, he was returned to detention. Two months later he was taken back to court and again returned to detention. However, as the appellant and his escort were leaving the courthouse on this occasion they were attacked by relatives of the deceased. In the confusion the appellant escaped and with his mother returned to [B] to stay with his grandparents. In May or June 2002 and again in July or August 2002 the home occupied by the appellant and his mother in [A] was searched by the authorities.

[8] With the assistance of a contact, his mother was able to obtain a genuine Iranian passport even though he had not completed his military service. In

December 2002 the appellant left Iran, arriving in Thailand. With the assistance of a helper he travelled through various countries in South East Asia and after obtaining a false German passport, arrived at Auckland International Airport on 15 March 2003. At the airport he sought refugee status on the basis of the alleged motor vehicle accident and the subsequent alleged detention and escape. He later produced two court notices requiring his appearance in [A] on 4 May 2002 and 3 September 2002 respectively.

[9] The appellant was interviewed by a refugee status officer on 4 April 2003. In a decision published on 9 May 2003 the officer declined the refugee claim on credibility grounds, cataloguing a number of inconsistencies and implausibilities in the appellant's account. The appellant appealed.

[10] In a new statement filed two days before the appeal hearing the appellant maintained that he had been involved in the fatal motor vehicle accident. He also produced a letter from his mother reporting that she was under surveillance by Sepah's Ettela'at, that her house had been searched and that she herself had been detained for a few days and interrogated. After her release she had been threatened with death by the family of the deceased. A further document was produced purporting to show that the mother had been dismissed from employment because of the dispute with the deceased's family.

The sexual orientation claim

[11] In his new claim the appellant says that in his early teens he became aware of his homosexuality and from intermediate school had had emotional and sexual relationships with other boys. His classmates soon discovered that he was a homosexual and he was made the object of derision. This brought the appellant to the attention of the school authorities and he was handed to the Monkerat (morals police). He was detained for one day and asked a number of questions about his sexual orientation and sexual activities. He was warned that he could be punished with one hundred lashes if he followed the same behaviour again. He was also told that he could face even more serious punishment, including death. The appellant's mother was summonsed and told about her son's activities.

[12] After this incident the appellant left intermediate school because he could not cope with the taunting of the other children and because he had come to hate

the atmosphere there. In 1993, when fourteen years of age, he began working in a motorbike workshop. After a few days he formed a sexual relationship with his employer, a relationship which continued for the next two years.

[13] In 1996 the appellant and his mother returned to [A] and at seventeen years of age he enrolled at a secondary school. In the first year he formed a deep emotional attachment with one of his classmates. One day in 1998 the elder brother of this classmate discovered the two performing a sexual act at the classmate's home. A few hours later the classmate's mother (and elder brother) arrived at the appellant's home shouting abuse and accusing the appellant of having seduced her younger son. The appellant did not attend school for several days. Soon after resuming school, he was given a severe beating by the elder brother and one other person when they accosted him on his way home. A week later the appellant was summonsed to the office of the principal and told that he had been expelled.

[14] For a long time the appellant was emotionally distraught and did not leave home.

[15] In 1999 he began working at a clothes shop specialising in sportwear. He had often visited the shop on his way to school and had become friendly with the two proprietors who were brothers. His employment at the shop lasted for three years. During this time he formed relationships with both brothers. His sexual activities with them were described as occasional. During this period the appellant also had casual sexual relations with other men he would meet through his employers, other acquaintances or at a public park. He said that all his relationships were conducted furtively, the overriding imperative being to conceal everything from the parents of the other men, from his own mother and from the public at large. He received little or no support from his mother, describing her as being constantly unhappy about his sexual orientation and as wanting him to leave Iran because she was tired of him. On two or three occasions the appellant attempted suicide because of his deep unhappiness at being unable to live a normal life which he defined as being able to form relationships with other men and to love and be loved. He described his situation in the following terms:

> Because of the situation in Iran and because of the Iranian beliefs and traditions I always saw myself in a cage where I was not allowed to have my life in the way that I wanted. I always was in fear of being reported and arrested again. I had to be myself and live in a way towards my feelings, but I was not able to. Many times

> I decided to commit suicide and release myself from the type of life that I had in there. I even did not dare to talk about my sexual feelings let alone to carry them on.

[16] Addressing the point that subsequent to his expulsion from school in 1998 he had not been detained, arrested or otherwise ill-treated because of his homosexuality, the appellant spoke of the effect on him of the potential punishment of a hundred lashes and execution. He said that if he returned to Iran he could not hide his sexual orientation. He explained that for him homosexuality was not a matter only of sex, but of having loving relationships of the kind enjoyed by men and women. He considered that life would be meaningless without the ability to express feeling and desire.

[17] He explained his earlier failure to advance his sexual orientation claim on two grounds. First, he did not know that a refugee claim could be based on sexual orientation and second, he felt too embarrassed to talk about sexual matters (particularly given that at the first instance hearing the refugee status officer and interpreter were both female) and did not know whether he would be treated fairly should he express his sexual feelings. However, after instructing his new solicitor (who speaks Farsi) following the first instance decline and after an attempted suicide in June 2003, he realised the necessity to disclose his homosexuality.

The motor vehicle accident revisited

[18] At the appeal hearing the appellant initially maintained the claim that he had been involved in a fatal motor vehicle accident and that he had been falsely accused of assassinating a Sepah officer. However, required by the Authority to face glaring inconsistencies in his various accounts, not to mention improbabilities of substantial proportion, he admitted that there had been no motor vehicle accident and that the court documents and letter of dismissal relating to his mother were false documents which he had obtained to give credibility to his account. He said that the true reason for leaving Iran was his homosexuality. He felt “totally harassed” to the extent that he could no longer continue living in that country.

Military service

[19] Insofar as the appellant rested his case on his unwillingness to perform compulsory military service, little meaningful detail emerged at the appeal hearing as to the grounds of this aspect of the claim. As the refugee claim succeeds on

the sexual orientation ground the Authority does not intend to address the military service issue in this decision.

THE ISSUES

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

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

[21] In terms of *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996); [1998] NZAR 252 the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is Yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility assessment

[22] Ordinarily, a refugee claimant who, two days prior to the appeal hearing, advances an entirely new claim and who during the hearing acknowledges the falsity of the original claim, faces a substantial credibility hurdle. However, having seen and heard the appellant we are satisfied that the motor vehicle accident story was a pretext to mask that which he believed he could not reveal, namely his sexual orientation. He is fortunate that in the month between his hospital admission in Auckland and the appeal hearing his personal odyssey led to the disclosure to his solicitor of the true basis for his refugee claim. His misguided persistence with the original false claim has not deflected a finding that he is an otherwise credible witness.

[23] In international refugee jurisprudence claims to refugee status based on sexual orientation are commonly, though unnecessarily, seen as troublesome. First there is the question whether the risk of suffering serious harm for reason of one's sexual orientation can be said to be a risk of "being persecuted" and second, whether sexual orientation should be accepted as a basis for finding a social group for the purposes of the Refugee Convention. In New Zealand at least both issues were settled affirmatively by the Authority's decision in *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387, a decision cited with approval by Lord Steyn in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 643D & 644G (HL). However, given that in this decision we are disagreeing with the reasoning (though not with the actual result) of the majority decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 (HCA) it is necessary that we explain the Authority's approach to the "being persecuted" element of the refugee definition. As to this there are four principal issues:

(a) The status of homosexuals in Iran.

(b) The meaning of "being persecuted" in the Refugee Convention.

(c) Sexual orientation and the Refugee Convention concept of "being persecuted".

(d) Whether, on the facts found, the appellant is at risk of being persecuted.

THE STATUS OF HOMOSEXUALS IN IRAN

The findings in *Refugee Appeal No. 1312/93 Re GJ*

[24] As the Authority's jurisprudence on homosexuals in Iran has largely been based on *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387, 391-394, 401 the country information relied on in that case is set out below for convenience.

Homosexuals In Iran

> Certain crimes in the Penal Code such as adultery, sodomy and malicious accusation are regarded as crimes against God (*Hodoud*) and therefore liable to

divine retribution, and carry a mandatory death sentence: Amnesty International, *When the State Kills ... The Death Penalty v Human Rights* (1989) 149, 150:

> "The Law of Hodoud (Crimes Against Divine Will; Hadd) and Qisas (retribution) forms a part of the Islamic Penal Code of Iran provisionally approved by the Islamic Consultative Assembly in 1982. It provides for the death penalty for a large number of offences including premeditated murder, rape, "moral" offences such as adultery, sodomy and repeated counts of drinking alcoholic liquor. The Law of Hodoud and Qisas also provides for the death penalty as a possible punishment for those convicted of being corrupt on Earth or at enmity with God. Such broad terms can apply to political opponents, including those expressing their views in a non-violent manner."

The specific provisions of the Law of Houdoud and Qisas prescribing the death penalty for the relevant offences are: sodomy (Article 140), tafhiz (homosexual conduct, without penetration) for the fourth time, having been punished for each previous offence (Article 153), lesbianism for the fourth time, having been punished for each previous offence (Article 161): Amnesty International, Iran: Violations of Human Rights - Documents sent by Amnesty International to the Government of the Islamic Republic of Iran (AI Index: MDE 13/09/87) 63-64.

The following summary is taken from Amnesty International, Breaking the Silence: Human Rights Violations Based on Sexual Orientation (AI USA Report, February 1994) 33:

> "International human rights standards recognise each person's right not to be arbitrarily deprived of their life and categorically state that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. The UN has committed itself to the gradual abolition of the death penalty. Amnesty International opposes the death penalty in all circumstances, and also points out when it is used in a discriminatory manner, such as against persons based on their sexual, racial, or ethnic identity.
>
> Although referred to as a "punishment" for crime, the death penalty is often arbitrary, used as a tool for political repression or disproportionately imposed on the poor and powerless. Like other disenfranchised groups, lesbians and gay men sometimes face the death penalty for their identity, including their homosexual conduct.
>
> In Iran, sodomy is punishable by death. During 1992, at least 330 people were executed in Iran. It is unclear how many of these executions may have resulted from accusations of homosexuality. Although Amnesty International has received reports that some lesbians and gay men have been stoned to death or beheaded for their homosexuality, it has been extremely difficult to substantiate these reports. What is clear is that homosexuality is a capital crime in Iran. In July 1980, a 38-year-old man, married with 6 children, was stoned to death in the town of Kerman in southern Iran. He had been convicted of homosexuality and adultery.
>
> In at least one case, homosexuality was used as one of the pretexts for application of the death penalty. Dr Ali Mozaffarian, a well-known surgeon and one of the leaders of the Sunni Muslim community in Fars province in southern Iran, was executed in Shiraz in early August 1992. He was convicted of spying for the United States and Iraq, as well as adultery and sodomy. His video taped "confessions", which may have been obtained as a result of physical or psychological pressure, were broadcast on television. Amnesty International believes that his trial may have been unfair,

> that the charges of spying, adultery and homosexuality were merely used to target this Sunni Muslim leader."

The suspicion that the Iranian authorities are wont to use a charge of homosexuality in order to target opponents of the regime is strengthened by the recently reported case of Ali Akbar Saidi-Sirjani, a writer who, following his arrest, is purported to have confessed to being a homosexual, as well as to gambling, drinking and smoking opium. See HRW, Human Rights Watch World Report 1995 (December 1994) 269, 270:

> "One of the few remaining public voices of dissent in Iran appeared to have been silenced with the detention in Tehran in March [1994] of Ali Akbar Saidi-Sirjani. His associate, Mohammad Sadeq Said, a poet, whose pen-name is Niazi-Kermani, was also arrested. The arrest of Saidi-Sirjani, a prolific writer, further narrowed the scope of expression in the Islamic Republic.
>
> Since 1989, the authorities have imposed a complete ban on all of Saidi-Sirjani's seventeen volumes of essays and social commentary. The writer responded to this muzzling by circulating open letters to the authorities, courageously denouncing censorship and the lack of freedom in Iran.
>
> A month after his arrest, the authorities produced an alleged confession they attributed to Saidi-Sirjani, of a wide range of crimes "conspiring to defame the Islamic regime and its founders". He also purported to have confessed to being a homosexual (a criminal offense in Iran punishable by death), as well as to gambling, drinking, and smoking opium. At the end of the year, Mr Saidi-Sirjani's status was unclear."

The Authority has also received expert evidence that:

> "Khomeini has written in great detail on matters of sexuality and secular behaviour in a puritanical fashion more akin to some Wahhibi texts than traditional Shi'a ones. This sort of attitude has given the Iranian authorities a green light to persecute sexual minorities regardless of the express provisions of the Iranian Penal Code.
>
> Taking as their text Khomeini's pronouncement:
>
> > "A man must not look upon the body of another man with lustful intent. Likewise, a woman may not look upon another woman with such interest."
> >
> > (Sayings of the Ayatollah Khomeini - Political, Philosophical, Social and Religious; Bantam Books, New York, 1979 at p.105.)
>
> the persecution of homosexuals in Iran has been severe. Arlene Swindler in her book Homosexuality and World Religions, (Trinity Press, Pa., USA, 1993) writes (p.194):
>
> > "Under Khomeini, hundreds of people were executed as homosexuals. Most of these were not gay at all .... the fact that the accusation of homosexuality is used for the purpose of physically eliminating people not of the party line (is similar to the situation) in Nazi Germany."
>
> Similarly, the persecution of Iranian homosexuals is commented upon in the book by Schmitt, A. and Sofer, J. Sexuality and Eroticism Among Males in Moslem Societies (Harrington, N.Y., 1992). In Helene Kafi's study (in Schmitt and Sofer at 67/9) details

> are given of the 100 to 200 executions of homosexuals in 1981/2 and the torture and rape of homosexual prisoners in Iranian jails. The persecution of homosexuals is further detailed in the chapter by David Reed in the same volume (pp.61-66), and in a particularly detailed study in that book by Maarten Schild (pp. 185-186) who further cites Khomeini's assertion that homosexuals had to be eliminated because they were parasites and corrupters of the nation by spreading "the stain of wickedness". Schild draws attention to the fact that "what occurred in Iran is certainly not typical of the attitude towards homosexuality in the whole spectrum of Islamic countries". This reinforces the point that the situation for homosexuals in Iran is a particularly dangerous one even compared with other Islamic countries."

The expert witness concludes his evidence with the following statement:

> "My own discussion with judicial figures in Iran such as the former Chief Justice, the former head of the Revolutionary Tribunal, members of the Majlis and Guardianship Council leave me in no doubt that the regime is intent on identifying and punishing anyone regarded as "*mofsed fil arz*" or "*mohareb*" (corrupt on earth or at enmity with God) and that this includes in particular homosexuals who have been singled out by Khomeini and others as both corrupt and as dangerous manifestations of "westification". There is no doubt in my mind that the purging of "morally corrupt" elements is regarded as a duty by the highest political and judicial authorities in Iran and that this duty, sanctioned by the specific institutions of the first *velayat-e faqih*, over-rides any provisions of the Shari'a, the Penal Code or the Iranian Constitution. The evidence for this is clear, documented and abundant. It is reinforced by every conversation or observation which can be made within the country."

...

The country information received by the Authority, and which is summarised earlier in this decision, establishes that in Iran, homosexuals, or persons suspected or accused of being homosexuals, are punished with extreme severity.

Country information - update

[25] Country information research conducted for the present appeal shows that homosexuality continues to be illegal and punishable by death in Iran. See by way of example Canadian Immigration and Refugee Board, Research Directorate, IRN39862.E, *Iran: Update to IRN28636.E of 11 February 1998 concerning information on the situation of homosexuals and whether legal penalties against homosexuality are applied in practice* (20 January 2003) and the International Lesbian and Gay Association, *World Legal Survey: Iran* (last updated 10 October 1999) (http://www.ilga.org/information/legal_survey/ middle%20east/iran.htm [accessed 17 March 2004]).

The law in practice

[26] The evidence as to the application of the law in practice is at times ambiguous and in need of careful interpretation. Some evidence asserts non-penalisation of homosexuality. Such assertions cannot always be taken at face value and must be read in context. Too narrow a conception of human rights must be avoided. Homosexuals can be persecuted by means which do not necessarily involve criminal penalties. The Canadian Immigration and Refugee Board, Research Directorate, IRN39862.E, *Iran: Update to IRN28636.E of 11 February 1998 concerning information on the situation of homosexuals and whether legal penalties against homosexuality are applied in practice* (20 January 2003) helpfully collects some of the country information which illustrates these points. It must be made clear that the observations which follow are not intended to be a criticism of the Research Directorate. They are intended to highlight the dangers inherent in interpreting country information. The first paragraph of the Update acknowledges that homosexuality continues to be illegal and punishable by death in Iran but goes on to record that reports of persons being penalised for homosexuality could not be found among the sources consulted by the Research Directorate. The cited sources are, however, at odds with the "no penalisation" conclusion drawn in the *Update*:

(a) A BBC article of 19 July 2002 which indicated that according to some activists, "The media in Iran tend to portray homosexuals who have been arrested as rapists and paedophiles" and that societal ignorance towards homosexuality is prevalent. The same article pointed out that homosexuals "are repressed by their family and relatives".

(b) A note that during a United Nations General Assembly Special Session on HIV/Aids, which was held in New York in June 2001, delegates from Iran were among those who criticized "any recognition of sexual minorities".

(c) An acknowledgement that in November 2001, the Swedish Aliens' Appeals Board decided to issue a residence permit to a homosexual Iranian teenager, who alleged the ill-treatment of homosexuals in Iran. According to the Board, "gay men and lesbians are not persecuted in Iran but criticizing the Islamic country for its treatment of homosexuals is a political act that may lead to persecution". Specifically, a spokesman for the Board is reported as stating that "a homosexual person (in Iran) does not risk

> persecution only because he is homosexual ... but he or she risks hard punishment, even the death penalty, if he or she conducts homosexual acts".

[27] The statement that the Research Directorate could not find reports of persons being penalised for homosexuality cannot be taken at face value as it stands in stark contrast with the information contained in the *Update*. The fact that homosexuals are repressed by their family and relatives and that they are portrayed by the media as rapists and paedophiles underlines the point. The November 2001 decision of Swedish Aliens' Appeals Board and the reported comments by its spokesman draws an artificial distinction between persecution "because one is a homosexual" as opposed to persecution for "conducting homosexual acts". If "hard punishment" is attracted by the latter, it is scarcely possible that homosexuals are otherwise treated with dignity and respect. Furthermore, the fact that criticising the government for its treatment of homosexuals may lead to persecution rather proves the point, namely that homosexuals are not tolerated by the authorities. In the circumstances it is difficult to accept the assertion made in the *Update* that reports of persons being penalised for homosexuality could not be found among the sources consulted.

[28] Similar dangers of interpretation attach to the paper published by UNHCR/ACCORD, *The European Country of Origin Information Seminar, Berlin, 11-12 June 2001 - Final Report - Iran* and in particular the following statement:

> Although homosexuality is never spoken about and thus a hidden issue, in practice it is not difficult to encounter homosexuals in Iran. There are special parks in Tehran, known as homosexual meeting places. There are also a large number of transvestites walking around in North Tehran. Furthermore, sex changes are permitted in Iran and operations are frequently and openly carried out. A different sexual orientation may, however, create problems. Still, homosexuality is practised every day, and as long as this happens behind closed doors within your own four walls, and as long as people do not intend to proselytize "transvestitism" or homosexuality, they will most likely remain unharmed.

Implicit in this passage is the proposition that to avoid harm, homosexuals in Iran must live "in the closet".

[29] Other country information is simply ambivalent. See for example the Danish Immigration Service, *Fact Finding Mission to Iran 8-17 September 2000* (Council of the European Union, 16 January 2002, 5262/02) which at para 5.5 reports (inter alia) that while one Western source familiar with the homosexual

scene in Tehran had never heard of cases being brought against homosexuals, one "source" attributed with a "good knowledge of the Iranian judicial system" reported that many cases concerning homosexuality have been brought before the Iranian courts. The source was unable to provide further details of the cases in question but did report that the death penalty had been pronounced in several.

[30] Information on whether the death penalty has been carried out for homosexual behaviour is inconclusive. The Amnesty International Report, *Breaking the Silence: Human Rights Violations Based on Sexual Orientation* (AIUSA Report, February 1994) at 33 concedes that while during 1992 at least 330 people were executed in Iran, it is unclear how many of those executions may have resulted from accusations of homosexuality. It goes on to say, however, that:

> Although Amnesty International has received reports that some lesbians and gay men have been stoned to death or beheaded for their homosexuality, it has been extremely difficult to substantiate these reports. What is clear is that homosexuality is a capital crime in Iran.

[31] The International Lesbian and Gay Association, *World Legal Survey: Iran* (last updated 10 October 1999) (http://www.ilga.org/information/legal_survey/middle%20east/iran.htm [accessed 17 March 2004]) records that:

> According to Amnesty International at least three gay men and two lesbians were killed in January 1990, as a result of the Iranian government's policy of calling for the execution of homosexuals. They were publicly beheaded.

No citation is given for this reference.

[32] Because of these difficulties the Authority has in earlier cases acknowledged that some country information suggests that homosexual behaviour in Iran will only result in harsh punishment if it involves a "public transgression" (see *Refugee Appeal No. 71185/98* (31 March 1999) at 6) while other country information suggests that though the law is theoretically harsh, in reality private homosexual acts are common and are tolerated (see *Refugee Appeal No. 71623/99* (13 April 2000)). In the latter decision the Authority at p 7 left open the question whether a homosexual who is discreet and who is unknown to the authorities would be at real risk of being persecuted:

> The Authority refers to its previous decisions in Refugee Appeal No. 1312/93 (30 August 1995) 6-11, 59 and Refugee Appeal No. 71185/98 (31 March 1999). It finds that there is a real chance that this appellant will suffer persecution should he return to Iran. The Authority expressly leaves open the question as to whether a

> homosexual who is discrete and who is unknown to the authorities would be at risk of persecution at the real chance level. There is some country information that while the law is theoretically harsh, in reality private homosexual acts are common and are tolerated; see Department of Foreign Affairs and Trade (Canberra) Country Profile: Islamic Republic of Iran (March 1996) 1-27, DIRB Iran: Update to Responses to Information Requests on the situation of homosexuals and on whether legal penalties are applied in practice (February 1998). This country information is left to be reviewed in a case in which it is an issue.

[33] The question left open in that decision must now be addressed and resolved.

[34] We should first record three general conclusions which can be drawn from the country information presently available:

(a) The Penal Code of Iran prescribes the severest of penalties for homosexuality (death). That penalty is not a historical footnote or relic on the Iranian statute books. It is a very real penalty which is imposed from time to time, as is the "lesser" penalty of being flogged.

(b) There is strong theological and societal disapproval of homosexuality in Iran.

(c) To avoid criminal penalties (including lashings and potentially, the death penalty), extrajudicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment, homosexuals in Iran must be "discreet". They are denied a meaningful "private" life. For most, sexual orientation must be carefully hidden under the camouflage of feigned heterosexuality.

[35] The central issue to be determined in this appeal is whether these factors, taken either singly or in combination amount to "being persecuted" as that term is understood in the Refugee Convention. In our view the answer is "Yes". The jurisprudential path which has led the Authority to this affirmative answer will now be outlined.

THE MEANING OF BEING PERSECUTED

A note on terminology

[36] While it is common in refugee discourse to refer to "the persecution element" of the refugee definition, the Authority prefers to use the language of the Convention itself, namely "being persecuted". Not only is this mandated by principles of treaty interpretation, it also serves to emphasise the employment of the passive voice. The inclusion clause has as its focus the ***predicament*** of the refugee claimant. The language draws attention to the fact of exposure to harm rather than to the act of inflicting harm. See *Refugee Appeal No. 72635/01* (6 September 2002); [2003] INLR 629 at [168]:

> Looking first at the language of the Refugee Convention, the "for reasons of" clause relates not to the word "persecuted" but to the phrase "being persecuted". The employment of the passive voice ("being persecuted") establishes that the causal connection required is between a Convention ground and the predicament of the refugee claimant. The Convention defines refugee status not on the basis of a risk "of persecution" but rather "of being persecuted". The language draws attention to the fact of exposure to harm, rather than to the act of inflicting harm. The focus is on the reasons for the claimant's predicament rather than on the mindset of the persecutor, a point forcefully recognised in Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at [33] & [65] (HCA). At a practical level the state of mind of the persecutor may be beyond ascertainment even from the circumstantial evidence.

Three approaches to understanding "being persecuted"

[37] While the drafters of the Refugee Convention deliberately left "being persecuted" undefined (Professor James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 102) it is nevertheless necessary to strive for an understanding of the meaning of the phrase. At least three approaches can be identified.

[38] One approach is to apply the domestic human rights standards of the country of asylum. This is inherently undesirable in the context of an international human rights treaty which must be interpreted and applied according to international, not domestic standards. Furthermore, the disadvantage of a domestic standard is that it simultaneously allows too easily the intrusion of ideology and also the implication of censure of the state of origin. More fundamentally, if in the country of asylum abuses of human rights occur (not necessarily approaching the level of "being persecuted"), the refugee decision-

maker may be blind or indifferent to refugee claims based on similar abuses in the claimant's country of origin, or may be deterred from recognising refugee status in case this is seen as a judgment on the refugee decision-maker's own country.

[39] A second approach is to seek the meaning of "being persecuted" in dictionaries. But a glance at any dictionary reveals that most words have several shades of meaning. The fact of the matter is that the sense in which a word is used in any treaty or statutory provision depends on the context and purpose of the treaty or provision. Secondly, language is not of mathematical precision. Sometimes what to one judge is clearly within the ordinary meaning of a word will not be to another. The need to interpret the terms of the treaty in their context and in the light of the object and purpose of the treaty precludes an interpretative approach which, to adapt the description given by Gaudron & Gummow JJ in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [25] (HCA), is undertaken with the text in one hand and a dictionary in the other. These observations apply to both the English and French languages, the only authentic languages of the text of the Refugee Convention. The Authority's reasons for not adopting a "dictionary" interpretation are explained in *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [43] to [55]. The following passage is taken from [46]:

> As a consequence, it is neither appropriate nor possible to distil the meaning of persecution by having resort to English and Australian dictionaries[1]. This can only lead to a sterile and mistaken interpretation of persecution. We refer by way of illustration of this point to the reference (with apparent approval) by Gummow J in *Applicant A* at 284 to a dictionary definition of "persecution" which asserted that it was the action of pursuing with enmity and malignity. This reference was subsequently treated by the Australian Refugee Review Tribunal as an authoritative statement as to how persecution was to be interpreted. The danger of this approach is twofold. First, it erroneously focuses on the intent of the persecutor rather than on the effect of the persecution on the victim. For a discussion of the difficulties this approach has caused in the United States see Deborah E Anker, *Law of Asylum in the United States* (3rd ed, 1999) 268-290. Second, and more relevant to the present context, it is an approach which lends itself to an unseemly ransacking of dictionaries for the *mot juste* appropriate to the case at hand. This does not assist in a principled analysis of the issues.

[40] The dangers inherent in the use of dictionaries to interpret the Refugee Convention have since been explicitly recognised by Kirby J in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at [108] (HCA).

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1 The Convention in any event provides that the English and French texts are equally authentic.

[41] The third interpretive approach, based firmly on accepted principles of treaty interpretation, is the contextualised approach exemplified by *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 709, 733-734 (SC:Can), namely that "being persecuted" may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. This is the approach which has been adopted by this Authority and, more recently, by the House of Lords in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495F (HL) (Lord Hope with whom Lords Browne-Wilkinson and Hobhouse agreed) and in *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856; [2003] 3 All ER 304 (HL) at [7] and [38] (Lords Bingham, Steyn, Hoffmann, Hutton and Rodger). Useful reference might also be made to what was said by Lord Lloyd in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305C (HL) and to Lord Steyn's further endorsement in *R v Special Adjudicator; Ex parte Ullah* [2004] UKHL 26 at [32] of the "sustained or systemic violation" approach.

[42] It is this third approach which will now be examined in greater detail. We do not intend addressing the possibly unique position in Australia where the Migration Act 1958 (Cth), s 91R sets out a statutory definition of "persecution". It would seem to us to impose a more burdensome test than the one adopted by the Authority. See further Alice Edwards, "Tampering with Refugee Protection: The Case of Australia" (2003) 15 IJRL 192, 202-204; Roz Germov & Francesco Motta, *Refugee Law in Australia* (Oxford, 2003) at 189-192. Whether s 91R altered the pre-existing legal test in Australia was left open in *SBBG v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 281 at [28] - [29] (FC:FC) (Gray, von Doussa & Selway JJ).

Principles of interpretation

[43] The general rule of treaty interpretation is contained in Article 31 of the Vienna Convention on the Law of Treaties, 1969:

> **Article 31 General rule of interpretation**
>
> 1. A treaty shall 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

[44] Anthony Aust in *Modern Treaty Law and Practice* (Cambridge, 2000) 186-187, after pointing out that Article 31 is entitled "General ***rule*** of interpretation", explains that the singular noun emphasises that the Article contains only one rule. There is no hierarchy of legal norms. One must consider each of the three main elements (text, context and object and purpose). None are accorded precedence:

> Article 31 is entitled "General rule of interpretation". The singular noun emphases that the article contains only one rule, that set out in paragraph 1. One must therefore consider each of the three main elements in treaty interpretation - the text, its context and the object and purpose of the treaty. By "context" is meant material related to the conclusion of the treaty; and the reference to "context" in the opening phrase of paragraphs 2 and 3 is designed to link those paragraphs with paragraph 1. Although at first sight paragraphs 1, 2 and 3 might appear to create a hierarchy of legal norms, this is not so: the three paragraphs represent a logical progression, nothing more. One naturally begins with the text, followed by the context, and then other matters, in particular subsequent material.
>
> Supplementary elements such as the preparatory work of the treaty (travaux préparatoires) are not included in Article 31, since that article is limited to the primary criteria for interpreting a treaty. Interpretation involves an elucidation of the meaning of the text, not a fresh investigation as to the supposed intentions of the parties. Furthermore, the preparatory work of a treaty is by its nature less authentic than the other elements, being often incomplete and misleading. Nevertheless, Article 32 provides that in certain circumstances recourse may be had to supplementary elements to "confirm" the meaning resulting from the application of Article 31.

[45] While the Vienna Convention on the Law of Treaties 1969 postdates the Refugee Convention and is therefore not strictly applicable (see Article 4 of the Vienna Convention), the Vienna Convention, particularly Articles 31 and 32, nevertheless constitutes an authoritative statement of customary public international law on the interpretation of treaties: *Libya v Chad* ICJ Reports (1994) p 4 at para 41. See also *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 171 ALR 483 (FC:FC) at [14] and [19]-[91] per Drummond and Katz JJ.

[46] The mandated holistic approach to interpretation of the Refugee Convention has most notably been endorsed by the High Court of Australia in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 231, 251-255 (HCA)(Brennan CJ and McHugh J) and by the House of Lords in *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856; [2003] 3 All ER 304 (HL) at [6] (Lord Bingham with whom Lords Steyn, Hutton & Rodger agreed). In *Applicant A* at 256 McHugh J stated:

> The phrase 'a well-founded fear of being persecuted for reasons of ... membership of a particular social group' is a compound conception. It is therefore a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole.

[47] In these circumstances it is accepted that Article 1A(2) is a single compendious definition and must be interpreted in good faith and as a whole in accordance with the ordinary meaning to be given to the terms of the words in their context and in the light of the object and purpose of the Refugee Convention.

[48] This "holistic" interpretive approach has for some number of years guided the Authority's interpretation of the Refugee Convention: *Refugee Appeal No. 70366/96 Re C* (22 September 1997); [1997] 4 HKC 236, 272-274; *Refugee Appeal No. 71427/99* (16 August 2000); [2000] NZAR 545; [2000] INLR 608 at [43] - [48]. Nevertheless, the "holistic" approach does not deny the necessity to analyse each constituent element or to examine the relationship of the elements to each other. It is essential to ensure that one element is not inadvertently given a function or meaning which more properly belongs to another. Holistic interpretation does not discard the necessity for intellectual rigour: *Customs & Excise Commissioners v Zielinski Baker and Partners Ltd* [2004] 1 WLR 707; [2004] 2 All ER 141(HL) at [11] (Lord Hoffmann). Thus the question whether there is a Convention ground cannot sensibly be conflated or confused with the issue of risk (the well-foundedness element). Similarly the question whether the anticipated harm can properly be described as "being persecuted" is not an analysis which belongs in the assessment of risk.

[49] Because the Preamble to the Refugee Convention assumes some significance later in this decision, it should be noted that Article 31(2) of the Vienna Convention on the Law of Treaties specifically acknowledges that when interpreting a treaty, the context comprises, in addition to the text, both the

preamble and annexes. See also *Golder v United Kingdom* (1975) 1 EHRR 524 at [34] (ECHR) where it was specifically recognised that in terms of Article 31(2) the preamble of an international convention may be used to determine its object and purpose.

[50] In the paragraphs which follow the general rule of treaty interpretation will be applied to the Refugee Convention, drawing on the Authority's established jurisprudence as well as relevant case law from other jurisdictions. It will be seen that application of the general rule of treaty interpretation has led to the acceptance in the United Kingdom, Canada and New Zealand of two fundamental propositions. First, that state protection is central to the definition of "refugee" and second, that "being persecuted" is to be understood as the sustained or systemic denial of core human rights.

State protection

[51] Central to the definition of the term "refugee" is the concept of state protection with the result that the phrase "being persecuted" must be interpreted within the wider framework of the failure of state protection. Article 1A(2) of the Refugee Convention relevantly provides that:

> For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> (2) ... owing to well-founded fear of being persecuted ... 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....

[52] The centrality of state protection to the Refugee Convention was explicitly recognised by the Supreme Court of Canada in *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (SC:Can) at 709 where, in delivering the judgment of the Court, La Forest J said:

> At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see The Law of Refugee Status (1991), at p135.

[53] The principle of surrogacy, long part of the Authority's jurisprudence (*Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [49]), was recognised also by the New Zealand Court of Appeal in *Butler v Attorney-General* [1999] NZAR 205, 216-217 (CA) and more recently by the House of Lords in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (HL) at 495E (Lord Hope with whom Lords Browne-Wilkinson and Hobhouse agreed). Both in New Zealand and in the United Kingdom it is settled that the determination whether the particular facts establish a well-founded risk of being persecuted requires identification of the serious harm faced in the country of origin and an assessment of the state's ability and willingness to respond effectively to that risk. "Being persecuted" is the construct of two separate but essential elements, namely risk of serious harm ***and*** a failure of state protection. This can be expressed in the formula that: Persecution = Serious Harm + The Failure of State Protection. See *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653F (HL); *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 515H (HL); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at [120] (HCA) per Kirby J approving *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [67].

[54] Where the United Kingdom and New Zealand law diverge is on the standard of state protection. In *Horvath* their Lordships unanimously rejected the submission that the level of protection provided by a state should be such as to reduce the risk to a refugee claimant to the point where the fear of being persecuted could be said to be no longer well-founded. The formula preferred by their Lordships was far less strict. In their opinion a refugee claimant who has a well-founded fear of being persecuted will not be recognised as a refugee if there is available in the home state a system for the protection of the citizen and a reasonable willingness by the state to operate it. In New Zealand, the Authority has declined to follow *Horvath* in this regard and in *Refugee Appeal No. 71427/99* at [66] held that the proper approach to the question of state protection is to enquire whether the protection available from the state will reduce the risk of serious harm to below the level of well-foundedness, or, as it is understood in New Zealand, to below the level of a real chance of serious harm. The duty of the state is not, however, to eliminate ***all*** risk of harm. Recent United Kingdom case law appears to suggest that in its application, the *Horvath* test may not be that dissimilar to the New Zealand test, particularly where state agents of persecution are involved: *Svazas v Secretary of State for the Home Department* [2002] 1 WLR

1891; [2002] INLR 197 (CA), particularly the judgment of Sedley LJ. The *Horvath* standard of state protection test recently faced strong challenge in the High Court of Australia. See *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 (HCA), particularly McHugh J at [78] & [83] and Kirby J at [112].

[55] In some fact circumstances the concept of state protection will require the exhaustion of domestic remedies before the Refugee Convention can be engaged: *Refugee Appeal No. 72558/01* (19 November 2002) at [100] - [107].

The human rights approach to "being persecuted"

[56] In determining the meaning of "being persecuted" it is also necessary to take into account the object and purpose of the Convention, a point firmly established by the Supreme Court of Canada in *Ward*. Underlying the Convention is the commitment of the international community to the assurance of basic human rights without discrimination. In so holding, the Supreme Court drew on the first recital in the Preamble to the Refugee Convention, the text of which is set out in the judgment of the Court delivered by La Forest J at p 733:

> Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows:
>
> ***"Considering** that the Charter of the United Nations and Universal Declarations of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination*.
>
> This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. Hathaway, supra, at p.108, thus explains the impact of this general tone of the treaty on refugee law:
>
> > The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.
>
> This theme sets the boundaries for many of the elements of the definition of "Convention refugee". "Persecution", for example, undefined in the Convention has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection"; see Hathaway, *supra*, at pp.104-105".

[57] The significance of the Preamble to the Refugee Convention is also explicitly recognised in the UNHCR, *Handbook on Procedures and Criteria for*

Determining Refugee Status, para 60 and in the UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees* (April 2001). The latter document at paras 5 and 17 accepts that human rights principles should inform the interpretation of the refugee definition, as should the ongoing development of international human rights law. The relevance of the Preamble was also recognised in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL) where Lord Steyn at 638-639 described the recitals as significant for two reasons. First they expressly show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first recital, was a fundamental purpose of the Convention. Lord Hoffmann at 650-651 stated:

> In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect.

[58] The consistently held view of the Authority has been that the principled approach of *Ward* to the interpretation of the "being persecuted" element of the refugee definition is to be preferred to the "dictionary" approach. The Authority has accordingly followed the example of the Supreme Court of Canada and adopted the formulation articulated by Professor Hathaway in his seminal text, *The Law of Refugee Status* (Butterworths, 1991) at 104 & 108, namely that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard. In other words, core norms of international human rights law are relied on to define forms of serious harm within the scope of "being persecuted": *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51] and *DG v Refugee Status Appeals Authority* (High Court Wellington, CP213/00, 5 June 2001, Chisholm J) at [19] and [22]. This is also the approach now taken in the United Kingdom: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495F, 501C, 512F, 517D (HL).

[59] The human rights approach to "being persecuted" has been applied by this Authority over the years in several contexts including sexual orientation (*Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387); gender based persecution (*Refugee Appeal No. 2039/93 Re MN* (12 February 1996) and

Refugee Appeal No. 71427/99 (16 August 2000); [2000] NZAR 545; [2000] INLR 608); racial discrimination (*Refugee Appeal No. 71404/99* (29 October 1999)) and in the context of privacy, religion and family rights (*Refugee Appeal No. 72558/01* (19 November 2002)).

[60] In Australia the picture appears less clear. In *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 (HCA), while it appears to have been accepted that persecution may be constituted by the "denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned" (see [76]) there was nevertheless a fundamental divergence between Gleeson CJ at [19] - [24] and McHugh & Gummow JJ at [73] over the question whether the Refugee Convention is to be understood as providing surrogate protection, as suggested by Professor Hathaway in *The Law of Refugee Status* at 124 and accepted in *Horvath* and in *Butler v Attorney-General*. Kirby J at [111], recognising the dangers of dictionary definitions, appears to have accepted the force of Professor Hathaway's formulation of persecution as a violation of basic human rights demonstrative of a failure of state protection. More recently in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 (HCA), Gleeson CJ, Hayne & Heydon JJ at [19] - [21] accepted both the "surrogate protection" understanding of the Refugee Convention and the need to understand persecution as the violation of fundamental human rights and freedoms. For his part, McHugh J at [72] - [74] continued to formulate an understanding of persecution without express recognition of the utility of employing international human rights norms other than that of non-discrimination.

[61] The human rights paradigm has been the key to the development of "gender asylum law" which in turn has been described by Deborah Anker in "Refugee Law, Gender, and the Human Rights Paradigm" (2002) 15 Harvard Human Rights Journal 133, 138 as a "catalytic force in itself, a major vehicle for the articulation and acceptance of the human rights paradigm". International human rights standards have also been applied in the context of refugee claims by homosexuals facing involuntary "medical" intervention. See Ryan Goodman, "The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary 'Medical' Intervention" (1995) 105 Yale LJ 255.

Identifying core human rights

[62] Recognising that "being persecuted" may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection, the question which arises is how one identifies "basic human rights".

[63] As Christian Tomuschat observed in *Human Rights: Between Idealism and Realism* (Oxford, 2003) at 2, human rights do not come out of the blue. It is therefore necessary to identify the sources of core norms of international human rights law for the purposes of refugee determination. In this context customary law is of limited assistance primarily due to the difficulty in establishing the two essential elements, namely State practice and *opinio juris*. As Bruno Simma and Philip Alston convincingly demonstrate in "The Sources of Human Rights Law: Custom, Jus Cogens and General Principles" (1992) 12 Australian YBIL 82, this can be a difficult exercise, fraught with doctrinal controversy. Given that only a small handful of human rights can be established in customary international law, there is substantial doubt whether custom really is an adequate means of identifying fundamental human rights for the purpose of interpreting the inclusion clause of the Refugee Convention. In this situation treaty law provides a more solid and compelling legal foundation.

[64] The Refugee Convention itself provides guidance as to the human rights to which reference should be made in the determination of refugee status. The Preamble makes explicit reference to the Universal Declaration of Human Rights, 1948 ("UDHR"):

> *Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
>
> *Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.

[65] The human rights enunciated in the UDHR were subsequently translated into binding treaty form by the International Covenant on Civil and Political Rights, 1966 ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights, 1966 ("ICESCR"). These three instruments must be read together. On accepted principles of treaty interpretation the phrase "being persecuted" is appropriately to be understood against the background of these norms. Professor

Hathaway in his *Law of Refugee Status* (1991) at 106 explains the point in the following terms:

> Among the myriad treaties, declarations, rules and other standards adopted by states, the International Bill of Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, is central. More than any other gauge, the International Bill of Rights is essential to an understanding of the minimum duty owed by a state to its nationals. Its place derives from the extraordinary consensus achieved on the soundness of its standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords. Reference to the International Bill of Rights in deciding whether or not a state has failed to provide basic protection in relation to core, universally recognised values is moreover consistent with the Convention's own Preamble and General Assembly Resolution 2399 (XXIII).

[66] Returning to the subject in "The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute" in IARLJ, *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (1998) 80, 85 Professor Hathaway points out that reliance on core norms of international human rights law (as contained in treaties) to define forms of "serious harm" within the scope of "being persecuted" is not only compelled as a matter of law, but makes good practical sense, for at least three reasons:

(i) One must look at ***how states themselves*** have defined unacceptable infringements of human dignity if we want to know which harms they are truly committed to defining as impermissible. Human rights law is precisely the means by which states have undertaken that task.

(ii) Refugee decision-makers who use human rights law to define harms within the scope of "being persecuted" are not combatting the views of governments, but rather relying on the very standards which governments have said to be minimum standards. This is what he calls a dynamic "dialogue of justification".

(iii) International human rights law provides refugee law judges with an automatic means - within the framework of legal positivism and continuing accountability - to contextualise and update standards in order to take new problems into account. Because international human rights law is constantly being authoritatively interpreted

> through a combination of general comments, decisions on individual petitions, and declarations of UN plenary bodies, there is a wealth of wisdom upon which refugee decision-makers can draw to keep the Convention refugee definition alive in changing circumstances. This flexibility of international human rights law makes it possible to address new threats to human dignity through refugee law, but to do so without asserting either subjective or legally ungrounded perceptions of "what's right, and what's wrong".

[67] Elaborating on the capacity of international human rights law to update itself, Professor Hathaway went on to suggest that while his *Law of Refugee Status* (1991) restricted itself to the UDHR, the ICCPR and the ICESCR, with the benefit of nearly (then) eight years of progress on human rights law, he acknowledged that one could today interpret "being persecuted" by reference to an enlarged set of international human rights instruments. However, he cautioned that one should not rush to embrace every new Convention on human rights, much less mere declarations or statements of principle as legally relevant to defining harms within the scope of "being persecuted". In his IARLJ paper at *op cit* 86 he said:

> If we believe that the standards relied on should really be agreed by states to be authoritative, if we believe in the importance of genuine accountability through a dialogue of justification with governments, in short, if we want refugee status determination to be taken seriously as law-based rather than as an exercise in humanitarian "do-goodism", then we have to exercise some responsible constraint on the impulse to embrace every new human rights idea that comes along.

[68] Conceding that drawing the bright line is not a simple task, Professor Hathaway made the following suggestions in his address at *op cit* 86:

> At a minimum, though it seems to me that a commitment to legal positivism requires, first, that we focus on legal standards - primarily treaties - not on so-called "soft law" which simply doesn't yet bespeak a sufficient normative consensus. While we can logically resort to these evolving standards as a means to contextualize and elaborate the substantive content of genuine legal standards, they should not, in my view, be treated as authoritative in and of themselves.
>
> Second, as among authoritative legal standards, it is important not to rely on treaties that remain short on serious support from states. Until and unless we are able honestly to say that a given treaty enjoys general support, it ought not to be used to interpret a term in what is meant to be a universal treaty on refugee protection. In practical terms, one might reasonably consider looking for ratification of a given treaty by a respectable super-majority - for example, two thirds of the United Nations membership, including some support in all major geo-political groupings.

[69] Applying this test Professor Hathaway was of the view that one could today interpret "being persecuted" by reference not only to the International Bill of Rights, but also by consideration of the Convention on the Elimination of all Forms of Racial Discrimination, 1966 ("CERD"), the Convention on the Elimination of Discrimination Against Women, 1979 ("CEDAW") and the Convention on the Rights of the Child, 1989 ("CRC").

[70] These views were adopted by the Authority in *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [51]. Properly understood, the interpretive approach mapped by Professor Hathaway will not lead to the ossification feared by Catherine Dauvergne and Jenni Millbank in "*Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh*" (2003) 25 Sydney Law Review 97, 111-112. Nor will it lead to an impermissibly narrow reading of "being persecuted", being the concern expressed by others. See Volker Türk & Frances Nicholson, "Refugee Protection in International Law: An Overall Perspective" at 38-39 and Alice Edwards, "Age and Gender Dimensions in International Refugee Law" at 50 & 66-67 in Feller, Türk & Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, 2003). International human rights instruments are "living instruments", constantly evolving and developing. This has been expressly recognised by the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 18 (ECHR) where the following observations were made in the context of the non-recognition in English law of gender reassignment and the failure by the United Kingdom to comply with its positive obligation to ensure the applicants' right to respect for their private lives. The following passage is taken from para [74]:

> While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, forseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases [citation omitted]. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved ... It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement ...

[71] The same interpretive approach has been explicitly recognised in the context of the Refugee Convention. In *Sepet v Secretary of State for the Home*

Department [2003] 1 WLR 856; [2003] 3 All ER 304 (HL) at [6]. Lord Bingham (with whom Lords Steyn, Hutton and Rodger agreed) said:

> It is also, I think, plain that the Convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will. I would agree with the observation of Sedley J in R v Immigration Appeal Tribunal, Ex p Shah [1997] Imm AR 145, 152: "Unless it [the Convention] is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism". I would also endorse the observation of Laws LJ in R v Secretary of State for the Home Department, Ex p Adan [2001] 2 AC 477, 500:
>
> > It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded.

Indeed *Sepet* is notable for the fact that a claim to refugee status based on a refusal to perform compulsory military service in the Turkish Army on conscientious grounds was determined by reference to international human rights norms.

[72] A further point which needs to be made is that the universality of the ICCPR, ICESCR, CERD, CEDAW and the CRC will not permit social, cultural or religious practices in a country of origin from escaping assessment according to international human rights standards. This is fully explained in *Refugee Appeal No. 2030/93 Re MN* at pp 19-28.

[73] The Authority's decisions have also recognised that in addition to employing the international human rights instruments referred to, it is only appropriate that regard be had to the interpretation of those instruments by the "treaty bodies" set up under the instruments, particularly the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of all Forms of Discrimination Against Women, the Committee on the Elimination of Racial Discrimination and of the Committee on the Rights of the Child. The Authority recognises that the binding effect and jurisprudential quality of the decisions of these bodies may be a matter of controversy (see *Refugee Appeal No. 72558/01* (19 November 2002)). Contrast the views expressed by Elizabeth Evatt, a member of the Human Rights Committee, in "The Impact of International Human Rights on Domestic Law" in Huscroft & Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002) at 281, 295, 302 with the views expressed in two other papers published in the

same text, namely Paul Rishworth, "The Rule of International Law?" *op cit* 267, 274 - 279 and Scott Davidson, "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" *op cit* 305-321. This is not a controversy we need enter here. The decisions of the Human Rights Committee can be at least of persuasive authority: *R v Goodwin (No. 2)* [1993] 2 NZLR 390, 393 (CA) and *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130 (HCA) at [148] (Kirby J). See further *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129, 134-136, 144 (CA) and *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17, 20-22; [2000] 1 WLR 240, 244-246 (PC). Contrast *Briggs v Baptiste* [2000] 2 AC 40, 53 (PC) where, in the context of the Inter-American system the point made was that while it is to be expected that national courts will give great weight to the jurisprudence of the Inter-American Court, "they would be abdicating their duty if they were to adopt an interpretation of the [American] Convention [on Human Rights, 1969] which they considered to be untenable". For observations as to the binding effect of decisions of the Committee against Torture, see *Ahani v Canada (Attorney General)* (2002) 208 DLR (4^{th}) 66 at paras 34-40 (Ont. CA).

[74] On occasion it might also be appropriate to draw on the jurisprudence of the European Court of Human Rights as well as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights under the American Declaration of the Rights and Duties of Man, 1948 and the American Convention on Human Rights 1969. However, as the European and inter-American systems differ in many ways from each other and from that provided for in the international human rights instruments referred to, caution must be exercised in applying the jurisprudence of these regional organisations outside their proper context. See for example David Harris, "Regional Protection of Human Rights: The Inter-American Achievement" in Harris & Livingstone, "The Inter-American System of Human Rights (Clarendon Press, Oxford, 1998) 1-29 and *Refugee Appeal No. 72558/01* (19 November 2002) at [115] - [119].

[75] There are three further cautions. First, in the context of Article 1A(2) of the Refugee Convention, the identification of basic human rights is directed to a single, limited end, namely the illumination of the meaning of the phrase "being persecuted". There is no other purpose. The function of refugee law is palliative. It does not hold states responsible for human rights abuses. The refugee decision-maker does not usurp the jurisdiction of the Human Rights Committee

under Article 40 of the International Covenant on Civil and Political Rights (the reporting process) or under Article 41 (the interstate complaints procedure). Nor is it the role of the refugee decision-maker to express "views" as if refugee adjudication were an individual complaint under the First Optional Protocol. The determination of refugee status is no more than an assessment whether, in the event of the refugee claimant returning to the country of origin, there is a real chance of that person "being persecuted" for a Convention reason.

[76] Second, it is important to remember why only a highly select group of human rights treaties are to be the point of reference. Not only is there a danger of over-inclusion, new "rights" can be claimed with little thought, debate or agreement: Philip Alston, "Conjuring up new human rights: A proposal for quality control" (1984) Am. J. Int'l L 613. Not everything that may serve to improve the well-being of individuals can or should be accepted as a human right.

[77] Third, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population. As Professor Hathaway explains at op cit 103-104:

> As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm per se, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection. The existence of past or anticipated suffering alone, therefore, does not make one a refugee, unless the state has failed in relation to some duty to defend its citizenry against the particular form of harm anticipated.

[78] It is almost unnecessary to add that we do not see the UN Human Rights Commission as an appropriate point of reference, lying as it does outside the treaty framework earlier described. In addition, the 52-state Commission is highly politicised, as witness the circumstances in which Cuba and China were successful in having the United States lose its seat in 2001. One commentator referred to the observable spectacle of countries accused of violating human rights being among the most ardent seekers of seats on the Commission in order to be better placed to defend themselves from criticism for violating human rights (see Colum Lynch, "United States loses seat on UN rights body", *Guardian Weekly*, May 10, 2001 p 32) while another commentator concluded that foxes were guarding the chicken coop ("Chickens and foxes", *Economist*, April 21, 2001 p 42). Among the Commission's new members in 2001 were Algeria, Congo, Kenya,

Libya, Saudi Arabia, Syria and Vietnam. They were later joined by Pakistan, Sudan and Togo ("Shameful all round", *Economist*, May 12, 2001 p 14). On 23 April 2004 the Commission failed to condemn the crimes against humanity, war crimes and other violations of international humanitarian law committed by the Sudanese government in the western province of Darfur: Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan* (May 2004). There is nothing in the assessment of the Human Rights Commission by Tomuschat in *Human Rights: Between Idealism and Realism* (Oxford, 2003) at 115-127 which persuades us that the work of the Commission is relevant to refugee determination.

[79] Human rights law is by no means a flawless system. It has many gaps and limitations. But as pointed out by Professor Hillary Charlesworth in "The Challenges of Human Rights Law for Religious Traditions", Janis & Evans (eds), *Religion and International Law* (Martinus Nijhoff, 1999) at 401, 410-411, for all these constraints, it does offer a vocabulary and structure in which claims by marginalised groups can be formulated. It allows dialogue on difficult issues of human existence. Human rights law allows continually changing, negotiated understandings of that which it is most essential to protect in order to defend and to enhance our common humanity. The standards are not perfect: they are simply the best that have been identified and agreed upon thus far.

The "hierarchy" issue

[80] While it is possible to identify distinct categories of obligation (sometimes inaccurately referred to as a "hierarchy" of rights) in the international instruments referred to, the question whether the anticipated harm rises to the level of "being persecuted" depends not on a rigid or mechanical application of the categories of rights, but on an assessment of a complex set of factors which include not only the nature of the right threatened, but also the nature of the threat or restriction and the seriousness of the harm threatened. It must also be remembered that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated: *Vienna Declaration and Programme of Action* (A/CONF.157/23, 12 July 1993) para 5.

The human rights approach to "being persecuted" - application to voluntary but legally protected action

[81] Refugee case law can be found which erroneously asserts in relation to the religion, political opinion and membership of a particular social group grounds that the claimant should desist from activity which arguably should be allowed as a legitimate exercise of basic, internationally recognised human rights. In some literature this has been described as engaging in a voluntary but legally protected action. See Hathaway & Foster, "Claims to Refugee Status Based on Voluntary but Protected Actions - Discussion Paper No. 1, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002" (2003) 15 IJRL 430. Curiously, the same case law does not suggest that a refugee claim based on race or nationality might be defeated by telling the claimant that he or she could or should avoid the anticipated harm by changing or concealing his or her race or nationality. Nor does this line of cases take into account the broad consensus that all five Convention grounds refer to characteristics which are either beyond the power of the individual to change, or so fundamental to individual identity or conscience that they ought not be required to be changed: *Ward* at 736-737; *Shah* at pp 639C-D, 651A-F, 656E, 658H and *Refugee Appeal No. 71427/99* at [97]. It is difficult to see what value human rights would have in any context if the individual was required to surrender those rights in the face of discrimination or persecution. In our view the Refugee Convention protects certain rights because of their intrinsic importance. Such protection is not made contingent on whether those rights can be hidden.

[82] In some case law voluntary but protected action is identified as an issue relevant to the question of risk (ie well-foundedness). The claim is not well-founded because the risk ***can*** be avoided. In our view such an approach is erroneous. The correct starting point of the inquiry is the nature of the right sought to be exercised. If the right is not a core human right, the "being persecuted" standard of the Refugee Convention is simply not engaged. If, however, the right in question is a ***fundamental*** human right, the next stage of the inquiry is to determine the metes and bounds of that right. If the proposed action in the country of origin falls squarely within the ambit of that right the failure of the state of origin to protect the exercise of that right coupled with the infliction of serious harm should lead to the conclusion that the refugee claimant has established a risk of "being persecuted". In these circumstances there is no duty to avoid the

anticipated harm by not exercising the right, or by being “discreet” or “reasonable” as to its exercise.

[83] Whether the risk of harm is real (ie well-founded) is a related but entirely separate issue. The nature of the harm and the risk of that harm occurring are distinct and separate elements of the refugee definition.

[84] Relevant to the “being persecuted” enquiry is the determination whether the right in question is one from which no derogation whatsoever is permitted even in times of compelling national emergency (eg freedom from arbitrary deprivation of life, protection against torture or cruel, inhuman or degrading punishment or treatment (ICCPR Articles 6 & 7) or a right from which derogation is permissible during public emergency which threatens the life of the nation and the existence of which is officially proclaimed such as freedom from arbitrary arrest or detention, the right to equal protection for all and the protection of personal and family privacy and integrity (ICCPR Articles 9-10, 3 & 26 and 17 & 23). But it would be misleading to assume that there is a clear and significant divide between rights which are non-derogable and those which are derogable. As the Human Rights Committee points out in *General Comment No. 24 - General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant* at para 10:

> While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule or law. A reservation to the provisions of Article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life by examples. While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

[85] Furthermore, while the ICCPR conceives the rights it encompasses as strict obligations which state parties undertake “to respect and to ensure” (Article 2(1)),

this does not mean that all of the rights it sets forth are absolute. Almost all of the rights in the ICCPR are accompanied by limitation clauses which permit reduction in their scope depending on the existing social needs. However, all of these clauses must be construed under a strict requirement of proportionality. Some of these clauses specify explicitly that any restriction must be necessary (for instance Articles 12(3); 18(3); 19(3); 21; 22(2)), some add that the yardstick of necessity must be gauged within the context of a "democratic society" (Articles 14(1); 21; 22(2)), in a number of provisions reference is made to "arbitrary" restrictions (Articles 9(1); 12(4); 17(1)), and finally, Article 25 speaks of "unreasonable restrictions".

[86] While the Human Rights Committee has taken the view that any legitimate restriction must be in accordance with the requirements warranted in a democratic society (see *General Comment No. 29 - Article 4: Derogations During a State of Emergency* at paras 4 & 6), the fact remains that few of the rights in the ICCPR can be properly described as "absolute". These complexities must be borne in mind when determining the nature and limits of the right asserted by the refugee claimant and before determining whether denial or infringement of that right is properly to be recognised as sufficiently serious to be categorised as "being persecuted".

[87] There is a wide conceptual divergence between the ICCPR and the ICESCR. Article 2(1) of the latter abandons the "respect and ensure" language of the former. The duty of a state party under the ICESCR is to take steps with a view to achieving progressively the full realisation of the rights recognised in the Covenant. This is because economic and social rights are to a large degree context-dependent, more than civil liberties. They have as their backdrop a concept of the state as a potent provider, but with the proviso that the duties owed to citizens can never be set out in absolute terms, but must take into account the scarcity of resources which any human community has to reckon with: Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford, 2003) at 39.

[88] However, as Tomuschat points out at *op cit* 39, what is true in general, does not provide the full picture. Some of the provisions of the ICESCR permit a different reading. Some of the rights listed in the ICESCR are in the nature of classical liberal freedoms, in particular Article 13(3) and (4), which guarantees certain rights regarding the choice of schools, and Article 15(3), a provision setting

forth freedom for scientific research and creative activity. The text of these provisions does not refer to national measures of implementation which, indeed, are not necessary to the extent that governments are simply enjoined to respect individual freedom. Additionally, some of the rights which are usually called economic or social rights imply a duty of the state to respect the individual's own efforts. Regarding the right to work, in particular, the most important facet may be the obligation of the state not to interfere with the professional activity deployed by persons desirous of earning their own living. To similar effect see Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights" in Eide, Krause & Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev ed, Martinus Nijhoff, 2001) 9, 10-11, 23-25.

[89] It is accepted that economic, social and cultural rights do have the potential to raise issues of substantial complexity, as exemplified by the decisions of the Constitutional Court of South Africa in *Government of the Republic of South Africa v Grootboom* (2001) (1) SA 46 (right to basic shelter and housing) and *Minister of Health v Treatment Action Campaign (No. 2)* (2002) (5) SA 721 (right to essential health care). On the other hand, not all refugee claims will raise complex ICESCR issues. For example, the right to life (Article 6 ICCPR) in conjunction with the right to adequate food (Article 11 ICESCR) should permit a finding of "being persecuted" where an individual faces a real risk of starvation.

[90] While it is essential that the nature and extent of the relevant fundamental right be investigated and identified, a note of caution is appropriate. In the context of refugee determination it is important not to be seduced by complexity and sophisticated over-analysis: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 508F (HL) (Lord Clyde). The gaze of the refugee decision-maker is fixed firmly on the question whether the anticipated denial of human rights in the country of origin meets the "being persecuted" standard, not on mechanically identifying breaches of human rights standards. For the purpose of refugee determination the focus must be on the minimum core entitlement conferred by the relevant right. Under a human rights approach, a prohibition on the exercise of a core entitlement is to be regarded as within the ambit of a risk of "being persecuted". Under this approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of "being persecuted". Similarly, in the context of the downstream issue of causation, where the risk of a broader range of persecutory harm ensues only

from taking such marginal actions, the risk is unlikely to be "for reasons of" religion, political opinion, sexual identity or whatever other Convention ground is relied upon.

[91] Sexual orientation and the Refugee Convention concept of "being persecuted" will now be examined from the human rights perspective. Reference will be made only to civil and political rights as economic and social rights do not arise on the facts.

SEXUAL ORIENTATION AND THE REFUGEE CONVENTION CONCEPT OF "BEING PERSECUTED"

[92] Sexual orientation is not explicitly recognised or mentioned as a human rights category in any of the human rights instruments to which reference has been made: *Quilter v Attorney-General* [1998] 1 NZLR 523, 564 (CA) (Keith J). It does not even appear to have been discussed during the *travaux préparatoires*. See Marc J Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 1987) 49-56 (Article 2(1)), 339-345 (Article 17) and 479-492 (Article 26). Sexual orientation is hardly mentioned by Manfred Nowak in *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 1993). It is referred to briefly only in the context of Article 17 (privacy) at 298-299.

[93] This does not mean that homosexuals do not enjoy the rights contained in the ICCPR and the other mentioned instruments. They plainly do - but not necessarily as homosexuals. Sexual orientation has, however, been recognised as engaging the non-discrimination provisions of Articles 2(1) and 26. This, in turn, impacts on the application of the balance of the ICCPR provisions.

Non-discrimination

[94] ICCPR Articles 2(1) and 26 comprehensively prohibit discrimination. These guarantees are reinforced by Article 3 (which prohibits sex discrimination), Article 4(1) (which prohibits discrimination in relation to derogations) and Articles 23, 24 and 25, which guarantee non-discrimination in relation to particular substantive rights. Of primary relevance in the present context are Articles 2(1), 3 and 26:

Article 2(1)

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

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 26

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

[95] The duties placed on States Parties by ICCPR Article 2, and in particular the right not to be discriminated against and to have an effective remedy, have an ***accessory*** character. This means that a violation of Article 2 can occur only in conjunction with the concrete exercise (but not necessarily violation) of one of the substantive rights ensured by the ICCPR: Manfred Nowak *op cit* 28 para 3; 34 para 15.

[96] Because Article 3 is confined to ensuring the equal right of men and women its scope of application is more narrow than that of Article 26, which ensures a general claim to equal protection of the law against discrimination. It is in this sense that Article 26 is the primary non-discrimination provision in the ICCPR. See further *Broeks v The Netherlands* (Comm No 172/1984, UN Doc CCPR/C/29/D/172/1984, 9 April 1994) at paras [12.3] - [12.4] (HRC). The disagreement in *Quilter* between Thomas J at 550-551 and Keith J at 561-562 as to the application of Article 26 does not have to be addressed in the context of the present case. Further reference should be made to the discussion in Joseph, Schultz & Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 2nd ed (Oxford, 2004) at [23.01] - [23.19].

[97] In *Toonen v Australia* (Comm No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994) the Human Rights Committee found that the reference to "sex" in Articles 2(1) and 26 is to be taken to include sexual orientation. The Committee unanimously found the Tasmanian laws criminalizing sexual relations between consenting adult males violated Mr Toonen's rights under Article 17(1) read in

conjunction with Article 2(1) of the ICCPR in that the prohibition by law of consensual homosexual acts in private was a violation of the right to privacy.

[98] This holding is a controversial one as "sexual orientation" is arguably more properly classified as an "other status" in Articles 2(1) and 26 rather than as an aspect of one's gender: Sarah Joseph "Gay Rights Under the ICCPR - Commentary on *Toonen v Australia*" (1994) 13 University of Tasmania Law Review 392 and Joseph, Schultz & Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 2nd ed (Oxford, 2004) at [23.25]. This is indeed how "sex" has been interpreted in the context of the European Union. See the cases collected in *MacDonald v Advocate General for Scotland* [2004] 1 All ER 339 (HL) at [57], [59] and [107] (Lords Hope and Hobhouse).

[99] This difficulty notwithstanding, *Toonen* illustrates how facially neutral provisions may sensibly be interpreted to recognise sexual orientation as being within the minimum core obligation of the relevant right. However, there are limits to this interpretive approach. It must surrender to the express language of the particular article in question. So in *Joslin v New Zealand* (Comm No 902/1999, UN Doc CCPR/C/75/D/902/ 1999, 30 July 2002) the Human Rights Committee held at paras [8.2] and [8.3] that the articulation in Article 23(2) of the right to marry as being "the right of men and women" precluded an interpretation which would recognise the right of homosexual couples to marry and to found a family.

[100] The decision of the European Court of Human Rights in *Fretté v France* (2004) 38 EHRR 21 on the not dissimilar provisions of the European Convention on Human Rights provides a further example of the application of the non-discrimination principle to facially neutral human rights provisions. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms in the Convention "shall be secured without discrimination on any ground such as sex". Article 8(1) provides that everyone has the right to respect for his private and family right. Mr Fretté sought authorisation to adopt a child. That application was declined because he was a homosexual, not because he was single. The law permitted adoptions by single (heterosexual) applicants. The issue before the Court was whether the difference in treatment was discriminatory for the purposes of Article 14. This required an examination whether the difference had objective and reasonable justification, that is whether it pursued a legitimate aim and whether

there was a reasonable relationship of proportionality between the means enjoyed and the aim sought to be realised. The majority found that the decision to reject the application for authorisation pursued a legitimate aim, namely the protection of the health and rights of children. As to the second condition, namely the existence of a justification for the difference of treatment, the majority was of the view that the case raised delicate issues and touched on areas where there is little common ground among the member States of the Council of Europe. The law appeared to be in a transitional state and for that reason a wide margin of appreciation had to be left to the authorities of each State. On the facts, the justification given by the Government of France appeared objective and reasonable with the result that the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the ECHR. See paras [37]-[43]. The court nevertheless found that there had been a breach of the Convention as Mr Fretté had been denied a fair hearing before the Conseil d'Etat.

[101] A refugee claim based on the facts in *Fretté* would fail because the refusal of permission to adopt a child cannot sensibly be described as "being persecuted". First, as Mr Fretté conceded at [28], the right to respect for private and family life does not include the right of any unmarried person to adopt a child. Second, the non-discrimination principle and the right to privacy were not in any event infringed. In refugee law terms, the *Fretté* case is well on the margin. But even if a breach of a human right is established, it does not follow that a finding of "being persecuted" must follow. So the denial to post-operative transsexuals of the right to marry, while a breach of the ECHR, would not, on its own, cross the "being persecuted" threshold as the breach is not, without more, at the core of any of the ***fundamental*** rights earlier discussed. While the circumstances may amount to a breach of the ECHR (see for example *Goodwin v United Kingdom* (2002) 35 EHRR 18 (ECHR) and *Bellinger v Bellinger* [2003] 2 AC 467 (HL) - consequences of non-recognition of gender re-assignment), it is not every breach of a human right which can appropriately be described as "being persecuted" for the purposes of the Refugee Convention. See Professor James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) at 103:

> Second, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population. As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm per se, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection. The existence of past or anticipated suffering

> alone, therefore, does not make one a refugee, unless the state has failed in relation to some duty to defend its citizenry against the particular form of harm anticipated.

[102] Another useful illustration of the distinction between core fundamental human rights and activity at the margin of a protected interest is the decision in *Laskey, Jaggard & Brown v United Kingdom* (1997) 24 EHRR 39 (ECHR) where the European Court of Human Rights found that prosecution for sado-masochistic acts (some of the acts were compared to torture) and the legislation under which the prosecution had been brought was not a violation of Article 8 of the ECHR because though the prosecution and conviction amounted to an interference with private life, the interference was necessary in a democratic society.

[103] Drawing on this discussion of various rights certain conclusions can be drawn. In the context of the Refugee Convention, *Toonen* establishes that the prohibition by law of consensual homosexual acts in private offends a core human rights obligation whereas *Joslin* establishes that the prohibition by law of same sex marriage does not. A claim to refugee status based solely on the prohibition by the country of origin of same sex marriages would thus not found a claim to refugee status. There is no right to same-sex marriage in international human rights law and the claimed right is at, if not beyond, the margin of what international human rights law regards as being the protection owed to homosexuals. On the other hand, a prohibition of consensual homosexual acts, if accompanied by penal sanctions of severity which are in fact enforced, may well found a refugee claim. There is no easy formulation. It cannot be said that criminalisation of consensual homosexual acts is on its own sufficient to establish a situation of "being persecuted". See further *Singh v Minister for Immigration and Multicultural Affairs* (2000) 178 ALR 742 at [22] - [25] (Mansfield J).

Sexual orientation, privacy and equality

[104] Moving from non-discrimination to privacy, it is to be noted that Article 17 of the ICCPR makes no reference to sexual orientation:

> **Article 17**
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

[105] However, in *Toonen* the Human Rights Committee employed the non-discrimination provisions of Article 2(1) to give to Article 17 substantive meaning and effect. It accordingly found that the Tasmanian laws which criminalised sexual relations between consenting adult males violated the right to privacy. The Committee found it unnecessary to decide whether the complaint was also justified under the non-discrimination provisions of Article 26. The approach of the European Court of Human Rights to sexual orientation cases has been remarkably similar. It ruled first in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (ECHR) that criminalising homosexual acts violated the right to privacy guaranteed by Article 8 of the European Convention on Human Rights. Then more recently, in *Lustig-Prean and Beckett v United Kingdom* (2000) 31 EHRR 601 (ECHR) and *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 (ECHR) - a pair of cases challenging the ban on homosexuals in the military - it took what appeared to be the next logical step, finding that the investigation and subsequent discharge of four homosexual members of the UK armed forces violated the Convention's privacy guarantee. The Court failed, however, to move beyond the *Dudgeon* right-to-privacy approach to attack the discriminatory purpose of the military policy itself and to vindicate the broader right of homosexuals to equal treatment.

[106] The sometimes asserted dichotomy between equality and privacy in the context of anti-sodomy laws was emphatically rejected by the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6. The Court had been urged by the Coalition to base its invalidation of the anti-sodomy laws on the ground that they violated the equality provisions in the Bill of Rights, arguing that privacy analysis is inadequate because it suggests that homosexuality is shameful and therefore should only be protected if it is limited to the private bedroom. In other words, the emphasis was to be on equality, not as the Human Rights Committee and the European Court of Human Rights have held, on privacy. This submission was firmly rejected by Sachs J. Because we find ourselves in respectful agreement with his analysis, the relevant paragraphs from his judgment follow, commencing at [111] - [113]:

> [111] These concerns are undoubtedly valid. Yet, I consider that they arise from a set of assumptions that are flawed as to how equality and privacy rights interrelate and about the manner in which privacy rights should truly be understood; in the first place, the approach adopted by the applicants subjects equality and privacy rights to inappropriate sequential ordering, while secondly, it undervalues the scope and significance of privacy rights. The cumulative result is both to weaken rather than strengthen applicants' quest for human rights, and to put the general development of human rights jurisprudence on a false track.

> [112] I will deal first with the question of inappropriate separation of rights and sequential ordering, that is with the assumption that, in a case like the present, rights have to be compartmentalised and then ranked in descending order of value. The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the State of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.
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> [113] One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subject to scarring of a sufficiently serious nature as to merit constitutional intervention....

[107] At [114] Sachs J went on to say:

> [114] Conversely, a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights. The case before us is in point. The group in question is discriminated against because of the one characteristic of sexual orientation. The measures that assail their personhood are clustered around this particular personal trait. Yet the impact of these laws on the group is of such a nature that a number of different protected rights are simultaneously infringed. In these circumstances it would be as artificial in law as it would be in life to treat the categories as alternative rather than interactive. In some contexts, rights collide and an appropriate balancing is required. In others, such as the present, they interrelate and give extra dimension to the extent and impact of the infringement. Thus, the violation of equality by the anti-sodomy laws is all the more egregious because it touches the deep, invisible and intimate side of people's lives.

[108] At [115] and [116] Sachs J concluded that the depreciated value given in argument to invalidation on the grounds of privacy, treating it as a poor relation of equality, was a result of adopting an impoverished version of the concept of privacy itself:

> [116] There is no good reason why the concept of privacy should, as was suggested, be restricted simply to sealing off from State control what happens in the bedroom, with the doleful subtext that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private. It has become a judicial cliché to say that privacy protects people, not places....

[109] Specific recognition was given at [118] and [119] to the limits of the concept of privacy:

> [118] At the same time, there is no reason why the concept of privacy should be extended to give blanket libertarian permission for people to do anything that they

> like provided that what they do is sexual and done in private. In this respect, the assumptions about privacy rights are too broad. There are very few democratic societies, if any, which do not penalise persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private. Similarly, in democratic societies sex involving violence, deception, voyeurism, intrusion or harassment is punishable (if not always punished), or else actionable, wherever it takes place (there is controversy about prostitution and pseudo-masochistic and fetishistic sex). The privacy interest is overcome because of the perceived harm.
>
> [119] The choice is accordingly not an all-or-nothing one between maintaining a spartan normality, at the one extreme, or entering what has been called the post-modern supermarket of satisfactions at the other. Respect for personal privacy does not require disrespect for social standards. The law may continue to proscribe what is acceptable and what is unacceptable even in relation to sexual expression and even in the sanctum of the home, and may, within justifiable limits, penalise what is harmful and regulate what is offensive....

[110] Acknowledging at [126] that the manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably, Sachs J at [127] and [128] stated:

> [127] In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.
>
> [128] ... Gays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion; they are not generally obvious as a group pressured by a society and the law to remain invisible; their identifying characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference; and they are seen as especially contagious or prone to corrupting others. None of these factors applies to other groups traditionally subject to discrimination, such as people of colour or women, each of whom, of course, have had to suffer their own specific forms of oppression....

[111] Applying this interpretation in the refugee context we are of the view that the equality principle enshrined in Article 26 of the ICCPR cannot be lightly put aside, given the centrality of the non-discrimination principle to the refugee definition (*Ward* 733). This is reinforced by the reference in the first recital of the Preamble to the Refugee Convention to the UDHR which proclaims the principle of equality of all human beings: *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL) at 639D per Lord Steyn). Compare Christopher N Kendall, "Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' is no Longer an Option, will Equality be Forthcoming?" (2003) 15 IJRL 715.

[112] The Authority does, however, hold a reservation about one aspect of the *Toonen* decision, namely the apparent acceptance at para [8.6] of the relevance of

domestic laws and societal attitudes. It so happened that in *Toonen* the evidence in question showed general Australian tolerance of homosexual lifestyles. But Sarah Joseph in "Gay Rights Under the ICCPR - Commentary on *Toonen v Australia*" (1994) 13 University of Tasmania Law Review 392, 405 asks how the Human Rights Committee is likely to deal with a complaint of persecution or discrimination by a gay man or woman against a state where, unlike Australia, cultural attitudes are indisputably hostile to homosexuals. See also Joseph, Schultz & Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 2nd ed (Oxford, 2004) at [16.38]. These concerns were shared by the Authority in *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995); [1998] INLR 387, 410-411. We do not accept that the domestic law of the country of origin or cultural relativity can override international human rights norms in the refugee determination context. See further *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 22-28; *Refugee Appeal No. 71427/99* [2000] NZAR 545; [2000] INLR 608 at [52]. But the approach taken by the Human Rights Committee in *Toonen* has left open the argument that in a similar case involving the domestic law of a Muslim state that applies Islamic law, consideration must be given to the public sensibility and morality obtaining within Muslim societies, conceding to that state a margin of appreciation: Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford, 2003) 117.

Self-denial and discretion

[113] The point forcibly made by Sachs J in *National Coalition for Gay and Lesbian Equality* at [109], [110], [112], [113], [114], [124], [127] and [128] is that domestic law provisions in the country of origin coupled with societal hostility, discrimination and prejudice may themselves constitute specific forms of oppression. A law which facilitates homophobic assaults can lead directly to what Sachs J at [130] memorably describes as "self-oppression".

[114] Understanding the predicament of "being persecuted" as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm. If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement and serious harm is threatened, it

would be contrary to the language context, object and purpose of the Refugee Convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin; or, to borrow the words of Sachs J in *National Coalition for Gay and Lesbian Equality* at [130], to exist in a state of induced self-oppression. By requiring the refugee applicant to abandon a core right the refugee decision-maker is requiring of the refugee claimant the same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct. The potential complicity of the refugee decision-maker in the refugee claimant's predicament of "being persecuted" in the country of origin must be confronted. The issue cannot be evaded by dressing the problem in the language of well-foundedness, that is, by asserting that the claim is not a well-founded one because the risk can or will be avoided.

[115] The human rights standard requires the decision-maker to determine first, the nature and extent of the right in question and second, the permissible limitations which may be imposed by the state. Instead of making intuitive assessments as to what the decision-maker believes the refugee claimant is entitled to do, ought to do (or refrain from doing), instead of drawing on dangerously subjective notions of "rights", "restraint", "discretion" and "reasonableness", there is a structure for analysis which, even though it may not provide the answer on every occasion, at least provides a disciplined framework for the analysis. A framework which is principled, flexible, politically sanctioned and genuinely international. Under the human rights approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of "being persecuted". A prohibition is to be understood to be within the ambit of a risk of "being persecuted" if it infringes basic standards of international human rights law. Where, however, the substance of the risk does not amount to a violation of a right under applicable standards of international law, it is difficult to understand why it should be recognised as sufficient to give rise to a risk of "being persecuted".

Decision of the High Court of Australia in *Appellant S395/2002*

[116] In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 (HCA) the Refugee Review Tribunal found that because a

gay couple from Bangladesh had conducted themselves in a discreet manner and as there was no reason to suppose that they would not continue to do so if they returned to their country of origin, they had no well-founded fear of being persecuted for reason of their sexual orientation and were therefore not Convention refugees. By a majority (McHugh, Kirby, Gummow & Hayne JJ; Gleeson CJ, Callinan & Heydon JJ dissenting) the High Court of Australia ruled that the tribunal had erred in law by enquiring into the question whether the claimants would avoid persecutory harm by being "discreet" about their sexual orientation. McHugh and Kirby JJ at [40] & [41] were of the view that the Convention would give no protection from persecution for a Convention reason if it were a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors. It would undermine the object of the Convention if signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention. While we readily agree with this statement, it is nevertheless a statement of a conclusion and the joint judgment regrettably offers no principled explanation as to why behaviour should not have to be modified or hidden.

[117] At [43], [45], [49] and [50] McHugh and Kirby JJ further stated that the reasonableness of the claimant's conduct is irrelevant to the refugee enquiry:

> [43] The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group.
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> ...
>
> **[45]** If a person claims refugee status on the ground that the law of the country of his or her nationality penalises homosexual conduct, two questions always arise. First, is there a real chance that the applicant will be prosecuted if returned to the country of nationality? Second, are the prosecution and the potential penalty appropriate and adapted to achieving a legitimate object of the country of nationality? In determining whether the prosecution and penalty can be classified as a legitimate object of that country, international human rights standards as well as the laws and culture of the country are relevant matters.
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> ...
>
> **[49]** ... thus, the issues were whether there was a real chance of the appellant being prosecuted for homosexuality and, if so, whether the prosecution and any potential penalty were so inappropriately adapted to achieving a legitimate object of Iranian society as to amount to persecution. The reasonableness of the appellant's conduct was not relevant to either issue. In determining whether the appellant faced a real chance of prosecution, the tribunal was entitled to consider

> not only the prosecuting policies of the Iranian authorities, but also the likelihood that inadvertently or deliberately the appellant might attract their attention. But the reasonableness of his conduct did not bear on the issue.
>
> **[50]** Insofar as decisions in the tribunal and the Federal Court contain statements that asylum-seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed.

[118] Gummow and Hayne JJ were also of the view that "reasonableness" has no part to play in the refugee inquiry. But whereas McHugh and Kirby JJ acknowledged (albeit obliquely) the relevance of international human rights standards, Gummow and Hayne JJ at [83] went further, discarding the human rights approach to understanding "being persecuted":

> Addressing the question of what an individual is entitled to do (as distinct from what the individual will do), leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning, exemplified by the passages from reasons of the tribunal in other cases, cited by the Federal Court in Applicant LSLS v Minister for Immigration and Multicultural Affairs, leads to error ... considering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution. [emphasis in original]

[119] The apparent rejection by Gummow & Hayne JJ at [83] of the human rights framework for determining what an individual is entitled to do is, with respect, insupportable. As a matter of treaty interpretation the well-founded element cannot do the work which properly belongs to the "being persecuted" element. Failure to recognise that the issue of voluntary but protected actions falls to be analysed as a human rights issue within the "being persecuted" element dangerously distorts the refugee enquiry into an apparently simplistic examination whether there is a risk of serious harm. The analysis by Gummow & Hayne JJ at [66] of the term "persecution" is, in the circumstances, superficial and the discussion of "applicable principles" at [72] to [77] unfortunately makes no reference to the principles of treaty interpretation firmly established in the Court's own jurisprudence. Consequently when their Honours at [80] state that a claim for protection cannot be answered by telling the applicant to hide the fact that he or she holds the political or religious beliefs in question, they do not explain why.

[120] The difference between McHugh and Kirby JJ and the Authority could be said to be about the location of the analysis. Is it the "being persecuted" element or the well-founded element? The difference between the Authority and Gummow and Hayne JJ is possibly more pronounced. Is it relevant to identify what an individual is entitled to do? In this regard the Authority shares common ground with McHugh and Kirby JJ in answering in the affirmative but there is a sharp

difference thereafter as to the proper place of human rights. The Authority puts them at the centre of the refugee inquiry. For the reasons which have been elaborated, the Authority takes as its starting point the "being persecuted" element, not the well-founded assessment as the former allows identification of the boundaries set by international human rights law for both the individual and the state. Once those boundaries have been identified it is possible to determine whether the proposed action by the claimant is at the core of the right or at its margins and whether the prohibition or restriction imposed by the state is lawful in terms of international human rights law. If the proposed action is at the core of the right and the restriction unlawful, we would agree that the claimant has no duty to avoid the harm by being discreet or by complying with the wishes of the persecutor. If, however, the proposed activity is at the margin of the protected interest, then persistence in the activity in the face of the threatened harm is not a situation of "being persecuted" for the purposes of the Refugee Convention. The individual can choose to carry out the intended conduct or to act "reasonably" or "discreetly" in order to avoid the threatened serious harm. None of these choices, however, engages the Refugee Convention.

[121] Responding more generally to the dismissal by the majority of "reasonableness" from the refugee enquiry, we ourselves believe to the contrary that recognition must be given to the fact that some international human rights are subject to what might loosely be called a "reasonableness" inquiry.

[122] See for example those provisions in the ICCPR which contain clauses subjecting the particular right to (*inter alia*) "the rights and freedoms of others": Article 12(3) (freedom of movement), Article 18(3) (freedom of thought, conscience and religion), Article 19(3) (right to hold opinions without interference), Article 21 (peaceful assembly) and Article 22(2) (freedom of association). Other limitations are noted at para [85] above.

[123] Because international human rights law in some circumstances imposes an obligation to respect the rights and freedoms of others, it cannot be said that ***as a matter of law*** the 'reasonableness' of the refugee claimant's proposed conduct is in all circumstances irrelevant. We have employed inverted commas to give recognition to the fact that the ICCPR does not expressly condition any rights with the word "reasonable". We are merely signalling that many provisions require competing interests to be balanced. In this balancing exercise a reasonableness

test has been adopted by the Human Rights Committee. The following passage is from *Toonen* at para 8.3:

> The prohibition against private homosexual behaviour is provided for by law, namely, Sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its General Comment 16 on article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances". The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case. [citations omitted]

[124] None of this is to deny that in a broad sense the majority decision in *Appellant S395/2002* and the decision of this Authority converge on the same point, namely that refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right. However, the paths taken to this point of convergence appear to be quite different. In New Zealand the analysis is located in the "being persecuted" element, not in the evaluation of risk nor in the Convention ground. In Australia international human rights standards, while routinely acknowledged as being relevant to the determination of the "being persecuted" element, do not appear to have been developed to any degree and there are suggestions in *Appellant S395/2002* that in the context of voluntary but protected actions the focus is rather on the assessment of risk of harm and the definition of the particular social group. If we have correctly understood the joint judgment of Gummow and Hayne JJ in *Appellant S395/2002*, the human rights approach to "being persecuted" may even have been inadvertently rejected in circumstances where it would have been of significant relevance. The New Zealand approach, on the other hand, not only acknowledges the relevance of human rights standards, it places them at the centre of the "being persecuted" analysis in the belief that this provides a principled and disciplined framework for analysis. It also avoids the unintended and possibly absurd results which might flow were one to take literally the holding that in the refugee enquiry, the primary focus is on the risk faced, not on the nature and extent of the human right asserted by the claimant. The Refugee Convention does not protect persons against any and all forms of even serious harm. Refugee recognition is restricted to situations in which there is a risk of a type of injury that is inconsistent with the basic duty of protection owed by a state to its population. "Being persecuted" is the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.

[125] The risk of the anticipated harm occurring is a related, but separate enquiry. It must occur downstream of the inquiry whether the anticipated harm can properly be described as "being persecuted". If the judgment of McHugh and Kirby JJ at [45] and [49] is to be read as according primacy to the well-founded element, we would respectfully disagree.

WHETHER ON THE FACTS APPELLANT AT RISK OF BEING PERSECUTED

[126] On the country information presently available the finding made earlier in this decision was that the Penal Code of Iran prescribes severe penalties for homosexual conduct between consenting adults. In addition there is strong religious and societal disapproval of homosexuality in Iran. To avoid severe criminal penalties, extrajudicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment, homosexuals in Iran must be "discreet". They are denied a meaningful "private" life. For most their sexual orientation must be carefully hidden.

[127] The appellant wishes to escape this situation, particularly the denial of a private life, his unequal treatment and the potential judicial and extra-judicial consequences of exercising a fundamental human right. His claim to refugee status is based on well established principles of international human rights law, namely the right to privacy (Article 17 ICCPR) and the rights to equality and non-discrimination (Articles 2(1) and 26 of the ICCPR). There is no suggestion here of activity at "the margin". It is also clear that measured by international human rights norms the Iranian state has both threatened and inflicted serious harm on homosexuals who seek to do no more than exercise their fundamental human rights. It follows that the facts establish both serious harm and the failure of state protection. The appellant has proved that his return to Iran would lead to the predicament of "being persecuted".

THE WELL-FOUNDEDNESS ISSUE

[128] The appellant must establish that the risk of "being persecuted" is well-founded, or as that term is understood in New Zealand, that there is a real chance of being persecuted: *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [111] -

[153], an approach not challenged in *Jiao v Refugee Status Appeals Authority* [2002] NZAR 845 (Potter J) or on appeal in *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

[129] If he returns to Iran the appellant will not be able to live openly as a homosexual and will have to choose between denying his sexual orientation or facing the risk of severe judicial or extra-judicial punishment. We are satisfied that one or the other of these circumstances could well occur and it follows that the real chance test is amply satisfied.

[130] We turn now to the issue of the Convention ground and causation.

PARTICULAR SOCIAL GROUP AND SEXUAL ORIENTATION

[131] The question whether homosexuals in Iran comprise a particular social group can be disposed of very shortly. This Authority held in *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995) at 57-58; [1998] INLR 387, 422-423 that sexual orientation can, in an appropriate fact situation, be accepted as a basis for finding a social group for the purposes of the Refugee Convention and that homosexuals in Iran are a cognisable social group united by a shared internal characteristic namely, their sexual orientation. The holding in that case that homosexuals may in some countries qualify as members of a particular social group was explicitly approved by Lord Steyn in *R v Immigration Appeal Tribunal; ex parte Shah* [1999] 2 AC 629 at 643D & 644G. The Authority's holding would now seem to be an uncontroversial one.

[132] Applying the causation standard set out in *Refugee Appeal No. 72635/01* (6 September 2002); [2003] INLR 629 at [173] it is sufficient for the appellant to establish that his membership of a particular social group is a contributing cause to the risk of "being persecuted". It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. On the facts the contributing cause test is easily met. The only reason why the appellant is at risk of serious harm in Iran is because of his sexual orientation.

OVERALL CONCLUSION

[133] Having established that he has a well-founded fear of being persecuted for reason of his membership of a particular social group the appellant must be recognised as a refugee. The appeal is allowed.

.....
Rodger Haines QC
Member