REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 76204

AT AUCKLAND

Before:	RPG Haines QC (Chairperson) AN Molloy (Member)
Representing the Appellant:	GM Illingworth QC (and on brief occasions H Hylan)
Date of Hearing:	28, 29 & 31 July 2008; 1 August 2008
Date of Further Submissions:	13 August 2008; 30 September 2008; 14 October 2008; 27 November 2008
Date of Decision:	16 February 2009

DECISION OF THE AUTHORITY DELIVERED BY RPG HAINES QC

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INTRODUCTION

[1] The appellant is a forty-one year old citizen of the Islamic Republic of Iran who arrived in New Zealand on 6 May 2002 and this is his third appeal to the Authority. His first refugee claim made on arrival at Auckland International Airport was unsuccessful both at first instance and on appeal to this Authority. See *Refugee Appeal No. 74256* (16 June 2004). An appeal to the Removal Review Authority on humanitarian grounds was declined on 5 May 2005 (*Removal Appeal No. 45847*). On 23 June 2005 an appeal to the Minister of Immigration under s 35A of the Immigration Act 1987 was lodged but it too was declined on 12 October 2005. On 7 December 2005 the appellant was served with a removal order under s 54 of the Act and placed in custody pending his removal from New Zealand under s 59 of the Act. On 14 December 2005 he made a second claim to refugee status. It was unsuccessful both at first instance and on appeal. See *Refugee Appeal No. 75889* (20 December 2006).

[2] While in detention in the period 7 December 2005 to 3 September 2007 the appellant consistently refused to cooperate with Immigration New Zealand in the obtaining of an Iranian travel document. As the Iranian authorities will not issue such document unless the applicant personally signs the application form and complies with all other requirements for the issue of a travel document, the appellant was able to unilaterally frustrate his intended removal from New Zealand pursuant to the removal order. On or about 12 July 2007, while still in Auckland Central Remand Prison, the appellant began what he calls a "fast" (it was a hunger strike) which lasted for fifty-three days. On 3 September 2007, weakened by his abstinence from food, he was released on bail subject to conditions, one of which required that he live with the vicar of St James Anglican Church, Orakei, the Revd Clive Sperring.

[3] On 27 September 2007 an appeal was lodged with the Minister of Immigration

seeking cancellation of the removal order and a special direction permitting the appellant to work in New Zealand until such time as it was safe for him to return to Iran. It was subsequently agreed that because the appellant was now asserting a *sur place* claim to refugee status, the Ministerial application should be treated as a third claim to refugee status and the case was referred to the Refugee Status Branch, Immigration New Zealand, for determination.

[4] On 13 December 2007 the appellant was interviewed by a refugee status officer in relation to this third claim but in a decision published on 31 March 2008 the renewed application for refugee status was declined. It is from that decision that the appellant has appealed to this Authority for the third time.

[5] It is to be noted that the three appeals to this Authority have been heard by separate panels of the Authority, each of these panels comprising (unusually) two members of the Authority. We say "unusually" because s 129N(5) and (6) mandate a single member panel other than in exceptional circumstances. It goes without saying that neither member of the present (third) panel of the Authority sat on the first or second appeals.

Jurisdiction - second and subsequent claims to refugee status

[6] In only limited circumstances can a second or subsequent claim to refugee status be made. Those circumstances are prescribed by s 129J(1) of the Act. The claimant must show that, since the determination of the first (or, as the case may be, second) refugee claim, circumstances in his or her home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim:

> **129J. Limitation on subsequent claims for refugee status-**

> (1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.
> (2) In any such subsequent claim the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding.

[7] A person whose subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by such officer on the grounds that the statutory criteria have not been satisfied, may appeal to this Authority. Section 129O(1) provides:

> **129O. Appeals to Refugee Status Appeals Authority-**
>
> (1) A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision.

[8] We, the third panel of the Authority, find that there has been a change of circumstances in Iran sufficient to satisfy the jurisdictional requirements of s 129O. In essence, the publicity given to the appellant's case in New Zealand during the period of his detention in Auckland Central Remand Prison has increased the risk of harm in Iran.

Prior findings of credibility and fact

[9] It does not follow from our finding of jurisdiction that all questions of fact and of credibility are therefore at large on this third appeal. Both ss 129J(2) and 129P(9) limit challenges to findings of credibility or fact made in relation to a previous claim. In the appellate situation, s 129P(9) stipulates that:

> (9) In any appeal involving a subsequent claim, the claimant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim, and the

Authority may rely on any such finding.

[10] It will be seen from our decision that we, the third panel, have arrived at our own independent conclusions as to the appellant's credibility and as to the facts. That having been said, however, we nevertheless further find that it would in any event have been appropriate to rely on the findings of credibility and of fact made by the two earlier panels.

[11] Because the determination of the issues of credibility and of fact raised by this third appeal are entwined with the appellant's first and second refugee claims, it is necessary that an outline of those claims be given. It is stressed that the account which follows is but an abbreviated summary as it is impracticable to relate all the evidence received by the Authority, comprising the 1,707 page Refugee Status Branch file, the documentary evidence filed by the appellant in support of his appeal, the evidence of the appellant and his witnesses given during the four day hearing and the additional material filed by the appellant subsequent to the hearing.

THE FIRST REFUGEE CLAIM

Brief outline of the first refugee claim

[12] As recorded in the first decision of the Authority (*Refugee Appeal No. 74256* (16 June 2004)), the appellant's account is that, dissatisfied with the human rights situation in Iran and looking for better economic opportunities, he left Iran on 29 February 2000, arriving in South Korea on or about the same date. Although raised a Muslim, within one month after his arrival in South Korea he began attending a Christian church in Seoul known as the Seoul Migrant Mission Church. Some fourteen months after his arrival in South Korea, he converted to Christianity in April 2001. His evidence at first instance when interviewed by a refugee status officer on 22 May 2002 (repeated at the appeal hearing on 4 March 2004 and 1 April 2004) was

that he was not baptised in South Korea and that in South Korea baptism only took place twice a year, namely at Easter and at Christmas. After his conversion to Christianity in April 2001 the appellant telephoned his mother and told her what had happened. Although she was initially shocked the appellant said that his mother eventually became curious to understand more about Christianity. It was in this context that he sent her a parcel containing three or four photographs showing himself and church elders standing by a cross. He also included a videotape of a particular service in which church elders had prayed for people with problems, including the appellant and other Iranian members of the church. The leaders had put their hands on the appellant's head and prayed and cried while asking God for his assistance and guidance.

[13] When, approximately two to three weeks later, the appellant contacted his mother to ascertain whether the parcel had been received, he learnt that his family had been told by the Iranian authorities that the parcel had been intercepted and that while personal items (such as clothing) sent by the appellant would be released, the videotape and photographs would not.

[14] Approximately two weeks later the appellant was told that his mother had fallen ill and had been taken to hospital. The appellant immediately returned to Iran but did so on a false passport in view of the perceived risk posed by seizure of the photographs and videotape. He experienced no difficulty entering Iran using the false passport. However, approximately one week after his return to Iran and at a time when he was at the home of a relative, two officials called at his mother's home in search of the appellant and questioned his younger sister as to his whereabouts. They told the sister that he (the appellant) had converted to Christianity and that was why they wanted to know where he was. Immediately on learning of this visit the appellant decided to leave Iran and did so within a matter of days, travelling first to Turkey (where he stayed for three months) and then to Thailand. After five months in

that country he returned to South Korea for three and a half months before departing for New Zealand in May 2002. At the end of 2002 the Iranian authorities visited his mother and questioned her as to the appellant's whereabouts. In February 2004 a brother was arrested, fingerprinted and questioned in the mistaken belief that he was the appellant. On his true identity being established he was released.

[15] In summary the first refugee claim was based on the alleged discovery of the appellant's conversion to Christianity and on the claimed risk of lengthy imprisonment, if not execution, in Iran as punishment for his abandonment of Islam. In addition, he would not be free to practice Christianity in Iran.

Reasons for the first refugee claim failing

[16] Although the refugee status officer at first instance had doubts as to whether the appellant had accepted Christianity, those doubts were resolved in favour of the appellant. The claim failed, however, as it was the officer's assessment that the risk of the appellant coming to serious harm in Iran did not reach the "well-founded" standard mandated by the refugee definition in Article 1A(2) of the Refugee Convention.

[17] On appeal to the first panel of the Authority the claim to refugee status failed because the central elements of the appellant's claim were rejected in their entirety on credibility grounds:

> [33] ... Here the Authority finds that having regard to implausibilities and inconsistencies, the appellant's evidence concerning his conversion, his sending the parcel with the incriminating photographs and videotape back to Iran and the subsequent interest in him is unreliable. It is rejected in its entirety.
>
> [34] From the above, it can be seen that the Authority has not expressly rejected his claim to have gone to churches here and in Korea. The Authority is prepared, in the circumstances, to extend the appellant the benefit of the doubt as to this issue, in light of documentary evidence showing the appellant in church related activities, but does [not] accept this activity took place as a result of genuine conversion. Its reasons follow.

[18] It is not intended to summarise the detailed reasons given by the first panel of the Authority for this credibility assessment. Broadly speaking, the reasons focussed on the inherent implausibility of central aspects of the appellant's evidence, significant changes to his evidence, inconsistencies and contradictions. The cumulative effect of the points was to lead the first panel of the Authority to conclude that it could not accept any of the appellant's evidence relevant to the core of his claim. It did, however, accept that he was a person who had left Iran illegally. In the view of the first panel this did not, however, give rise to a well-founded fear of being persecuted.

[19] One aspect of the first refugee claim does, however, require more detailed exposition. It is the question whether the appellant was baptised in South Korea. This was an issue of some importance at the third appeal hearing and it is therefore necessary to elaborate on the baptism issue as it was presented in the context of the first refugee claim.

[20] The appellant's evidence both to the refugee status officer and to the first panel of the Authority was that he had not been baptised in South Korea. His baptism had occurred only subsequent to his arrival in New Zealand, the date of baptism being 30 June 2002 at the Auckland Pan Pacific Mission. However, subsequent to the first appeal hearing but prior to publication of the Authority's decision, his then solicitor (Ms Jean Hindman), by letter dated 30 April 2004, advised the first panel that she had been instructed to submit the following documents in support of the appeal (the extract which follows has been taken from her letter):

> 1. Selected certified translation of Baptism Certificate dated 19 November 2002 (sic) [the date in the document is actually 19 November 2000] from Seoul's Foreign Labourers' Missionary Church;
>
> 2. Certificate of Identification from Seoul Migrant Mission Centre dated 29 February 2004; and
>
> 3. Original Envelope in which these documents were received from the Seoul Migrant

Mission Centre post stamped 06.04.2004 - Yanggok, Korea Post.

To distinguish these documents from a second set tendered in late 2007, these documents will be referred to for ease of identification as the “Hindman documents” or more particularly, the “Hindman certificate of baptism” or the “Hindman certificate of identity” as the case may be.

[21] The letter from Ms Hindman offered no explanation as to the provenance of the documents, the circumstances in which they had been obtained or how their existence could be reconciled against the appellant’s evidence both at first instance and before the first appeal panel that he had not been baptised in South Korea.

[22] In its decision dated 16 June 2004, the first panel of the Authority gave as one of its reasons for its adverse credibility finding the inconsistency between the Hindman documents and the claim by the appellant that he had not been baptised in South Korea.

[23] Because the appellant in late 2007 produced a very different baptism certificate from the Seoul Migrant Mission Church and a very different certificate of identification, it will be necessary to return to the baptism issue later in this decision. First, however, it is necessary that the circumstances of the second refugee claim be briefly outlined.

THE SECOND REFUGEE CLAIM

Brief outline of the second refugee claim

[24] As already mentioned, on 7 December 2005 the appellant was served with a removal order and taken into custody. It was while he was in custody that he lodged his second refugee application. In the confirmation of claim form dated 13 December

2004 he repeated the elements of the first claim to refugee status, particularly the sending to his mother of the photographs and videotape of his church activities in South Korea, the seizure of the photographs and videotape by officials in Iran, his return to Iran, the subsequent visit to the family home by officials wanting to question him about his conversion to Christianity and finally, the mistaken arrest of his brother by those officials. But to this account the appellant added a new element, namely that three or four months earlier he had learnt from his mother that:

(a) She had received a court document stating that the appellant had been convicted as an apostate and sentenced to death; and

(b) Relatives (including his cousins) had threatened to kill the appellant should he not surrender himself to officials on his return to Iran.

[25] In the confirmation of claim form the appellant reiterated that he had not been baptised in South Korea. As to the Hindman certificate of baptism issued by the church in South Korea, the confirmation of claim form records the appellant's comments as follows:

> The Church authorities in Korea with full trust in me and my sincere Christianity beliefs, and to assist me stated that I had been baptised ... My lawyer [Jean Hindman] advised me to make enquiries to the church in Korea, the church said I was baptised - just because of the full trust they had in me. My lawyer didn't read my prior file and submitted the baptism certificate to RSAA in error.

[26] A refugee status officer interviewed the appellant in relation to the second refugee claim on 27 January 2006, 17 February 2006 and 16 May 2006. After the second of these dates the appellant (now represented by Mr Hylan) submitted by letter dated 6 March 2006 the following four documents together with English translations. The descriptions and extracts which follow are taken from the second panel's decision at para [8]:

(a) A letter dated 8 February 2005 from the Islamic Revolution Court in Tehran asking the appellant to report to the court at 9.30am on 14 February 2006.

(b) A summons dated 28 February 2006 issued by the Justice Department summonsing the appellant to appear before the Tehran Court at 10am on 5 March 2005.

(c) A judgment of the Islamic Revolution Court dated 5 March 2005 recording that the appellant had been sentenced to death on charges of "Apostasy, Blasphemy to Islam". The document records that the court had viewed "the videotape of accused while attending the church, denouncing Islam and conversion to Christianity". The relevant passages of the translation read (p442 of the file):

> **Procedure**
>
> After inspection of all pages of the file and viewing the videotape of accused while attending the church, denouncing Islam and conversion to Christianity the court issues [illegible].
>
> **Court verdict**
>
> The court was held at the above date and was attended by the members. After hearing the honourable [Islamic] Revolution Attorney's charges the court, according to the Islamic Republic Constitution and Article [illegible], subject to the Islamic Penal Law and taking into consideration the undeniable documents about the accused attending the church, his conversion to Christianity and rejecting Islam, which resulted in blaspheming Islam, the court sentenced the accused to death penalty. This is a ruling in absentee and would be open to appeal within legal period at the [illegible] court.

(d) The final document is a letter purporting to be from the appellant's brother. It is undated and reports that a cousin had threatened to kill the appellant on his return to Iran for having renounced Islam. The English translation of the relevant passages follow:

> Dear [the appellant], you have put me too in trouble because of changing your religion. One day when I was leaving home they arrested me as they mistook me for you and interrogated me. I was only let free when mum brought my Identity

> Document, which made them realize they had mistaken. However, they exhausted me by so many questions they asked.
>
> On the other hand, our cousin [maternal], ... says if you returned to Iran he would inform the government or kill you by his newly purchased gun since you have changed your religion. In brief, here we have been put in trouble and mum is regularly being harassed.
>
> Dear [appellant], you would face a big trouble if you return to Iran. You would better think about your situation.
>
> Take care.
>
> Because of your wrong action, the whole family is very upset. It was due to our similarity that I was mistaken for you.
>
> Goodbye.

[27] Although in the Interview Report the refugee status officer raised a number of substantial credibility concerns in relation to these documents and in relation to other aspects of the second refugee claim, those concerns were not ultimately determined as the second refugee claim was declined on the grounds that the jurisdictional threshold for second claims specified by s 129J(1) of the Act had not been met. From this decision the appellant appealed.

[28] At the second appeal hearing on 10 August 2006 the appellant was represented by Mr Mansouri-Rad. Submitted in support of the appeal was a letter dated 9 August 2006 from Revd Clive Sperring who stated that he had known the appellant since the beginning of 2004 in his capacity as Vicar of St James Church, Orakei and attested that the appellant had attended that church regularly "until last year". The letter concluded:

> [The appellant] has told me about the judgment which has been handed down by the Islamic Republic of Iran that he be sentenced to death in his absence for converting to Christianity, which is seen as rejecting Islam and in Iran is punishable by death. I believe this to be true and I know that [the appellant] is concerned that if he were to be deported to Iran, he would be imprisoned and eventually executed. I have spent a considerable amount of time visiting [the appellant] in Mount Eden prison over these past months and find his faith in Christ has grown despite all the difficulties he faces. He continues to attend Christian worship and Bible study classes while in prison. I urge you, therefore, to favourably consider his application for refuge (sic) status.

[29] Also submitted were letters of support from parishioners of St James, favourable work references and a letter from Revd TM Dibble, Assistant Chaplain at Auckland Central Remand Prison dated 22 August 2006 attesting to the appellant's attendance in prison at the celebration of Mass each Tuesday and at the Friday Scripture Study session led by Father Dibble. The letter relevantly states:

> I find [the appellant] a very sincere young man who takes an active part in both the Mass and the Scripture Study. His knowledge and understanding of the Christian Scriptures steadily increases and he is able to make a constructive intervention in the discussions.
>
> I find him always polite and co-operative both with myself and with other inmates. He is always considerate and generously contributes to the welfare of other prisoners in his wing.

Reasons for the second refugee claim failing

[30] The detailed decision of the second panel of the Authority delivered on 20 December 2006 does not easily lend itself to summary in a few lines. The essence of the findings, however, were:

(a) That the three documents purporting to come from the court in Iran were not genuine documents.

(b) That the appellant did not give truthful evidence as to the claimed circumstances in which he learned of the death sentence or as to the reasons why the alleged information concerning the death sentence was not communicated to the Minister of Immigration who at the relevant time was considering an appeal by the appellant.

(c) The letter from the appellant's brother was not a true document in that it had been written to provide false information in support of the appellant's case.

(d) The appellant's claims about his Christian faith could not be relied upon.

[31] As to the appellant's claim that he was a Christian and at risk of being persecuted for apostasy, the Authority reached the following conclusions:

> [49] We find his attendance at church, his "conversion" of the Iranian woman and his attempts to convert remand inmates are all activities calculated for the sole purpose of advancing his refugee claim. He has a history of giving false evidence about numerous matters concerning his claimed Christian activities including the alleged consequences of those activities. He has produced fabricated documents in both his first and his second refugee claim, including self-serving fraudulent letters. Against this background, his claims about his Christian faith cannot be relied on.
>
> ...
>
> [51] We do not accept the appellant's evidence that he has been sentenced to death in Iran, or that his cousins have threatened to kill him. We do not accept that the Iranian authorities or the appellant's family members are aware of his claim to have converted to Christianity, or that he is, in fact, a genuine Christian convert. Accordingly, the country information put forward by Counsel about the current situation for Christian converts in Iran does not fall to be considered.

THE THIRD REFUGEE CLAIM

Brief outline of the third refugee claim

[32] The third refugee claim was submitted in November 2007 subsequent to the appellant's release on bail from Auckland Central Remand Prison on 3 September 2007. It is based on three grounds:

(a) The appellant's experiences in Auckland Central Remand Prison. In particular it is said that his "fast" or hunger strike have demonstrated that he has undergone a genuine conversion to the Christian faith.

(b) The situation for Christian converts in Iran has deteriorated substantially since the dismissal of the second claim to refugee status.

(c) The appellant's "fast" or hunger strike resulted in wide publicity being given to his case and in particular, his claim that he has renounced Islam and converted to Christianity. Irrespective of whether he has in truth converted to Christianity, he will now be at risk on return to Iran either because the authorities there believe he is a Christian convert (even if that belief is mistaken) or because they wish to punish him for making claims of apostasy.

[33] In opening submissions counsel for the appellant advised the present panel of the Authority that while the appellant believes in sharing his faith, he does not claim to be an evangelical person and does not rely on proselytising as the generation of the risk in Iran. His "prime case" is that the publicity given to his case in New Zealand and overseas has identified him as an apostate, that is, as a person known to have renounced Islam and to have converted to the Christian faith.

[34] To contextualise grounds (a) and (c), a brief overview follows of events during the appellant's period in custody and the publicity given to those events.

Overview of custody period

[35] The appellant has been unlawfully in New Zealand since 25 July 2004, being the date on which his temporary permit was revoked consequent on the dismissal of his first appeal to this Authority on 16 June 2004. On 7 December 2005, after being served with a removal order, he was taken into custody for the purpose of executing the removal order. The second application for refugee status lodged on 14 December 2005 had the effect of legally inhibiting his removal from New Zealand. See s 129X(1) of the Act. Ultimately, the second refugee claim was unsuccessful, the second appeal to this Authority being dismissed on 20 December 2006.

[36] In 2006 and throughout 2007 the appellant refused to sign the documents

required by the Iranian Embassy in Wellington before they would issue a travel document to facilitate his removal to Iran. As New Zealand does not have an agreement with the Iranian government for involuntary repatriation, the appellant's non-cooperation amounted, in effect, to an indefinite stay of the statutory removal process, the only issue being whether the appellant would remain in custody or be released on bail. In this regard there are parallels between his case and the circumstances in *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295 (13 August 2008) and *Mohebbi v Department of Labour* (High Court Auckland, CIV2007-404-3710, 5 November 2007, Potter J). Mr Yadegary was conditionally released from custody on 4 April 2007. Mr Mohebbi was conditionally released on 5 November 2007.

[37] On 19 June 2007 at the District Court, North Shore, Morris DCJ, on an application by the appellant for release on conditions, indicated that he was prepared to release the appellant on conditions, including that he (the appellant) sign all appropriate documents to apply for a travel document. On the appellant indicating that he would not comply with such a condition, the application for release was declined and the Warrant of Commitment extended.

[38] It was a month later, on or about 12 July 2007, that the appellant began his "fast" or hunger-strike. He says he started the fast because "Jesus told [him] to" but Jesus did not tell him the reason. It never occurred to the appellant that the "fast" would place pressure on the Minister of Immigration or that it would affect his immigration status. He told the refugee status officer that he did not create the media interest in his case, but rather this was done by Jesus Christ. He believed it was a miracle that his case came into the public domain via the media. We do not accept this evidence because, as will be seen, we do not accept that the appellant is a credible witness. Moreover he gave Revd Sperring a copy of the purported death sentence and asked him to make it known. Both at Auckland Hospital when receiving treatment during

his hunger strike and on the occasion of his release from custody at the District Court North Shore he gave emotionally charged interviews to television media about his case. His claim that he did not seek publicity is disingenuous.

News reports

[39] It would seem from the *Bundle of News Reports* (23 July 2008) submitted in support of the third appeal that the hunger-strike was first reported in New Zealand media on 14 August 2007 when *The New Zealand Herald* published an item recording that the appellant had been taken to Auckland Hospital for treatment after refusing food for one month. The item also reported that Green MP Keith Locke had visited the appellant in hospital and had written to the Minister of Immigration asking that he intervene in the case on humanitarian grounds. In a television item broadcast in August 2007 on the eve of his discharge from hospital and return to prison, the appellant was pictured sitting in a wheelchair in an obviously weakened state. Speaking in English (and emotionally) he made reference to the death penalty sentence and to the fact that family members wished to kill him for renouncing Islam. He also stated his intention to refuse food until he was allowed to stay in New Zealand.

[40] On the appellant's return to Auckland Central Remand Prison, media publicity continued, the *Bundle* containing extracts not only from *The New Zealand Herald* but also from *TV3 News*, *The Dominion Post* and assorted websites both secular and religious. Excluding the at times extensive television items, there are thirteen Press items from August 2007, thirty-six from September 2007, two from November 2007 and one from April 2008. As can be seen, media reports peaked in September 2007 due to the length of the hunger-strike, protest activity outside Auckland Central Remand Prison by an informal coalition styling itself as Global Peace and Justice Auckland (seven supporters were arrested after five chained themselves to the outside

of the prison to highlight the appellant's plight and two other protesters who had been warned to stay away were arrested when they returned to the prison grounds) and because the appellant was visited in prison by the Anglican Archbishop, David Moxon and the Anglican Church's Social Justice Commissioner, Revd Dr Anthony Dancer. Finally, the reports refer to the appellant's release from custody on Monday 3 September 2007 on the fifty-third day of his hunger-strike. One of the television items broadcast on that date features interviews with, *inter alia*, the then Prime Minister, Hon Helen Clark, together with politicians across the political spectrum, including Rodney Hide, Keith Locke and Peter Dunne.

[41] According to the report by Simon Collins & Paula Oliver, "Iranian hunger striker wins bail", *NZ Herald*, Tuesday, September 4, 2007, p A3, the Department of Labour did not oppose the appellant's release from prison because (*inter alia*) there were concerns for his health. In the same article the then Minister of Immigration, Hon David Cunliffe is reported as saying that the case was unique in that the appellant's state of health had "reached such a parlous state that in our view intervention [was] required". The article goes on to state that the appellant was released on condition that he stayed with Revd Clive Sperring, observed a curfew from 10pm to 8am and resumed a normal diet under medical supervision. The appellant is reported in this article as stating that "he would eat or fast as Jesus directed". The article continues:

> Clutching a Bible and a Bible study booklet he said: "I'm never alone because He is always with me. I can stay in the fasting if He wants me to stay in the fasting".

Church witnesses

[42] In support of his claim to be a genuine convert to Christianity and to attest to the strength of his faith, the appellant submitted a *Bundle of Witness Statements* (23 July 2008) containing the statements of some twenty parishioners of St James Church, of whom fourteen gave oral evidence at the appeal hearing. In addition the *Bundle* contained a supporting statement by Revd Clive Sperring who also gave oral

evidence, as did Dr Anthony Dancer.

[43] In general terms the Revd Sperring and the witnesses from St James confirmed that the appellant had attended St James from the beginning of 2004 (approx) until he was taken into custody in December 2005. Subsequent to his release on bail in September 2007 and while living with the Revd Sperring (and his family) he (the appellant) had played an active part in the life and activities of the St James congregation. All the witnesses attested to their belief in the appellant's sincerity and genuineness of faith. Dismay was expressed at this Authority's failure to recognise the appellant as a refugee and at his subsequent detention in prison. However, without exception none of the witnesses had seen either the first or the second decisions of this Authority. One witness had, however, been able to locate the research copy of the first decision on the Authority's website. Mrs Sperring (the wife of Revd Sperring) who assisted in the preparation of the case for the third appeal, had read parts of the file but could not say that she had read the two decisions.

[44] Even the Revd Sperring, who has steadfastly supported the appellant since the beginning of 2004, has not read the two previous decisions of the Authority. He said that he was there to support the appellant in spiritual matters and had not discussed his appeals and legal submissions. He had, however, been asked by the appellant to let it be known that he (the appellant) was under sentence of death in Iran. The Revd Sperring had been provided by the appellant with the Iranian court documents "establishing" the death sentence. In a video clip produced in evidence, the Revd Sperring was interviewed on national television during the time of the "fast" or hunger strike and in that interview displayed the document purporting to establish the death sentence. This evidence we will return to later.

[45] It is to be recalled that towards the end of his "fast" or hunger-strike, the appellant was visited in prison by the Anglican Archbishop and by Dr Anthony

Dancer. While the Archbishop was not called as a witness at the third appeal hearing, Dr Dancer did give evidence. He told the Authority that towards the end of the appellant's "fast" he and the Archbishop had met with the appellant in prison for about one hour. At that time the appellant was weak and in a wheelchair. Subsequent to the appellant's release from custody he had met the appellant at the Revd Sperring's home, again for about one hour.

[46] After the two one-hour visits to the appellant Dr Dancer wrote to counsel for the appellant a letter dated 24 September 2007 expressing the opinion that he (Dr Dancer) was "generally convinced of the authenticity of [the appellant's] faith and that that conviction had "deepened" upon his second encounter with the appellant. Only two passages from Dr Dancer's letter are reproduced below:

> Lastly, I became increasingly alert that [the appellant's] use of the Bible and his expression of faith displayed a high level of integration, rather than superficial utilitarian usage, particularly between First and Second Testaments. He spoke, in form and content, from *within* the story. It's a subtle, but important point of distinction, and not one it would be easy to achieve or maintain over time if it were not authentic. At the time of leaving [the prison], I was generally convinced of the authenticity of his faith.
>
> ...
>
> In sum, I am satisfied as to the authentic response by [the appellant] to God's call upon his life and therefore that his conversion is genuine. It is readily apparent that [the appellant] takes seriously both his commitment to Christian community, bible reading, prayer, fellowship, worship and the Christian commitment to share one's faith with others, and does so with a real joy and zeal for Jesus Christ.

[47] In his oral evidence before the Authority Dr Dancer said that after the one hour prison visit he felt it was "more likely than not" that the appellant's faith was genuine and that after the second one hour meeting he had been "more convinced" as to the genuineness of the appellant's faith. Dr Dancer added, however, that because "faith is a subjective thing", one can never be one hundred percent sure as to a person's faith and that the person concerned "could walk away from it at a moment's notice".

[48] Asked whether he had read the first and second decisions of the Authority, he

answered in the negative but added that the fact that the appellant had not been accepted as a truthful witness by other decision-makers did not change his view as to the genuineness of the appellant's faith because the other decision-makers had based their assessment on "external factors" of his life whereas his (Dr Dancer's) assessment had taken account of "the internal in the context of the external" and that his internal assessment "outweighed doubts raised by the external". Asked whether he was aware of the documents purporting to establish that the appellant had been sentenced to death in Iran and that it was now conceded that those documents were false, Dr Dancer responded that he was aware that it had been said by someone who had examined the document that it was a false document.

[49] As to the weight to be given to Dr Dancer's opinion, we have taken into account the fact that it rests on two one-hour meetings with the appellant and that little regard, if any, has been paid to other claims the appellant has made in relation to the circumstances surrounding his conversion to Christianity.

[50] The evidence of Dr Dancer, Revd Sperring and the parishioners from St James, sincere as it undoubtedly is, is of limited assistance to the Authority. Without exception, none of the witnesses had the advantage of being provided by the appellant with the Authority's first and second decisions, nor have they had the advantage of access to the information presently before this, the third panel of the Authority. Above all, unlike the Authority, none of these witnesses have had the obligation to test the appellant's credibility and to reach an objective assessment of the truthfulness of his claims. None have had the advantage of listening to all of the appellant's evidence as opposed to those parts the appellant has chosen to share with them. Few seemed aware of the concession now made by the appellant that the documents purporting to establish that he has been sentenced in Iran to death for converting to Christianity are false documents, as earlier found by the second panel of the Authority.

[51] Later in this decision we address in greater detail the evidence we have received on the question of the genuineness of the claimed conversion to Christianity.

[52] We turn first to an assessment of the appellant's credibility.

CREDIBILITY - LEGAL ISSUES

[53] It is well recognised that issues of credibility lie at the heart of most determinations of refugee status. See, for example, *Khalon v Attorney-General* [1996] 1 NZLR 458, 467 (Fisher J). Given the credibility determination required in the present case, some points of reference might be helpful.

Credibility and the consequences of an adverse finding

[54] In the refugee context, as in many others, it is common to encounter situations in which the particular individual has told lies and the Authority is well aware of the danger, when making a credibility assessment, of relying on such lies for they can be told for many reasons, some of them understandable, some not entirely rational. The fact that lies are told during an interview does not mean that the refugee claimant is not telling the truth about the facts on which the well-founded fear of being persecuted is based, a point recently acknowledged by Harrison J in *AA v Refugee Status Appeals Authority* (High Court Auckland, CIV-2006-404-7974, 29 June 2007) at para [41(2)]:

> The fact that a party has lied when giving evidence at a hearing in any jurisdiction does not of itself mean that the whole of his or her evidence is untruthful. The nature and context of the lie are relevant to its weight.

[55] Indeed, even if the entire account of a refugee claimant is dismissed as a fabrication, it does not necessarily follow that the individual is not a Convention refugee. Other evidence, independent of the claimant, including country information,

may establish that the individual is at risk of being persecuted for a Convention reason; in which case recognition of refugee status must follow notwithstanding that the particular claimant's account has been properly rejected in every respect on credibility grounds. See *Sakran v Minister of Immigration* (High Court Christchurch, CIV2003-409-001876, 22 December 2003, William Young J) at paras [41] to [43]. The point is encapsulated by the *Michigan Guidelines on Well-Founded Fear* (2005) 26 Mich. J. Int'l L 491 at para [12]:

> Even where there is a finding that an applicant's testimony is not credible, in whole or in part, the decision-maker must nonetheless assess the actual risk faced by an applicant on the basis of other material evidence.

[56] The point was expressed in different terms by Anderson J in *K v Refugee Status Appeals Authority* (High Court Auckland, M No. 1586-SW99, 22 February 2000) at para [38]:

> It is axiomatic that the plaintiff's claim should be assessed on the basis of what facts were found, and not on the basis of what evidence was rejected.

Expert evidence and the issue of credibility

[57] It is also common in refugee claims for expert evidence to be given on a range of issues, including medical and psychiatric matters, country conditions and the like. Clearly such evidence must be taken into account and carefully assessed but the decision-maker cannot surrender to the expert the responsibility of assessing the evidence and of making findings of credibility and of fact. See *Butler v Removal Review Authority* [1998] NZAR 409 at 424 (Giles J) applied in *Razak v Refugee Status Appeals Authority* [2002] NZAR 552 at 556 (Chisholm J). See also *Ravinthrakumar v Immigration Appeal Tribunal* [2004] Imm AR 28 (CA). The relevant extract from *Butler* follows:

> ... the Authority is a body required to act judicially. It must evaluate and reach a

> determination on the evidence. The consequence of counsel's submission would be to abrogate the decision making function of the Authority to that of the qualified expert. That cannot be right. It is for the Authority to evaluate and assess the evidence in a reasoned, objective and judicial manner. Expert evidence is an important part of the evidence, but, as the Authority noted, it is only 'part' of the evidence. The Authority is entitled, indeed required, to consider it in the context of, and to measure it against, other evidence.
>
> ...
>
> In my view the Authority is not obliged to accept the report of a qualified expert without more. It is fully entitled to evaluate and assess that evidence, to consider it in the context of the totality of the evidence, and to reach its own objective and reasoned assessment of it.

[58] We make the latter point because in the submissions to the Minister of Immigration dated 27 September 2007 and in submissions to this Authority, it was argued for the appellant that in assessing whether the appellant's claimed conversion to Christianity was genuine, the decision-maker must take advice from "the experts", defined as "established church leaders of integrity"; the authenticity of the appellant's professed Christian faith was to be determined by reference to "independent" evidence on the point. However, the submission is not entirely congruent with the law as stated above. Particularly the Authority cannot abrogate its decision-making function to an "expert". In any event, for reasons developed later in this decision, we have found the so-called expert evidence in this case of little assistance. Then the Authority was referred to Appendix C to the submissions for the Minister dated 27 September 2007 which is a document said to identify "a variety of errors that have been committed by immigration officials when interviewing and assessing the authenticity of the faith of alleged Christian converts". The document is dated February 2005 and addresses the refugee determination process in the United Kingdom. Of the four authors, three appear to be members of the clergy and one is described as a senior lecturer in law. The qualifications and experience of the authors are not disclosed. This is somewhat unfortunate given that the authors are criticising refugee decision-makers in the UK for themselves not having the qualification and expertise to make credibility assessments in religious conversion cases. Be that as it may we understand many of the concerns expressed by the authors but do not take them to suggest that it is

impermissible or otherwise inappropriate for a refugee decision-maker to test the credibility of an asylum-seeker's claim to have converted to Christianity, to assess the genuineness of the conversion and to arrive at findings of credibility. In the circumstances we do not find Appendix C of any help on the facts of the present case.

[59] We turn now to issues central to the appellant's credibility.

[60] Integral to the appellant's claim to refugee status are the documents he has produced and the evidence he has given in relation to them. Both the documents and his evidence illuminate central aspects to the refugee claim. Among those documents are:

(a) The certificates of identity issued by the Seoul Migrant Mission Church.

(b) The certificates of baptism issued by the Seoul Migrant Mission Church.

(c) The four Iranian documents purporting to establish that the appellant has been sentenced to death, namely the "please report" letter dated 8 February 2005 from the Islamic Revolution Court of Tehran, the summons dated 28 February 2006, the death sentence dated 4 March 2005 and the handwritten letter from the appellant's brother.

Each of these sets of documents will be considered in turn.

THE CERTIFICATES OF IDENTITY FROM THE SEOUL MIGRANT MISSION CHURCH

[61] Central to the appellant's case is his claim that he first travelled from Iran to Korea on 29 February 2000 and within a short period of time began attending a Christian church in Seoul, his conversion to Christianity following in April 2001. It

was when he telephoned his mother to inform her of this development and sent her a parcel containing photographs of himself with church elders standing by a cross, together with a videotape of a church service (first decision paras [15] to [18]), that his difficulties in Iran began.

[62] As will be recalled, the first appeal before this Authority was heard on 4 March 2004 and 1 April 2004. Following the hearing, by letter dated 30 April 2004 the appellant's then counsel (Jean Hindman) filed:

(a) A certificate of identification from the Seoul Migrant Mission Church dated 29 February 2004 attesting that the appellant had faithfully attended the church from March 2000 to April 2002; and

(b) A selected certified translation of a baptism certificate mistakenly said to be dated 19 November 2002 but in fact dated two years earlier, namely 19 November 2000 from the Seoul Migrant Mission Church certifying that the appellant had been "officially baptised" in the church on 19 November 2000.

These are called "the Hindman documents" to distinguish them from a second certificate of identification and a second certificate of baptism subsequently submitted by the appellant through Mr Illingworth QC to the Minister of Immigration on 27 September 2007, some three years and five months later. The second set will be referred to as "the Illingworth documents" or, as the case may require, "the Illingworth certificate of baptism" or "the Illingworth certificate of identification".

[63] We address first the certificates of identification and then the certificates of baptism.

Conflicting certificates of identification

[64] The focus of attention in relation to both the Hindman and Illingworth certificates of identification are the commencement and terminating dates of the appellant's claimed "faithful" attendance at the Seoul Migrant Mission Church:

(a) The two certificates contain conflicting dates.

(b) The Hindman certificate of identity contradicts the appellant's claim that he returned to Iran to see his sick mother.

(c) The Illingworth certificate of identity contradicts the appellant's claim that he first arrived in South Korea on 29 February 2000.

[65] The Hindman certificate of identification places the commencement of the appellant's attendance at the Seoul church at March 2000, which is consistent with the appellant's claim that he arrived in South Korea on or about 29 February 2000. However, the terminating date on the Hindman document of the appellant's attendance at the Seoul church is given as April 2002. This latter date is in conflict with the appellant's evidence that he left South Korea in April or May 2001 to visit his ailing mother in Iran and that he did not return to South Korea until January or February 2002 when he stayed for three months and ten days before travelling to New Zealand. It follows that the Hindman certificate of identification is either inaccurate in asserting the appellant's faithful attendance at the church in the period April/May 2001 to January/February 2002 or the appellant was actually living in South Korea for an uninterrupted period from March 2000 to April 2002. If the latter, he did not return to Iran as claimed.

[66] We turn now to the second certificate of identification, being the document annexed to Mr Illingworth's submissions to the Minister dated 27 September 2007. In this certificate the dates of "faithful" attendance by the appellant at the church are said

to be “from August 1999 to March 2001”.

[67] The commencement date of August 1999 conflicts with the appellant’s asserted date of first arrival in South Korea, namely 29 February 2000. The terminating date of March 2001 is consistent with his claim that he went to Iran in April or May of 2001 to see his mother. The certificate accordingly raises the possibility that the appellant was in South Korea on a date much earlier than that claimed and in circumstances which have not yet been disclosed.

[68] Having noted the conflicting dates in the Hindman and Illingworth certificates of identification, the third panel of the Authority asked the appellant about the circumstances in which the Hindman documents had been received in New Zealand. The appellant said that after the first RSAA hearing he had contacted the church in South Korea and asked for information confirming the length of time he had attended the church there. As a consequence he received the envelope and the two documents submitted to the RSAA by Ms Hindman, being the baptism certificate and the certificate of identification. He had made one or two telephone calls to the church. Once he had received the documents he did not contact the church again. Nowhere in his evidence, either before the third panel of the Authority or at any earlier time in the presentation of his refugee claim, was there any suggestion that he had received a different set of certificates from the Seoul Migrant Mission Church.

[69] The appellant’s attention was then drawn to the fact that the Hindman and Illingworth certificates contain very different dates of attendance at the church and that it is apparent that he has tendered conflicting documents in support of his refugee claim. To this he glibly asserted that there was not much difference between the two documents. After being pressed on the clear differences between the claimed attendance dates, the appellant changed his evidence, saying that the Illingworth documents were in fact the **first** set of documents received from the Seoul Migrant

Mission Church. When these documents were taken to his then lawyer (Ms Hindman) she had drawn attention to the "August 1999" date in the certificate of identification and he (the appellant) had consequently contacted the South Korean church again and as a result received the **second** set of documents which were eventually filed in support of his first appeal by Ms Hindman.

[70] The third panel of the Authority was therefore confronted not only with the surprise appearance of the new set of baptism and identification documents in the submissions to the Minister but also with the assertion that the Hindman set was the second set to arrive in New Zealand. Even the appellant's account as to the circumstances in which the Hindman set was obtained was an evolving one. Initially the appellant asserted that when he received the envelope containing the Illingworth documents he gave them to his lawyer (Ms Hindman) and was told that there were problems in relation to the dates in the certificate of identity and that he was to contact the church in South Korea to ask them to send a new set of documents. On this account it is to be noted that it was the lawyer who advised him that there was a difficulty about the dates. The appellant repeated this evidence on more than one occasion during the third appeal hearing. Later, however, his evidence changed once more. The new account was that on receiving the first set (ie the Illingworth set) he (the appellant), not the lawyer, had noticed that the certificate of identity (written in English) had a problem with dates and instead of giving the certificate to Ms Hindman, he had telephoned the church in South Korea and it was in those circumstances that the second set of documents had been received in New Zealand, handed to Ms Hindman and filed with the RSAA.

Conclusions in respect of certificates of identification

[71] Apart from the evolving nature of the appellant's evidence, the Authority found him glib and consistently evasive as to the circumstances in which the Hindman and

Illingworth documents had been obtained. In our view there has been a distinct lack of candour on the part of the appellant in failing to disclose the true circumstances in which the two contrasting sets of documents were obtained and he actively concealed from the first and second panels of this Authority the fact that the Hindman set of documents was not the only set in his possession. The claimed "original" Illingworth set emerged by accident when, immediately following his release from prison and while still weakened by his "fast", the appellant inadvertently provided Mr Illingworth with the conflicting documents. The irreconcilable attendance dates asserted by the certificates of identification challenge in a substantial way the appellant's narrative of arrival in South Korea on or about 29 February 2000, his return to Iran to visit his sick mother and his subsequent re-entry to South Korea following a hasty departure from Iran to escape the authorities. The Illingworth set places the appellant in South Korea much earlier than that presently admitted to by the appellant and, if accurate, points to an entirely different set of circumstances which have not yet been disclosed.

[72] The appellant's difficulties with the certificates of identification are compounded by difficulties with the two sets of baptism certificates which accompanied the certificates of identification. It is to these certificates that we now turn.

THE BAPTISM CERTIFICATES

[73] At the hearing two points emerged in relation to the two baptism certificates issued by the Seoul Migrant Mission Church:

(a) The two certificates contain conflicting dates for the claimed baptism;

(b) Whether the appellant was in truth baptised by the Seoul Migrant Mission Church and whether he knew that the documents provided by that church were baptism certificates.

Conflicting baptism certificates

[74] The Hindman baptism certificate certifies that the appellant was “officially baptised” in the Seoul Migrant Mission Church on 19 November 2000. By way of contrast, the Illingworth baptism certificate asserts that the date of baptism was 4 April 2001.

[75] There are two minor differences in that there is a slight variation in the spelling of the appellant’s name and what appears to be a serial number in the top left hand corner. It changes from “0027" to “01-1-18".

[76] Asked why he gave Mr Illingworth the baptism certificate which asserts a baptism date of 4 April 2001, the appellant said that it was a mistake.

Whether appellant baptised in South Korea

[77] As the first panel of the Authority noted at para [35] of its decision of 16 June 2004, the Hindman baptism certificate conflicts with the appellant's evidence given at his initial interview by the refugee status officer (and repeated before the first panel of the Authority) that he was not baptised in South Korea. It was only after he arrived in New Zealand that he was baptised by full immersion on 30 June 2002 by the Pan Pacific Mission.

[78] Asked by us why, in these circumstances, he had given the baptism certificate of 19 November 2000 to Ms Hindman the appellant pointed out (correctly) that the Hindman certificate of identification was in English (a language which he could then understand) but the baptism certificate is mostly in Korean (except for his name and the date of baptism), a language he could not read. He thought the two documents were one ie that the baptism certificate was part of the certificate of identification and he was therefore unaware that he had provided Ms Hindman with a certificate of baptism. It was Ms Hindman who had arranged for the Korean language document to be translated and he claims that he was not told by her at any point that the Korean language document turned out to be a baptism certificate. Nor had he ever been provided with a copy of the English translation.

[79] The appellant went on to say that he learned from attending Mass and Scripture Study at Auckland Central Remand Prison that it was possible to be baptised not only by full immersion, but also by the sprinkling of water. He also recalled that on one occasion, when attending the church in South Korea, he had been sprinkled with water. When he became aware in late 2005 or early 2006 that the second document he had given to Ms Hindman was a baptism certificate he realised, for the first time, that he had indeed been baptised by the church in Seoul and that his earlier assertion that he had not been baptised there was mistaken and based on an inadequate

understanding of the true circumstances.

[80] Asked whether, at any time, he had contacted the church in Seoul to obtain clarification of how and when he had been baptised and the dates of his attendance at the church, the appellant replied in the negative. The Authority found this response surprising given the difficulty this point has caused his refugee claim and given the significance of baptism in the Christian faith.

Conclusions in respect of baptism certificates

[81] As in relation to the two certificates of identification, the appellant's evidence in relation to the baptism certificates was characterised by evasion and glibness. In particular we do not accept that while in prison he discovered that he had in fact been baptised in South Korea by being sprinkled with water. This is nothing more than an opportunistic attempt to reconcile his unequivocal statement in his first refugee claim that he had not been baptised with the later production of the baptism certificate through Ms Hindman:

(a) It is to be recalled that at the very first interview with the refugee status officer and again at the first appeal hearing, he had underlined his "not baptised" statement by pointing out that it was his understanding that baptism occurred in Korea only twice a year, namely during Easter and during Christmas. This evidence, given when his experiences in South Korea were then much closer in time, clearly evidenced an awareness of what baptism was in the Seoul Migrant Mission Church and when it occurred. We do not accept his belated rationalisation that he was sprinkled with water in South Korea and thereby baptised, in effect, without his knowledge. Given the significance of baptism, it is remarkable, to say the least, that he would not have been made aware of the fact that he was being "officially" baptised by the church in South Korea.

(b) Furthermore, the irreconcilable baptism dates given in the Hindman and Illingworth baptism certificates respectively seriously undermine the credibility of any claim to have been baptised in South Korea. Added to this is the appellant's failure to make proper inquiry and to provide authentication of his alleged baptism, if indeed it ever occurred.

(c) Not only are the claimed dates of baptism in the two certificates irreconcilable, the Illingworth certificate places the baptism almost immediately upon the appellant beginning his alleged attendance at the Seoul church, making baptism on that date highly improbable, to say the least.

Overall conclusions in relation to South Korean certificates

[82] When the two baptism certificates are put in the context of the accompanying certificates of identification, we conclude that either the appellant has not given a truthful account of his arrival in South Korea and his subsequent activities there or that the documents are false, or a combination of the two.

[83] Our assessment of the appellant as a witness is that he has not given a truthful account either as to when he arrived in South Korea or as to his activities in that country. He knowingly concealed the first set of documents until, disorientated by his "fast", he inadvertently provided that set to Mr Illingworth for submission to the Minister of Immigration. His attempts to reconcile the Illingworth and Hindman documents with the narrative of evidence he has given on previous occasions is nothing more than an after the fact rationalisation, not a reflection of an underlying truthful experience of conversion to Christianity in South Korea.

[84] We do not accept his account of his arrival and departure from South Korea, his claimed attendance at the church in Seoul, his baptism there or his return to Iran in the

circumstances claimed. In short, we reject entirely all parts of his evidence as to matters which occurred prior to his arrival in New Zealand on 6 May 2002.

[85] We turn now to the death sentence documents.

DEATH SENTENCE DOCUMENTS

[86] It is to be recalled that the four documents evidencing the death sentence were submitted by Mr Hylan to the refugee status officer by letter dated 6 March 2006 in support of the second refugee application lodged on 14 December 2005 and after the appellant had been taken into custody. The contention by the appellant was that his death sentence for apostasy and blasphemy constituted a change of circumstances in Iran and thereby gave the refugee status officer jurisdiction to entertain the second refugee application. Although the refugee status officer had serious concerns as to the credibility of both the claim and of the documents, he was prepared to assume, without deciding, that there had been a change of circumstances in Iran for the purpose of the first limb of the jurisdiction test. However, as to the second limb, because the grounds on which the second refugee claim were based were in the officer's opinion the same as the first claim, the jurisdictional bar had not been crossed.

[87] The second appeal to the Authority was heard on 10 August 2006. The four Iranian documents were at the centre of that appeal. After hearing the appellant give evidence the second panel of this Authority gave comprehensive reasons for not believing him and found that none of the four documents from Iran were genuine. We do not intend to repeat here the reasons given for those findings. It is sufficient to note that the findings specifically rejected the appellant's account of the circumstances in which he came to know of the death sentence and of his account of his dealings with his then solicitors (Marshall Bird & Curtis) in relation to the documents:

(a) The appellant had told the refugee status officer that he (the appellant) had spoken directly with his lawyer about the death sentence and the court documents soon after he received the news from his mother but his lawyer had told him "to wait".

(b) On appeal he told the second panel of the Authority that on learning from his mother that he had been sentenced to death he had telephoned his lawyer's office and told his lawyer's secretary about the news and advised her that he was waiting for the court documents to arrive. He expected that the secretary would tell the lawyer who would in turn advise the Minister, before whom there was then an appeal under s 35A of the Act. It did not occur to him to check that the secretary had passed the information to the lawyer and then to the Minister because he had lost his mobile telephone and he was waiting for the court documents to arrive.

(c) Confronted by the second panel with the inconsistency between (a) and (b) above, the appellant said that his evidence to the refugee status officer was wrong. He was granted leave by the second panel to obtain the lawyer's file and to file any relevant evidence which might support the account in (b) above. After Mr Mansouri-Rad (who appeared for the appellant on the second appeal) filed the information he had obtained from the Marshall Bird & Curtis file, the second panel of the Authority concluded that there was no indication in that new evidence that the appellant had mentioned the death sentence to anyone in the office of Marshall Bird & Curtis. It remarked that the papers showed no sense of the urgency one might expect from an appellant who had just learnt that he had been sentenced to death. The Authority also found that the appellant's claim that the loss of his mobile telephone precluded him from ensuring that his lawyer knew of the death sentence was "absurd". Further,

there was no logical reason for the appellant to delay communicating the fact of his death sentence to his lawyer until he had some documents to support it.

(d) Another aspect of the appellant's evidence which was adversely commented on in the decision of the second panel was his claim that his family, on receipt of the documents, had not reported this development to the appellant. To the second panel he stated that his family had not taken the request letter and the summons seriously but they had panicked on receipt of the death sentence. On the second panel expressing their astonishment that an Iranian citizen would not take seriously a summons from the Revolutionary Court (particularly in circumstances where the Iranian authorities had previously been making enquiries about the appellant in relation to his conversion to Christianity causing the appellant to flee Iran to save his life), the appellant explained that his mother was "not the kind of person to know everything. She just looked at them [the documents] and thought they were not important". The second panel described this explanation as "not plausible" and did not accept it. The panel also described as implausible the appellant's claim that his family were waiting for **all** the documents to arrive before they told the appellant about them. As the second panel commented, the family could not have known, when the first document arrived, whether other documents would arrive and, if so, when. Second, it would be illogical and dangerous for the family to delay advising the appellant of the serious charges against him while they waited for documents that might never arrive.

[88] We have repeated these few aspects of the decision of the second panel to underline the point that the four Iranian documents were not dismissed in a vacuum. The finding that they were not genuine documents was a finding reached after hearing the appellant's account and after reaching the conclusion that he himself was not a credible witness as to the circumstances in which he had learnt of the death sentence

and as to the circumstances in which the documents had arrived in New Zealand. It was implicit from the findings made by the second panel that the appellant himself was aware that the story that he had been sentenced to death and that he was at risk of being killed by cousins was a made up story. We emphasise this point because in the submissions to the Minister dated 27 September 2007, relied on both before the refugee status officer and before the present panel of the Authority, it is argued that the second panel had made "a crucial mistake" in that, having concluded that the documents were not authentic, they "simply assumed" that the appellant must have known that the documents were not authentic. In our view this submission is based on a decontextualised reading of the second decision of the Authority. While no express finding is made that the appellant was aware that the documents were not authentic, it is a finding which is necessarily implicit in the specific points in relation to which his evidence was expressly rejected.

[89] We, the third panel, have nevertheless independently considered the question whether, at the time the documents were submitted in support of the second refugee claim, the appellant was aware that the documents were false documents. Our conclusion is that he was so aware. Our reasons follow.

[90] Ordinarily, the question whether a person was aware of the falsity of a document requires prior establishment of the fact that the document is indeed false. As to this, it is now conceded by the appellant that the death sentence documents are false documents:

(a) In the submissions to the Minister dated 27 September 2007 at para 5.8 it is stated:

> The issue of greatest significance in the second appeal was the authenticity of the alleged death sentence documents. The RSAA's concerns over those documents appear to be well-founded and for present purposes counsel accept that it would

> be extremely difficult to establish that they were authentic. But even assuming that the RSAA decision was correct in relation to the authenticity of the documents, it does not follow that [the appellant]'s credibility is destroyed as a result.

(b) In opening the appellant's case before this, the third panel of the Authority on 28 July 2008, Mr Illingworth conceded that it was "quite clear that the court documents were false documents". He went on to repeat the point that the appellant says that he did not know they were false and did not have reason to doubt them. This the appellant confirmed in evidence, emphasising that it was his belief that the documents were genuine and he did not ask anyone to get false documents for him.

[91] As to whether the appellant knew the documents to be false when they were first submitted in support of his refugee claim, it is relevant to take into account:

(a) The evidence he gave to the second panel (as opposed to that panel's findings); and

(b) Whether the appellant has been honest and candid in the use to which the documents have been put by him.

[92] As to the evidence he gave to the second panel, it is relevant that he has given inconsistent accounts of his dealings with his then lawyers in relation to the news of the death sentence. The file of his then lawyer does not support his claim that he told someone in that firm of the death sentence. The claim that the loss of his mobile telephone precluded him from ensuring that his lawyer knew of the death sentence is, at the very least, implausible as is the claim that his mother delayed telling him of the letter and summons because she did not think them important.

[93] But over and above these points is the issue explored at some length before us, the third panel, namely whether the appellant's dealings with the "death sentence" documents have been sincere, forthright and candid. We have found that they were not and that he was not truthful when questioned on these issues.

[94] We begin by noting that the appellant has deployed the claimed death sentence to good effect and it has attracted wide publicity to his case. The death sentence was mentioned to Mr Keane, his work supervisor, and the appellant has made no secret of the fact that as a convert to Christianity he faces death in Iran. It was the evidence of Revd Sperring that the appellant asked him to make it known that he (the appellant) was under sentence of death and he gave Revd Sperring a copy of the Iranian document dated 5 March 2005 evidencing that sentence. The Revd Sperring said that he believed the document to be true and he made specific reference to the death sentence in an affidavit he swore on 7 June 2007 in support of an application in the District Court at North Shore that the appellant be released on conditions. In addition (and more publicly) Revd Sperring gave wide dissemination to the death sentence document in the television interview produced in evidence. In this interview the point made by Revd Sperring was that it was unjust for the appellant to be detained in prison pending his removal to Iran when, as a Christian convert, he faced execution in Iran by judicial sentence of death. The document purporting to be the death sentence was displayed by Revd Sperring for viewers of the programme to see.

[95] There is no doubt that Revd Sperring was in good faith conscientiously drawing attention to an enormous wrong which he believed was being inflicted on the appellant. Indeed he has been a tireless campaigner for the appellant and his commitment is underlined by the fact that the appellant's bail conditions require him to live in the Revd Sperring's household. But at no time has the appellant shown Revd Sperring the first and second decisions of the Authority. Given the centrality of the death sentence to the appellant's case (at least until the concession was made as to

its falsity), the selective provision of the death sentence to Revd Sperring without the findings of the second panel in relation to that document disabled Revd Sperring from understanding the full circumstances of the case. As it turned out, he was even left ignorant by the appellant of the later concession that the Iranian documents are indeed false documents. We expand on this point next.

[96] Given the concession in the submissions to the Minister dated 27 September 2007 that "The RSAA's concerns over [the alleged death sentence] documents appear to be well-founded" and further given the explicit concession made on 28 July 2008 (in the presence of the appellant) that it was "quite clear that the court documents were false documents", the present panel of the Authority enquired of Revd Sperring on Day 3 of the hearing (31 July 2008) whether, given his expressed belief that the Iranian documents were true, he had been told by the appellant that it was conceded that the documents were false documents. He answered in the negative.

[97] It strikes the Authority as remarkable that having asked his mentor to publicise the death sentence, not only would the appellant withhold from Revd Sperring the decision of the second panel of the Authority but that he would also leave Revd Sperring in ignorance of the concession as to falsity made first on 27 September 2007 and repeated at the opening of the appeal on 28 July 2008. We do not see this as an oversight on the appellant's part. The death sentence was, on any view, a dramatic development in his case and he used Revd Sperring, a man of the cloth, to ensure that maximum (credible) publicity was obtained. Withholding from Revd Sperring the findings of the second panel of the Authority and later withholding from him the concession that the documents are indeed false documents is strong evidence of a distinct lack of candour and openness, notwithstanding the appellant's claimed belief in Christian principles. The situation was not improved by the calling of the Revd Sperring's wife to give evidence to the effect that although she had been present at a meeting in Mr Illingworth's office when the appellant was advised to accept that the

Iranian documents were false, she had failed to pass this information on to her husband. At all times the responsibility for making full disclosure rested on the shoulders of the appellant, he having requested Revd Sperring to publicise the death sentence and having armed him with a copy of the document itself. He has, after all, been living in Revd Sperring's household throughout the period from 3 September 2007 down to the present time.

[98] There was a similar lack of candour in relation to his dealings with the witness Bruce Keane who has known the appellant for the past four years, first as his supervisor at work and then as a friend. He was a regular visitor to Auckland Central Remand Prison during the period of the appellant's detention there and also appeared on television to forcefully argue what he believes to be an injustice done to the appellant. Prior to his arrest the appellant had told Mr Keane that he (the appellant) was expecting an important document establishing that he (the appellant) had been sentenced to death in Iran for apostasy. Subsequent to the appellant being taken into custody, Mr Keane personally uplifted the parcel containing the documents from DHL, took photocopies of the documents and delivered them to Mr Hylan. Following his (Mr Keane's) appearance on television someone (not the appellant) had told him that the death sentence document might not be an original and there could have been a mistake in the court. Yet the appellant has not told him (Mr Keane), subsequent to his (the appellant's) release, that it was now conceded that the court documents are false. It was only when Mr Keane gave evidence on the fourth day of the hearing (1 August 2008), that Mr Keane first learnt of the concession as to falsity from the Authority's questions. This is a second illustration of the appellant's selective deployment of information to suit his own purposes.

[99] In closing submissions the Authority was asked to accept the appellant's evidence that while a concession had been made on his behalf that the court documents are false documents, it remains his belief that they are genuine. The

Authority was also asked to consider the possibility that there was a real likelihood that the death sentence documents were delivered to his mother by cousins intent on harming the appellant and that the mother had been intimidated into sending the documents to the appellant in good faith, believing the documents to be true, and the appellant had held the same belief.

Conclusions in relation to death sentence documents

[100] The short answer to these claims is that the Authority does not believe the appellant. His claimed belief in the genuineness of the documents was asserted with an artificial, if not contrived air of innocence. Our assessment of his demeanour is supported by the fact that at the second appeal hearing he gave conflicting evidence as to whether he told his then lawyer of the death sentence. He also gave as the reason for not checking to ensure that his lawyer had received this important information the untenable explanation that he had lost his mobile telephone and was waiting for the court documents to arrive. There is also the improbable gap between mid-2001 when he allegedly fled Iran and the date of the purported death sentence of 4 March 2005. The "existence" of the death sentence was not mentioned in the appeal to the Minister of Immigration dated 23 June 2005. It first surfaced, somewhat fortuitously, only after the removal order was served on 7 December 2005 and after the appellant had been taken into custody. In all the circumstances the Authority explicitly rejects the appellant's evidence that he believed the Iranian documents to be genuine. On the contrary, the Authority finds that from the outset he was aware of what is now conceded on his behalf, namely that the court documents are false documents. It follows that he has deliberately misled all those who have taken up his cause in the belief that he has been sentenced to death.

[101] Before leaving this issue it is necessary to make the point that the appellant cannot plead the confidentiality provisions of s 129T of the Act as the reason for not

disclosing the decisions of the first and second panels to his supporters. He asked Revd Sperring to give wide publicity to the death sentence and he has, without heed to confidentiality issues, spoken to many individuals about his refugee claim and disclosed the basis on which it is advanced. He has spoken twice on national television, the first during his "fast" when he was admitted to Auckland Hospital and the second when he was released from custody from the District Court at North Shore. There has been an implied, if not an express, waiver of confidentiality in terms of s 129T(4). He cannot plead the statutory provision as a defence to the withholding of the first two decisions of this Authority from his support group. Nor can the provisions of s 129T excuse his marked lack of candour in propounding his claims without permitting access to the objective analysis of those claims. Given the terms of s 129T(4), there is no basis whatever for the suggestion by counsel that the then Minister of Immigration, Hon David Cunliffe, was in breach of the confidentiality obligation. On one view he (the Minister) would have been justified in making public the first two decisions of the Authority under s 129T(4) which permits such disclosure where a refugee claimant has expressly or impliedly waived his or her right to confidentiality.

CREDIBILITY - APPELLANT'S SUBMISSIONS

[102] In closing submissions it was accepted by Mr Illingworth that in some ways the appellant did not make a good witness. Reference was made to his failure to answer questions directly even though assisted by an interpreter of the highest quality. It was submitted on his behalf that in any credibility assessment, allowance had to be made for the fact that the appellant is "a person of limited intellectual and linguistic ability who is at times obtuse". It was conceded that as a witness the appellant "could have done a lot better" but the Authority was reminded that this did not indicate dishonesty as opposed to "confusion and an obtuse aspect to his nature" in terms of understanding the point of a question and addressing it in his reply.

[103] In asking the Authority to make considerable allowance for the appellant's attributes attention was drawn to the fact that many events had occurred some time in the past and the appellant's prolonged "fast" had made him extremely unwell and, while there was no medical evidence on the point, the fast had also affected the appellant's memory.

[104] The Authority was also asked to give substantial weight to the evidence given by a wide range of people who had reached a highly favourable assessment of the appellant. The Authority had to weigh the possibility that while there were matters on which the appellant had been evasive or on which he had prevaricated, he was a person who had impressed a large number of people and there may be reasons other than dishonesty which explain the deficiencies in his evidence. In short, it was possible that he had not tried to deceive anyone.

[105] We have considered these submissions at length but in the end our conclusions on the appellant's credibility are clear, as would be apparent from the preceding analysis. He is a manipulative and opportunistic individual who is indifferent to his sworn obligation to tell the truth. He has provided information to those around him on a "need to know" basis; that is, information has been provided selectively for the purpose of securing the particular person's acceptance and belief. Having considered the alternative possibilities elaborated on by counsel in closing submissions, we are of the clear view that from the outset the appellant initiated and pursued his refugee claim on an intentionally false premise, namely that he is a convert from Islam to Christianity.

[106] We do not accept that weight can be given to the character assessments given in evidence by the appellant's witnesses or to their belief that his commitment to Christianity is genuine. The Authority has had the benefit of access to all of the

evidence running to some 1,707 pages, including the detailed statements made by the appellant, the evidence recorded in the first instance interviews, the first and second decisions of the Authority and to the documents submitted in support of the refugee claim. Above all, we (the third panel), like our colleagues on the previous panels, have had the advantage of an objective investigation of the claims by a process of close questioning and exploration of the appellant's credibility over more than two days.

[107] None of the appellant's witnesses have had these advantages. This point is underlined by the fact that he has not shown the first and second decisions of the Authority to his support group. They have taken his assertions at face value. We are of the view that his highly selective deployment of elements of his claim to engender support for his case is itself a reflection of his overall failure to deal with refugee status officers, the Authority and the Minister of Immigration with the candour that applications of this kind require and which, were he truly the devout Christian he claims to be, he would have manifested in any event. His withholding from Revd Sperring of the concession as to the falsity of the Iranian death sentence documents is indicative of the point.

CREDIBILITY - THE QUESTION OF THE CONVERSION

[108] Our assessment of the appellant's credibility as a witness is an unflattering one. However, we remind ourselves that this assessment is not necessarily determinative of the view to be reached on the question of his claimed renunciation of Islam and his conversion to Christianity.

[109] The circumstances of the appellant's case engender considerable scepticism. His first and second refugee claims were based on an asserted conversion which had come to the attention of the Iranian authorities after their interception of the

photographs and video posted by the appellant to his mother from South Korea. On that version being disbelieved he asserted a new mechanism for establishing knowledge by Iranian officials of a purported conversion, namely the death sentence documents which were used to good effect to generate publicity for his case in New Zealand which, in turn, was said to establish knowledge of his claims by Iranian officials. The subsequent "fast" also generated much publicity for the case and the grounds on which it is based. Either way, it is now claimed that the publicity has inevitably led the Iranian authorities in Wellington (and by inference in Iran itself), to be aware of his claimed apostasy.

[110] Our general assessment of the appellant's credibility might seem enough to dismiss out of hand the claim that the appellant's conversion is a genuine one. However, having given long and careful consideration to the evidence we have concluded that the issue should be separately addressed. We address first the evidence given by the appellant's church witnesses.

Assessment of the "expert" evidence

[111] The Authority is required to make an assessment of the appellant as a witness and to then determine which part or parts of his evidence are accepted or rejected or to which the benefit of the doubt is to be extended. His evidence spans what might be described as matters temporal and matters spiritual. The former includes issues relating to his travel movements, activities in the various countries through which he has passed and his general narrative of events, both overseas and in New Zealand. That narrative has as its centre his claim to have converted to Christianity.

[112] With the possible exception of Mr Keane (his former work supervisor), all the witnesses who gave evidence, either in person or in writing, deposed largely to matters spiritual, particularly the genuineness with which the appellant (in their view)

professes his new faith. We doubt very much whether any of the parishioners from St James claim to be experts on the subject. Certainly Mr Keane does not claim to be one. That leaves the ordained priests, being Revd Sperring and Dr Dancer. While we had a short reference from Revd Terry Dibble, we did not hear from him personally and his letter was not put before us with the suggestion that it contained expert evidence. As previously mentioned it merely confirms that the appellant was found to be a "very sincere young man who takes an active part in both the Mass and the Scripture Study".

[113] As to Revd Sperring and Dr Dancer, it was really the latter who was put forward as an expert in the true sense of the term, his qualifications being that he works as the Social Justice Commissioner for the Anglican Church in Aotearoa, New Zealand and Polynesia, he is an ordained priest of the Anglican Church, and holds degrees from Exeter University and more recently the University of Oxford. Among other things, over the years he has conducted research into areas of justice, discipleship, conversion and ethics. His office has been primarily responsible for the Anglican Church's engagement with and support of the appellant.

[114] The weight to be given to Dr Dancer's evidence is problematical. He described a one hour meeting in Mt Eden Prison when the appellant was weak from his "fast". His conclusion at the end of that hour (reached with Archbishop Moxon) was that he felt it was more likely than not that the appellant's faith was genuine. He spent a second hour with the appellant following the latter's release from prison and was more convinced at the end of that second hour. However, as previously mentioned, he conceded that because faith is "a subjective thing" one can never be one hundred percent sure as to a person's faith. He also conceded that a person could walk away from their faith at a moments notice. These concessions are not inconsistent with Dr Dancer's assessment that he found the appellant's expression of faith to be genuine but they do underline the inherent difficulty in assessing matters spiritual. In assessing the weight to be given to Dr Dancer's opinion we must necessarily take into

account the less than optimum circumstances in which that opinion was reached (a mere two hour contact period with the first hour comprising a prison visit). In addition, Dr Dancer has not at any time had the advantage of considering the evidence tendered by the appellant in support of his first, second and third refugee claims, or of testing his claims against that evidence in an objective manner. Nor has he had an opportunity to consider the first and second decisions of the Authority. He seemed unconcerned both by these factors and by the fact that he had learnt that it had been said by someone who had examined the death sentence documents that they were false documents. Dr Dancer said that the fact that the appellant has not been accepted as genuine by other decision-makers did not change his view because, he explained, those decisions and the history on which they were based focussed on external factors in the appellant's life. Dr Dancer's assessment took account of what he described as internal factors. His internal assessment outweighed doubts raised by the external.

[115] We find the distinction between "internal" and "external" artificial. Truthfulness spans both aspects of human existence and it must surely be relevant for the Authority to enquire into both aspects not only because the one relates to the other, but also because the one can shed light on the other. While it is possible for a person to be untruthful about external matters but truthful about matters spiritual, sight must not be lost of the fact that belief in Christ means acceptance of a set of values, one of which is honesty in both the internal and external worlds. We cannot accept that in assessing the genuineness of the appellant's claimed conversion it is irrelevant to take into account his evidence as to the "external" factors and the circumstances which preceded, accompanied and followed the claimed conversion. Equally it cannot be irrelevant to take into account the fact that the appellant has produced conflicting documentary evidence as to the dates of his attendance at the church in Seoul and produced certificates of baptism which are not only irreconcilable the one with the other, but also irreconcilable with the evidence he swore to at both the first and second appeal hearings. Equally it is difficult to see how it is irrelevant to the overall

credibility of the appellant's claims in relation to both the internal and external worlds that he has knowingly made the false claim that he has been sentenced to death in Iran for having renounced Islam and converted to Christianity. We are also troubled by the fact that Dr Dancer's opinion was reached after only one contact hour (followed by a second) with the appellant. Little account has been taken of the fact that the hearing before the first panel of the Authority occupied two days, the second appeal hearing occupied a whole day and the appellant gave evidence to the third panel for almost two and a half days. We, the third panel of the Authority, have spent far more time testing the appellant's evidence than Dr Dancer and the Archbishop.

[116] As to the Revd Sperring, when questioned about the fact that he had not been shown by the appellant the first and second decisions of this Authority and had not been told by the appellant that the Iranian death sentence documents were false, he said that he was there to support the appellant in spiritual matters and had not discussed with the appellant his appeals and legal submissions.

[117] Unlike Dr Dancer and Revd Sperring the Authority is required to assess not only the spiritual but also the temporal aspects to the refugee claim. In particular we must reach an integrated assessment of the credibility issues. As mentioned, we do not believe that it is possible to compartmentalise the case. It is understandable that the appellant's witnesses should focus on the spiritual but such artificiality is not open to the Authority. In particular we need to take into account the difficulties in the appellant's evidence not only before us, the third panel, but also the difficulties which emerged in the evidence given to the refugee status officers and to the first and second panels of the Authority.

Findings in relation to the "conversion"

[118] From the time of his arrival in New Zealand the appellant has single-mindedly pursued his ambition to gain residence status in New Zealand. Being unable to satisfy

Government residence policy, his only hope of gaining such status has been to claim refugee status. Given the well-known fact that under Sharia law apostasy is punishable by death, a refugee claim based on this ground has a certain attraction to those opportunistically inclined. To provide evidence of his claimed conversion the appellant attended the Pan Pacific Mission in Auckland where he was baptised on 30 June 2002, a date disconcertingly close to the appellant's arrival in New Zealand on 6 May 2002. Thereafter, from early 2004 he began attendance at St James Church in Orakei. In evidentiary terms, the Pan Pacific Mission served its purpose by providing a certificate of baptism and the attendance at St James produced the letter of support from the Revd Sperring dated 3 March 2004.

[119] But as the appellant's attempts to secure refugee status began to fail and as the period for which he was required to keep up the pretence of a conversion extended from one year into another, the appellant had to keep engaging more and more with his support group, particularly that at St James. Over time he became more adept at playing his role, learning the "vocabulary" of Christianity and how to use the Bible. He became a more convincing actor.

[120] Once taken into custody on 7 December 2005 he had little to do in prison other than to attend Scripture study and Mass and to continue to study the Bible. There was little else he would and could talk about when visited in prison by his supporters from St James. This made the appellant seem all the more credible to those who saw only those scenes of the play to which they were admitted by the appellant. They were not made privy to the underlying pretence at conversion and the manipulative deployment of the false documents, particularly those purporting to establish the death sentence. The appellant played the part of a convert but did not in this process become a genuine convert.

[121] So that our findings cannot be mistaken, the essential points are:

(a) The appellant's purported conversion to Christianity is not a genuine act of faith, but a means to an end, namely to secure residence in New Zealand.

(b) The evidence as to the claimed attendance at the Seoul Migrant Mission Church and the appellant's claimed baptism there is rejected.

(c) The appellant has knowingly deployed false documents in support of his claimed conversion to Christianity, namely the South Korean certificates of identification and certificates of baptism and the Iranian documents purporting to show that he has been sentenced to death for apostasy.

(d) The appellant has not converted to Christianity, but has played the role of a convert. He has assumed an identity of convenience. There is no underlying spiritual content to the role being played.

(e) The untruths told by the appellant, the false documents he has produced and his general lack of candour in dealing even with those who are his strongest supporters, is evidence of the underlying utilitarian nature of his "belief" and the absence of a true commitment to his new proclaimed faith.

The future

[122] Since his release from prison on terms requiring him to live in the household of Revd Sperring, the appellant has found it both necessary and convenient to continue to play the role he has written for himself of a genuine convert to Christianity. But it is our finding that if returned to Iran he will abandon this role prior to his arrival in that country.

[123] We are required to assess the risk of harm to the appellant were he to be returned to Iran as such a person. First we divert briefly to address the relevance of the findings made by the two earlier panels of the Authority.

Whether findings of first and second panels to be relied on

[124] It will be clear that we have arrived at our conclusions on credibility and fact independently of the conclusions reached by the two previous panels of the Authority. In making our own findings we have taken into account the criticisms which have been made of the decisions of the first and second panels of this Authority as set out in the appellant's submissions to the Minister dated 27 September 2007.

[125] That does not mean we accept that the criticisms have validity. The six criticisms made of the decision of the first panel are issues going to weight, plausibility and inference. Opinions might differ on each of these matters but the opinion which counted was that of the first panel as decision-maker. No judicial review challenge was brought by the appellant and we see no compelling basis for exercising our discretion under s 129P(9) against relying on the findings of the first panel.

[126] As to the criticisms made of the decision of the second panel, the point made by the appellant is a simple one, namely that the second panel, having concluded that the Iranian death sentence documents were false, impermissibly found that the appellant must have known that those documents were false. We have already dealt with this argument and explained why it is based on a decontextualised reading of the decision itself and we do not accept that it is a valid criticism of the second decision.

[127] In closing submissions it was accepted that only in exceptional cases would the Authority exercise its discretion to go behind the credibility findings made by another

panel and it was further accepted that there was "a formidable difficulty even in relation to the evidence given by the appellant" before the third panel. Because we have reached independent conclusions on issues of credibility and fact it is largely academic whether we should exercise our discretion under s 129P(9) in favour of not relying on the findings of the first and second panels. But as counsel realistically recognised, this is not in any event one of those exceptional cases in which the discretion should be exercised. Our conclusion is that while we have independently arrived at an adverse credibility finding we would not, in any event, have departed from the findings of credibility and of fact made by the first and second panels of the Authority.

[128] The question is whether anything of the appellant's case remains notwithstanding the findings we have made.

ADDRESSING WHAT REMAINS OF THE APPELLANT'S CASE

[129] In broad terms, we have found the appellant's evidence not credible and we have further found that he is not a genuine convert to Christianity. However, this does not conclude our task of determining whether there is a real risk of the appellant being persecuted should he return to Iran. The question is whether, our findings notwithstanding, there is any remaining evidence of risk. In this regard the answer is in the affirmative. The unusual amount of publicity generated by the appellant will have brought him to the attention of the authorities in Iran. They may mistakenly believe that he is a genuine convert or alternatively, they may wish to punish him for falsely making a claim of renunciation of Islam.

[130] Recognising the potential for an adverse credibility finding, the appellant's fall-back position as articulated in the written submissions of 23 July 2008 at paras 83 and 84 is that even if all credibility is rejected, the appellant cannot return to Iran without a

well-founded fear of being persecuted due to the media coverage "both in New Zealand and internationally":

> The analysis does not depend on the appellant's credibility but on an assessment of whether the media coverage may have caused the Iranian government to target the appellant, thereby greatly increasing the possibility of adverse treatment should the appellant be forced to return to Iran, and thus requiring New Zealand to classify the appellant as a refugee.

[131] In short, the appellant's position is that he is a refugee *sur place*. We address the *sur place* issues next before returning to our analysis of the facts relating to the risk of harm.

Refugees *sur place*

[132] A person who is not a refugee when he or she left the country of origin, but who becomes a refugee at a later date, is called a refugee *sur place*. See the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* at para [94]:

> The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "*sur place*".

[133] As para [96] of the *Handbook* recognises, a person may become a refugee *sur place* as a result of his or her own actions "such as associating with refugees already recognized, or expressing his political views in his country of residence". There is nothing exceptional about these two examples. The first circumstance refers to situations in which the risk of being persecuted arises almost unwittingly and the second to circumstances where the individual has exercised a fundamental human right. It is quite another matter for someone who is not at risk of being persecuted to deliberately manipulate circumstances to create such a risk for the purpose of

subsequently justifying a claim to refugee status. This Authority has held that where an individual so acts he or she is not a person to whom the Refugee Convention applies. See *Refugee Appeal No. 2254/94 Re HB* (21 September 1994) also reported in (1995) 7 IJRL 332. In that case the Authority stated at 36; 352:

> What must be recognised ... is that a person who, not being at risk of fundamental marginalization or disfranchisement in the country of origin, wilfully creates a set of circumstances simply as a means of accessing the benefits of the Refugee Convention cannot be said to be a refugee for the purpose of the Refugee Convention.

[134] In concluding that there is a good faith requirement the Authority at p 59; 352 stated:

> We intend adopting and applying the three-part classification devised by Grahl-Madsen, namely:
>
> (1) Actions undertaken out of genuine political motives.
>
> (2) Actions committed unwittingly, or unwillingly (eg as a result of provocation), but which nevertheless may lead to persecution "for reasons of" (alleged or implied) political opinion.
>
> (3) Actions undertaken for the sole purpose of creating a pretext for invoking fear or persecution.
>
> Our decision to interpret the Refugee Convention as requiring, implicitly, good faith on the part of the asylum seeker turns on a value judgment that the Refugee Convention was intended to protect only those in genuine need of surrogate international protection and that the system must be protected from those who would seek, in a *sur place* situation, to deliberately manipulate circumstances merely to achieve the advantages which recognition as a refugee confers. The sooner abuses of this kind are detected and eliminated, the longer the integrity of the refugee status determination procedures and the protection afforded by the Convention will enable the *bona fide* asylum seeker to escape persecution. Clearly this is the underlying assumption of the Convention.
>
> However, the good faith principle must be applied with caution, not zeal. The precise application of Grah-Madsen's third category must be determined on a case-by-case basis. It may be that a balancing exercise is called for and a careful assessment made of all the circumstances, including the degree of bad faith, the nature of the harm feared and the degree of risk. See, for example, the earlier discussion of *Bastanipour* and the passage cited from Hathaway, *The Law of Refugee Status* 39. We anticipate that only in clear cases (and the present case is undoubtedly one) will an asylum seeker fall outside of the Refugee Convention by reason of an absence of good faith.

[135] The appellant has not challenged this approach. See the submissions to the

Minister dated 27 September 2007 (filed also in support of the third appeal) where, at para 7.7, it is explicitly accepted that "a failed refugee claimant cannot legitimately self-generate a *sur place* claim". The submissions then go on to address the reasons why it is submitted that it is not possible to characterise the circumstances of the appellant's case as one in which there is an absence of good faith.

Whether an absence of good faith

[136] We do not in the good faith analysis hold against the appellant the fact that he has invented a false claim to refugee status, given false evidence and produced false documents. These circumstances are unfortunately very common in the asylum context and are not in themselves evidence of an absence of good faith in the sense now under discussion ie the cynical creation of a risk of being persecuted to provide a platform for a refugee claim through which the individual secures the rights and benefits of a refugee in New Zealand. Rather, the focus must be on the appellant's manipulation of publicity to create a risk of being persecuted which had not until then been present.

[137] In this regard it is relevant that the death sentence document was given by the appellant to Revd Sperring with the request that he (Revd Sperring) make the sentence known. The appellant was himself in detention at that time, aware that the document was false and that no death sentence was in existence. His actions were clearly self-serving, manipulative and in bad faith. Ordinarily, the appellant's claim to refugee status would be bound to fail on this ground.

[138] However, it would appear from the evidence that the publicity given to the appellant's case was simultaneously being driven by other actors whose good faith is not in question. We refer in particular (but not exhaustively) to:

(a) Consistent advocacy of the appellant's case by Keith Locke MP.

(b) The widely publicised visit to the prison by Archbishop Moxon and Dr Dancer.

(c) Protest activity by the group known as Global Peace and Justice. This group had been staging monthly protests outside the prison to highlight the plight of some five Iranian detainees, not only that of the appellant. At one time or another the other detainees included Mr Mohebbi and Mr Yadegary. For an account of the activities of this group, see"Starving for Justice", *Aotearoa Anarchist Network* 12 November 2007 put in evidence by the appellant. Once this group learnt of the appellant's hunger strike the monthly protests were increased to weekly events and on the Saturday preceding the appellant's release, five "activists" chained themselves to a building and flag post outside the prison, attracting inevitable publicity. Two others were arrested.

[139] The decision in *Refugee Appeal No. 2254/94* emphasises that the good faith principle must be applied with caution, not zeal and the precise application of Grahl-Madsen's third category must be determined on a case-by-case basis. Given factors (a) to (c) above, we find that the actions taken by the appellant's supporters on the false information provided by him have contributed substantially to the risk of harm in Iran and on these special facts find that those actions are enough to disengage the bad faith disqualification which would otherwise have attached to the appellant's actions. It is ironic that the appellant's supporters, being unaware of the true facts, have inadvertently created the grounds for a refugee claim which was otherwise without foundation and fraudulent.

[140] Against this background we return to the facts as found and now address the inclusion clause provisions of Article 1A(2) of the Convention in the light of those findings. There are no exclusion issues.

THE ISSUES

[141] 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."

[142] In terms of *Refugee Appeal No. 70074/96 Re ELLM* [1998] NZAR 252 the principal issues are:

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

2. If the answer is Yes, is there a Convention reason for that risk of being persecuted?

ASSESSMENT

The risk issue - the legal test for "a well-founded fear"

[143] The refugee definition requires a refugee claimant to establish a "well-founded" fear of being persecuted. As to this:

(a) The well-founded standard mandates the establishment of a real as opposed to a remote or speculative risk of harm, though the evidence does not have to show that persecution is more likely than not to eventuate. See *Refugee Appeal No. 72668/01* [2002] NZAR 649 at paras [111] to [154] and *Refugee Appeal No. 75692* [2007] NZAR 307 at para [90]. Underlining that the evidentiary standard in refugee determination is below the civil standard of proof and that the rules of evidence are not applied, the Court of Appeal in *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA) at para [31] observed:

> ... general principle requires the applicant to establish the claim, and the particular difficulties faced by refugee claimants in making out their claims justify a generous approach to the determination of the claim. Such generosity is also to be seen operating in a different sense in the tests of "well-founded" or "a real chance": those tests do not require, for instance, a showing that persecution is more probable than not. But we recall that that is a distinct matter of evaluation (against a rather low threshold) in respect of which of talk of onus or standards of proof is inappropriate.

(b) The standard is an entirely objective one. See *Refugee Appeal No. 75692* [2007] NZAR 307 at paras [76] to [90].

(c) Contextually, the word "fear" in Article 1A(2) is not used in the sense of trepidation, but in the sense of anticipation. See *Refugee Appeal No. 75692* [2007] NZAR 307 at paras [76] to [90] and the *Michigan Guidelines on Well-Founded Fear* (2005) 26 Mich. J. Int'l L. 491.

(d) The trepidation of the refugee claimant, no matter how genuine or intense, does not affect the legal standard and is irrelevant to the well-foundedness issue. See *Refugee Appeal No. 75692* [2007] NZAR 307 at para [90]. Equally, the absence of trepidation on the part of the claimant does not affect the legal standard or alter the fact that the inquiry is an objective one, independent of the claimant's subjective state of mind.

Facts against which assessment of risk to be made

[144] The risk of harm to the appellant were he to return to Iran is to be assessed against our finding that it is a reasonable inference that the widespread publicity given to the appellant's case has led to the Iranian authorities becoming aware of the appellant's **claim** to have converted to Christianity and to have been sentenced to death in Iran for the crime of apostasy. The question is whether this factor gives rise to a real risk of serious harm which can appropriately be described as "well-founded". The answer to this question must be found in the evidence before the Authority as to the human rights situation in Iran. This is commonly referred to as the "country information".

Outline of country information

[145] The general background to Christians in Iran is outlined in the US Department of State, *International Religious Freedom Report 2007 - Iran* (14 September 2007) produced in evidence by the appellant. The later *International Religious Freedom Report 2008 - Iran* (19 September 2008) is in very similar terms. According to these reports the constitution of the Islamic Republic of Iran states that the official religion of Iran is Islam and the doctrine followed is that of Ja'afari (Twelver) Shi'ism. Article 4 of the constitution states that all laws and regulations must be based on Islamic criteria. The population is 98 percent Muslim; 89 percent is Shi'a and 9 percent

Sunni. Non-Muslims account for 2 percent of the population and comprise Bhaha'is, Jews, Christians, Sabean-Mandaeans and Zoroastrians. While the constitution states that "within the limits of the law", Zoroastrians, Jews and Christians, as recognised religious minorities, are guaranteed freedom to practice their religious beliefs, members of these "recognised" minority religious groups have reported government imprisonment, harassment, intimidation and discrimination based on their religious beliefs. The government severely restricts freedom of religion. Both reports state that respect for religious freedom continued to deteriorate with government rhetoric and actions creating a threatening atmosphere for nearly all non-Shi'a religious groups, including evangelical Christians. There have been continuing reports of government imprisonment, harassment, intimidation and discrimination based on religious beliefs. Apostasy, specifically conversion from Islam, is punishable by death, although both reports note that there were no reported cases of the death penalty being applied for apostasy during the respective reporting periods. Proselytising of Muslims by non-Muslims is illegal. Evangelical church leaders are subject to pressure from authorities to sign pledges that they will not evangelise Muslims or allow Muslims to attend church services.

[146] While other sources also report imprisonment, harassment, intimidation and discrimination based on religious beliefs there is unanimity on the fact that there have been no reported cases of the death penalty being applied for apostasy since 1994. See the UK Home Office, *Operational Guidance Note: Iran* (27 February 2007) cited at page 7 of the Refugee Status Officer's interview report of 11 February 2008 and Amnesty International, *The Return of Christian Converts to Iran* (September 2007) at p 4.

[147] At the hearing before the third panel much emphasis was placed on reports that on 9 September 2008 the Iranian parliament approved a new penal code calling for a mandatory death sentence for apostates. Presently, the bill has yet to make its way

through Iran's policy-making process before it becomes law. Parliament is reviewing it article by article, after which it will be sent to Iran's most influential body, the Guardian Council, which will rule on it. As to this evidence:

(a) It is presently speculative as to whether the bill will be passed.

(b) Even if enacted, the information presently before the Authority shows that in all likelihood it simply enshrines that which is the current position under the Constitution, namely that judges must use their knowledge of Sharia law to rule on cases where codified legislation does not exist: Amnesty International, *Iran: New Government Fails to Address Dire Human Rights Situation* (AI Index: MDE 13/010/2006) (February 2006) at p 15 fn 21 (file p 1314). Or as summarised in the Department of State, *International Religious Freedom Report 2008 - Iran*:

> In February 2008 a revision to the Penal Code was drafted for approval by the legislature whereby apostasy, specifically conversion from Islam, would be punishable by death under the revised Penal Code. Previously, death sentences for apostasy were issued under judicial interpretations of Shari'a law.

(c) Even if enacted, it remains to be seen whether the death sentence will actually be carried out. As previously mentioned, there have been no such recorded incidents since 1994.

(d) We do, however, take into account this new development as evidence of what the Department of State, *International Religious Freedom Report 2008 - Iran* describes as government actions creating "a threatening atmosphere for some religious minorities".

[148] We have been referred to a number of country information sources on religious freedom in Iran with particular reference to the issue of apostasy. As may be expected, a range of opinions and assessments are offered, not all of them

reconcilable. We do not intend in this decision to embark upon an extended analysis of the country information. For the purposes of the present case we found the summary published by Christian Solidarity Worldwide, *Iran - Religious Freedom Profile* (July 2008) to be the most succinct account of apostates in Iran. After noting that during the last two years there have been fresh waves of arrests, detentions and intimidation of Muslim converts to Christianity and Bhaha'is it describes the position of apostates in the following terms:

> 3.1.1. Apostates
>
> The persecution of Muslim converts to Christianity has re-escalated since 2005. The Iranian police continue to detain apostates for brief periods and pressure them to recant their Christian faith and to sign documents pledging they will stop attending Christian services and refrain from sharing their faith with others. There have also been increasing reports of apostates being denied exit at the borders, with the authorities confiscating their passports and requiring them to report to the courts to reclaim them. During the court hearings they are coerced to recant their faith with threats of death penalty charges and cancellation of their travel documents. Although verdicts stipulating the death penalty for apostasy are rarely, if ever, carried out, intense pressure and serious human rights abuses occur regularly, and extra-judicial murder and attacks by official Islamic militias or radical groups are a serious concern.
>
> During 2008, reports of the arrest and detention of Muslim-background Christians and leaders of underground house churches in Shiraz, Mazandaran and Tehran continued. In all of these cases, they were kept incommunicado and in solitary confinement for days or weeks with no official charges or legal representation. During their detention they were interrogated regularly, verbally abused, asked to recant their faith and threatened with apostasy and treason charges. They were released either by signing documents pledging no involvement in Christian activities, or paying hefty bails and turning over deeds to their properties, with no guarantees that the investigations against them were dropped or that they would not be charged.
>
> On a fact-finding visit to Iran during 2008, CSW became aware of a minimum of 40 cases of Christians, particularly converts from Islam, whose passports had been confiscated at the airport on their return from attending Christian conferences abroad. They were all required to present themselves in front of judges, who coerced them to convert to Islam if they wanted to regain their travel documents without facing criminal charges. A significant number were pressured to comply.

[149] Both from this extract and from other country information submitted in evidence it is possible to conclude that serious human rights abuses are regularly experienced by those suspected of apostasy. Extra-judicial murder and attacks by official Islamic militias or radical groups are a serious concern, as is incommunicado

detention in solitary confinement for days or weeks with no official charges or legal representation. It is common for people to be badly beaten in short term detention.

[150] But the picture remains contradictory. After detailing specific cases in which apostates have been detained and interrogated, the CSW briefing goes on to record that there are nevertheless vibrant house and public churches mostly formed by converts who are able to continue their faith and to meet with others. It is mainly converts who are in leadership positions who face a serious risk of harm:

> Muslim converts to Christianity are still the most vulnerable among the Christian community in Iran. However, the death penalty is not applied and there are vibrant house and public churches that are mostly formed by converts. Even though converts are able to continue their faith and meet with others, converts who are in leadership positions and lead Christian ministries face serious risk of detention, intimidation, imprisonment and extra-judicial physical harm.

[151] The risk of harm mainly attaches to proselytising Christians:

> Evangelical and Pentecostal churches are distrusted and persecuted in Iran. In addition to state-based persecution, church leaders or proselytizing Christians have been attacked, kidnapped and killed by mobs or state agents. One of the main reasons for such intense persecution has been the high number of apostates from Islam in Evangelical and Pentecostal churches. Unlike ethnic Christians of the Armenian and Assyrian communities, Protestant churches actively proselytise.

[152] This heightened risk is not applicable to the appellant as he expressly stipulated before the Authority (through counsel) that he does not rely on proselytising as the generation of the risk to him in Iran. Further, he is not in a leadership position and does not claim that he is likely to assume such position. His "prime case" is that the publicity given to his case in New Zealand and overseas has identified him (even if incorrectly) as an apostate.

[153] The assessment in the Christian Solidarity Worldwide briefing is very much in accord with previous assessments made by the Authority, the most relevant of which is *Refugee Appeal No. 76083* (27 June 2008), a decision specifically relied on by the

appellant in submissions. The following passages are taken from paras [82] and [83]:

> [82] While the pressure on known Christian converts by the Iranian authorities appear to be intensifying, the Authority agrees with the assessment in *Refugee Appeal No. 75376* that an ordinary convert who is neither a church leader nor a proselytiser and does not possess any other characteristics that may exacerbate the risk of them coming to the attention of the Iranian authorities will not be at risk of being persecuted to the real chance level.
> [83] However, the Authority has repeatedly emphasised the need for a careful assessment of the background and personal characteristics of individual claimants so that any additional risk factors are identified and taken into account. Every case falls to be determined on its own facts.

[154] Taking as our starting point the finding that an ordinary convert who is neither a church leader nor a proselytiser does not face a real chance risk of being persecuted, we turn to the question whether, given that the appellant is not a convert to Christianity, there are any specific aspects of his case which are relevant to the risk of his being persecuted if returned to Iran. In the interests of clarity we address now only the well-foundedness issue. The question whether any risk of harm faced by the appellant is a risk of "being persecuted" is addressed thereafter.

Conclusion on the risk issue

[155] The most obvious feature of the appellant's case is the high degree of sometimes sensational publicity he has attracted by going on an extended "fast" or hunger strike. Both directly and indirectly he made sure that officials in the Iranian Embassy in Wellington could not but fail to take notice of his claimed conversion to Christianity. See particularly his interviews on television while at Auckland Hospital and on his release from detention. He relies on country information to the effect that he could well be detained at the border, intimidated, imprisoned and subjected to extra-judicial physical harm. Whether this risk gives rise to a real, as opposed to a speculative risk of harm, is finely balanced. On the one hand, if Iranian officials were intent on doing harm to the appellant, they had available the simple expedient of issuing a travel document to facilitate his removal to Iran. Yet they did not take this

step. Then again it might be said that his use of an admittedly false court document purporting to establish a death sentence might increase the risk of punishment. As against this, it is relatively common for false official documents to be submitted in support of refugee claims by Iranian nationals (and indeed, nationals of many countries) but there is no evidence that on return to Iran this is a particular risk factor. On the other hand, while the Iranian state itself may not regard the appellant's case as one deserving of severe punishment, there is the possibility that individual officers who might question the appellant on arrival at the airport (a real risk, given the publicity his case has received in New Zealand) might come to this view, as might a judge before whom the appellant may be required to subsequently appear.

[156] The assessment of risk is not assisted by the fact that it is difficult to know with any precision what actually happens in Iran to returnees such as the appellant, or indeed to Muslim converts to Christianity generally or those who have falsely claimed to be converts. The picture painted by the country information is at times fragmentary, contradictory and confused. For example, the appellant submitted a Christian Solidarity Worldwide press release, "Iran - Parliament votes in favour of punishing apostasy with death" (11 September 2008) which (*inter alia*) reported the arrest and detention since 15 May 2008 of two Christians from Muslim backgrounds who were charged with apostasy at the Revolutionary Court in Shiraz. But in a later press release, "Iran - Christians detained for apostasy are released" (9 October 2008) Christian Solidarity Worldwide reported that the men had been acquitted of all charges at a court hearing on 23 September 2008 and released on 25 September 2008. As with almost all of the country reports, so little is known of the particular circumstances of the reported cases that it is difficult to draw general conclusions and allowance must be made for the inherent unpredictability of human affairs and of officials in Iran in particular. This does not mean that conjecture or surmise have a part to play in determining the "well-founded" issue. They do not: *Refugee Appeal No. 72668/01* [2002] NZAR 649 (NZRSAA) at para [130]. It is for this reason that

the Authority's jurisprudence requires the decision-maker to focus on risk factors specific to the individual refugee claimant.

[157] On the facts of the present case we identify the following as specific risk factors:

(a) The substantial and at times sensational publicity given to the appellant's case in New Zealand has increased the risk of the appellant being detained at the airport on arrival in Iran and questioned about his activities in New Zealand and about his claim to have converted to Christianity.

(b) For the same reason there is an increased risk that either in addition to or instead of such detention and questioning, he will be required to report to a judge, questioned, asked to recant his "Christian faith" and possibly threatened with apostasy charges.

(c) The authorities may not believe that the appellant has simply played the part of a convert to Christianity or may take the view that he should be punished for having claimed to have renounced Islam.

(d) That in his interaction with officials it is possible that the appellant will be physically ill-treated while in detention.

[158] The question is whether these factors create a "real chance" of the appellant being persecuted. The answer to this question is inherently problematical given that it involves making a prediction of the chance of an event occurring in the future on country information which itself is inherently imprecise and ambiguous. Sir Stephen Sedley, a highly respected Judge of the Court of Appeal for England and Wales, has described the process as making "a possible life-and-death decision extracted from

shreds of evidence and subjective impressions": Stephen Sedley, "Asylum: Can the Judiciary Maintain its Independence" in *Stemming the Tide or Keeping the Balance - The Role of the Judiciary* (IARLJ, Wellington, October 2002) 319 at 324. In similar terms, one of the preeminent refugee scholars, Professor James C Hathaway in *Rebuilding Trust - Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (December 1993) at pp 6 & 7 has described refugee status determination as:

> ... among the most difficult forms of adjudication, involving as it does fact-finding in regard to foreign conditions, cross-cultural and interpreted examination of witnesses, ever-present evidentiary voids, and a duty to prognosticate potential risks rather than simply to declare the more plausible account of past events.

[159] In our view, a fair assessment of the circumstances of this particular case is that it is difficult to say one way or the other whether there is a real chance of the appellant coming to serious harm should he return to Iran. Whether there is a risk sufficient to cross the "real chance" or more precisely, the well-founded standard is debatable and one on which opinions could reasonably differ as there is doubt either way. On established principle, the benefit of the doubt must be given to the refugee claimant: *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA) at paras [23] to [32]. Bearing in mind the gravity of the consequences which could flow from a mistaken finding of "not well-founded", we conclude, by the narrowest of margins and by giving the appellant the benefit of the doubt, that the real chance test is satisfied on the present facts.

[160] We turn now to the question whether the risk of harm faced by the appellant can be described as a risk of "being persecuted".

The harm issue - the legal test for "being persecuted"

[161] The Authority has for many years interpreted the "being persecuted" element of

the refugee definition as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. In other words, core norms of international human rights law are relied on to define the forms of serious harm which are within the scope of "being persecuted". This is sometimes known as the human rights understanding of "being persecuted" and is fully explained in *Refugee Appeal No. 74665/03* [2005] NZAR 60; [2005] INLR 68 at paras [36] to [125].

"Being persecuted" and State protection

[162] As noted in *Refugee Appeal No. 74665/03* at para [51], central to the definition of the term "refugee" is the concept of state protection. Consequently the phrase "being persecuted" must be interpreted within the wider framework of the failure of state protection. 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 therefore to be seen as the construct of two separate but essential elements, namely the risk of serious harm and a failure of state protection. This has been expressed in the formula Persecution = Serious Harm + The Failure of State Protection: *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL) at 653F.

Conclusion on the "being persecuted" issue

[163] For this particular appellant the country information establishes that although verdicts stipulating the death penalty for apostasy are rarely, if ever, carried out, intense pressure can be applied to individuals to remain true to Islam and to recant conversion to any non-Islamic faith. Serious human rights abuses are regularly experienced by those suspected of apostasy, including imprisonment, harassment and intimidation. Of particular concern is incommunicado detention in solitary confinement for days or weeks with no official charges or legal representation. It is common for people to be badly beaten in short term detention. In our view should these categories of harm be inflicted on the appellant they would amount to a violation of the fundamental rights in Articles 6 and 7 of the International Covenant on Civil and Political Rights, 1966. On the facts, a more detailed discussion is not called for nor is it necessary to examine the fair trial provisions of Article 14.

[164] As it is our conclusion that there is a real risk of these harms being inflicted on the appellant by agents of the state itself, the "being persecuted" limb of the refugee definition is satisfied as the risk of serious harm is accompanied by a failure of state protection.

The Convention ground issue

[165] As the risk of serious harm faced by the appellant is clearly for reasons of religion, this last element of the refugee definition is also satisfied.

CONCLUSION

[166] For the reasons given we find, by the most narrow of margins, that the appellant has satisfied the requirements of Article 1A(2) of the Refugee Convention. The appellant is recognised as a refugee. The appeal is allowed.

[167] We conclude, however, by pointing out that should there be a subsequent diminution in the risk of harm faced by the appellant in Iran, the Refugee Convention requires that his refugee status be revisited. This is because the refugee definition, particularly Article 1C, stipulates that the Refugee Convention ceases to apply in certain circumstances, one being where the refugee can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. In this context it is to be noted that one of the statutory functions of a refugee status officer is to apply to the Authority for a determination whether the Convention has ceased to apply, in terms of Article 1C, to a person who has previously been recognised as a refugee by the Authority.

"RPG Haines"

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[Rodger Haines QC]

Chairperson