

AT AUCKLAND

Appellant:	AV (Iran)
Before:	S A Aitchison (Chair) L Moor (Member)
Counsel for the Appellant:	D Mansouri-Rad
Counsel for the Respondent:	No Appearance
Date of Hearing:	13, 14 October 2011
Date of Decision:	22 November 2011

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining to grant refugee status and protected person status to the appellant, a citizen of Iran.

[2] The appellant fears serious harm from Iranian authorities because she has disobeyed the *Sazman-e Moghavemat-e Basij (Basij)* by deserting and failing to comply with their instructions. Her claim also relates to the discriminatory effect of custodial laws in Iran, which led to her losing custody of her daughter to her ex-husband. The primary issue in this appeal is whether the appellant's fear of being persecuted is well-founded.

[3] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[5] The appellant is of Azeri ethnicity and was born in Tehran, Iran. Her father is deceased, and her mother and siblings live in Iran.

Education and Political Views

[6] During the 1990s, the appellant completed a Bachelor's degree at a university in Tehran. During the course of her study, she married an Iranian man AA and gave birth to a daughter, BB, who is now a teenager.

[7] The appellant found the university environment difficult, as she was always on guard about how she dressed (she was required to wear a *mantor* and head scarf) and how she generally expressed herself. The Islamic dress code was strictly enforced at the university, and no criticism of the government was tolerated. The appellant found these restrictions an insult to her intellect.

[8] From the time of the revolution in Iran in 1979, the appellant disliked the theocratic government, but she had no choice but to tolerate the laws and regulations imposed upon her. As a child, she soon learned about the inequality existing between men and women in Iranian society, and felt the pressure of this inequality as she became an adult. In contrast to men, women had limited freedom of movement and opportunities in education and employment. The appellant experienced these limitations on a personal level, as upon marrying her husband, and moving to live with his parents in Tehran for the first year of their marriage, she was pressured by the family to cease her university studies. It took considerable will for her to continue and complete her degree – terms which she had agreed with her husband prior to their marriage.

Employment with an Iranian Government Department

[9] In 1998/1999, the appellant became employed in an administrative position in the training department of an Iranian government department. She obtained this position through the assistance of her husband's family, who were a respected, religious, martyrs' family in Iran, with employees in the government service. In particular, they had a relative who worked as a manager in the human resources department of the Iran railway service.

[10] The appellant did not have a choice about her employment, as AA's parents made all significant decisions for her. They considered that working in government was a "safe" position for her, to maintain her respectability as a woman (as in the private sector men more freely approach women) and demonstrate her support for the Islamic regime.

[11] In addition to controlling the appellant's employment, AA and his parents prohibited the appellant from having any contact with her own family.

Marriage and Divorce to AA

[12] The appellant's marriage to AA, who was employed sporadically in the private sector, was an unhappy one. She and her daughter were subjected to repeated domestic violence. The only reason the appellant stayed with AA was to prevent her daughter from being taken from her. She was willing to do anything to keep her daughter at her side.

[13] In 2004, having become bankrupt, AA left Iran, and in the four to five months leading to his departure, the appellant and AA lived separately, the appellant at a rented address in Tehran and AA with friends. At the time AA left, he threatened that he would take BB away from the appellant. AA travelled for approximately a year, then entered a western country where he now has residence.

[14] AA gave power of attorney to his father to commence divorce proceedings against the appellant. The appellant resisted the divorce for as long as she could, fearing that she would lose her daughter, but ultimately she was powerless. In spite of supporting their son, AA's parents did not want the couple to divorce as this was a shameful matter. Consequently, they put pressure on the appellant, threatening that they could cause her to lose her employment. At the end of 2007, the divorce was finalised. On attending court, the appellant was instructed that, according to Iranian law, custody rights for her daughter would be assigned to BB's father, and in his absence to her paternal grandfather.

[15] Initially, AA's parents allowed the appellant to keep BB with her, until arrangements were made for her to join her father overseas. The appellant was not, however, permitted to make any decisions about BB without consultation with them. In 2008, BB was sent to live with her father overseas.

[16] The appellant's divorced status caused her to feel insecure in many respects, none-the-least in her employment. Her employment was on a contract basis, renewable yearly, and she feared if anyone in her workplace learned of the divorce her contract might not be renewed. The appellant knew of another female colleague who had left her employment after her divorce had led to her being criticised at her workplace. She did not know the full circumstances surrounding the woman's resignation.

[17] Without employment, the appellant would have no means of support. When seeking rental accommodation in Iran, for example, a birth certificate is required which reveals marital status. Divorcee women are subsequently refused accommodation. Further, divorcees in Iranian society are viewed as "bad women" and men think that divorcees are "easy woman" and feel free to harass them. The appellant considered such labelling to be worse than any torture.

Member of *Basij*

[18] During this period of insecurity, in 2007/2008, the appellant became a regular member of the *Basij* in her workplace. She knew that the *Basij* did not have a good reputation and that it was "totally opposed to my personal opinion", but owing to her fear of losing her employment due to her status as a divorcee, she considered that if she joined the organisation in name only, as a regular member, she would secure her employment and experience less difficulties in the workplace. She made this decision at a time when she was "drowning" and "at the edge of a cliff and any moment falling down", a decision which upon later reflection she considered was not a good one. Her decision also coincided with a retrenchment and downsizing in government departments generally.

[19] The appellant observed other colleagues who were members of the *Basij* and felt that if she simply attended a few meetings and speeches, she could safely maintain her membership without compromising herself. As a regular member, she attended training on the Islamic dress code, a Quran session, and some political speeches. She never committed herself to the government or supported the violation of human rights and never reported any of her colleagues. She made a "personal choice for personal purpose only".

Temporary Marriage to CC

[20] In 2007/2008 the appellant met CC, some fifteen years her junior, and entered into a temporary marriage with him. They entered into a temporary

marriage because they experienced opposition from both their families, particularly from CC's family who considered the appellant too old for their son. They also considered it shameful for their son to marry a divorcee. CC's family refused to meet the appellant, and his mother sent her a mobile text message threatening that if she did not leave his son she would come to her workplace and "embarrass" her in front of her colleagues. The appellant feared that she could lose her employment as a result.

Political Participation

[21] In the lead-up to the June 2009 election in Iran, the appellant was drawn to support the opposition candidate, Hossein Mousavi, because he spoke of respecting women's rights and resolving the economy in Iran. She openly demonstrated her support by wearing green items of clothing each day to her office, and by joining a number of street rallies supporting him. She felt free to openly discuss the election with colleagues as Hossein Mousavi held a position in the government and the press was freely reporting on the elections at the time.

[22] Following the election, the appellant and CC were concerned that the elections had not been free and fair, and both joined the Green Movement, protesting regularly in demonstrations in the street. They maintained that support for several months following the election. At the time, the appellant received a message at work to the effect that as a *Basij* member, she was required to report any persons supportive of Hossein Mousavi to the authorities. The appellant did not report anyone to the authorities, and continued to join the demonstrations. While she saw *Basij* at the demonstrations, she never saw anyone from her workplace. As she wore a *mantor* and scarf, and due to the general crowded and chaotic nature of the protests, she felt that she would be difficult to recognise. She considered that she might be arrested, but at the time was so motivated that soon there would be significant changes made in Iranian society. She believed that the end of the Iranian regime was nigh. She put the Green Movement and hopes for change before everything else in her life.

[23] In September/October 2009, the appellant's manager told her that she was required to attend the *Herasat* office located in the same building where she worked. She was met there by an official who told her that he knew that she had been a supporter of the Green Movement before the election and asked if she was still a supporter. He also asked her what her opinion of the Islamic government was. She responded that she knew Ahmadinejad was the leader of Iran and that

“his word was the last word”. When asked if she accepted Ahmadinejad as the president, she responded that she did as he was successful in the election. She was released and told to inform on any persons who did not support the regime. In spite of this instruction, the appellant did not report any of her colleagues.

[24] Notwithstanding this questioning at the *Herasat* office, the appellant continued to attend demonstrations. In February/March 2010, she was formally summoned by letter to attend the *Herasat* office again. On attending, she was told that the *Ettela'at* had not seen any sign of loyalty from her and were suspicious that she was part of the Green Movement. She was advised that in order to show her loyalty she would be required to become an active *Basij* member. She was threatened that she would lose her employment and be arrested if she did not do so. She was also told that she was required to report on disloyal colleagues. The appellant responded that she was devoted to the regime and the supreme leader and promised that she would join as an active *Basij* member.

[25] The appellant joined as an active *Basij* member and attended gatherings and meetings for *Basij* members. She did not report any of her colleagues. She was advised that she would need to attend weapons training, and when the time came over the summer to attend, she called her manager at the office and the *Basij* administration, and advised that she was sick and would attend the next training.

[26] Following the second interrogation by *Ettela'at*, the appellant realised that she was under heavy surveillance at her workplace and under pressure to perform a role for the *Basij* that she did not support. She was not willing to “fight against” her own people, and made a decision to leave Iran. CC assisted her to find an agent, obtain a passport and source funds for her trip. She feared that her name was already on a blacklist and paid a bribe in order to obtain her passport and obtain assistance to leave the country safely.

[27] The appellant departed Iran on 30 July 2010. She did not take leave from her employment or resign. A month prior, she married CC. He travelled with her to Thailand, then returned to Iran. He currently lives with his parents in Iran and works in his father’s business.

Material and Submissions Received

[28] Counsel filed submissions with the Tribunal on 12 October 2011.

ASSESSMENT

[29] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[30] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant’s account.

Credibility

[31] The appellant’s account to the Tribunal, given over the course of two days, was consistent with what she had said previously. She presented in an open, forthright and credible manner. The Tribunal accepts her evidence as credible.

[32] It is on this basis that the Tribunal will assess the appeal.

The Refugee Convention

[33] Section 129(1) of the Act provides that:

“A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.”

[34] Article 1A(2) of the Refugee Convention 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

[35] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[36] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[37] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

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

[38] In 2007, the appellant joined the *Basij* as a regular member and in February/March 2010, she was forced to join the *Basij* as an active member. As soon as she became an active member, she was instructed to attend weapons training and report her colleagues for any behaviour inconsistent with the goals of the regime. As she found these requirements contrary to her personal beliefs she fled Iran, paying several bribes in order to leave the country safely.

[39] A detailed introduction to the nature and function of the *Basij* is discussed in *Refugee Appeal No 76344* (24 July 2009). Formed by order of Ayatollah Khamenei in 1979, and falling under the arm of the Islamic Revolutionary Guards Corps (*Pasdaran*), the *Basij* comprises an essential part of the Iranian security system responsible for controlling the civilian population. *Basij*, who number

around 13.6 million (approximately 20 per cent of the population), possess police powers, and are involved in maintaining law and order, defending the country against foreign threats, and enforcing ideological and Islamic values upon the Iranian population; Danish Immigration Service *Human Rights Situation for Minorities, Women and Converts, and Entry and Exit Procedures, ID Cards, Summons and Reporting* (30 April 2009); Radio Free Europe *Dilemmas in the midst of a 'coup'* (19 June 2009) www.rferl.org.

[40] The *Basij* have different layers of volunteer membership known as "Regular", "Active", and "Special", reflecting intensifying degrees of involvement; American Institute for Public Policy Research, A Alfoneh, *Iran Primer: The Basij Resistance Force* (21 October 2010). They are present in many facets of society, placed regionally across the country, including local mosques, government offices, factories, schools and universities; *supra*. Children also become members; Institute for War & Peace Reporting *Teenage Paramilitaries in Iran* (30 June 2010). Reportedly, many students, especially those from lower socioeconomic backgrounds, join the *Basij* as a result of their desire to enter the postgraduate level and find employment, and to afford themselves of the privileges offered, including discounts on textbooks, entertainment, food and travel; see Saeid Golkar "The Reign of Hard-line Students in Iran's Universities" (Summer 2010) 17(3) *Middle East Quarterly* pp 21-29. The *Basij* also has two military battalions, the Ashura and the Al-Zhara, the Ashura being designated riot control forces and the Al-Zhara comprising women; *supra*.

[41] Having deserted the *Basij* and failing to follow orders, the appellant fears she will be viewed as being anti-regime, and suffer immediate arrest, detention, and ill-treatment at the hands of the authorities should she be returned to Iran.

[42] The oppressive, and often brutal, response of the Iranian authorities towards those who fail to comply with the regime's norms is well-documented. In particular, in the wake of the June 2009 presidential elections, the Iranian authorities have taken concerted steps to exert their control upon the Iranian populace. From the outset, Ayatollah Khamenei ordered the use of force to suppress any dissent; Amnesty International *Iran: Khamenei's speech gives legitimacy to police brutality* (26 June 2009). The response of the authorities to dissidents and protestors, both in Iran and abroad, involving their arrest, detention, and serious mistreatment, is detailed in country information; see United States Department of State *Country Report on Human Rights Practices 2009: Iran* (3 March 2010); Human Rights Watch *Iranian Society More Closed Than Ever*

(11 June 2010); Fanaz Fassihi "Iranian Crackdown goes Global" *Wall Street Journal* (4 December 2009); "Military authorities threaten the supporters of 'Green Movement' outside the country" *BBC Farsi* (5 November 2009); see also discussion in *Refugee Appeal No 76399 and No 76400* (13 September 2010) and *Refugee Appeal No 76454* (8 March 2010). This oppression is ongoing; see Amnesty International *From protest to prison: Iran one year after the election* (9 June 2010).

[43] Similarly, the regime's response to those who fail to comply with orders, that include the reporting, or suppression, of dissidents, is arbitrary and in violation of fundamental human rights standards. On 22 April 2011, an article "Pan-Arab paper says Iranian Basij forces refused to fire at protesters" from the BBC Monitoring International Reports, reported that the Iranian leadership was considering how to deal with military officers who refused to follow orders to fire at demonstrators. Reportedly, the "phenomenon" had caused panic among the Revolutionary Guard members and political elite. Seven members of the *Basij* were "sacked" for refusing to obey such orders, and consequently placed in Evin Prison and tortured; *supra*; Asharq Alawsat "Iran ponders how to deal with those who disobey" (24 April 2011) www.asharq-e.com/news.asp.

[44] It is likely that the appellant's sudden departure from Iran will be known to the Iranian authorities because she left her employment without notice and because she failed to follow the orders of her superiors in the *Basij*. While there is no evidence that the appellant's employer has enquired about her absence with her new husband and his family, it is relevant that she never revealed her changed marital status in the workplace. Prior to her departure, the authorities regarded her with suspicion and she was summoned to the *Herasat* office on two occasions, where officials expressed strong concern that she did not support the regime and had participated in the Green Movement. On the second occasion, she was threatened that if she did not participate as an active *Basij* member she would lose her employment and be arrested.

[45] The Tribunal finds that there is a real chance that the appellant will be subject to arbitrary arrest, detention, and ill-treatment if she returns to Iran, in violation of articles 7 and 9 of the ICCPR, namely, the right to be free from cruel, inhuman and degrading treatment, and arbitrary arrest and detention. The fact that the appellant's desertion has occurred at a time of particular civil unrest and turmoil in Iran, to curb which the authorities have adopted extreme measures, is an exacerbating factor that heightens her risk of being persecuted.

[46] Given this finding, it is not necessary to consider the remaining gender-related aspects of the appellant's claim.

Is there a Convention reason for the persecution?

[47] As to the second issue raised by Article 1A(2), the harm faced by the appellant at the hands of the Iranian authorities would be for reasons of an imputed political opinion and membership of a particular social group, namely, women (see *Refugee Appeal No 71427* (16 August 2000)).

Conclusion on Claim to Refugee Status

[48] For the reasons stated above, the Tribunal finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

Exclusion

[49] As the appellant was a member of the *Basij* in Iran, the Tribunal has considered the applicability of Article 1F(a) of the Refugee Convention.

[50] Article 1F(a) of the Refugee Convention provides as follows:

“The provisions of this convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the International Instruments drawn up to make provision in respect of such crimes.”

[51] The “serious reasons for considering” standard is well below that required under criminal law (beyond a reasonable doubt) and civil law (on the balance of probabilities); See *Refugee Appeal No 1248/93 Re TP* (31 July 1995) at 32, and *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301, 306 (Smellie J).

[52] A general principle of both national and international criminal law is that a person may not be held accountable for an act he or she has not personally performed, or in which he or she has in some other way participated. As articulated by the ICTY Appeals Chamber in the case of *Tadić*, ICTY AC, 15 July 1999 (Case No IT-94-1-A) at para [186]:

“The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).”

[53] The *Basij* are regarded as committing/having committed serious offences in Iran, as part of a widespread and systematic attack against the civilian population, as such, constituting crimes against humanity. Their participation in the security apparatus in Iran has resulted in the unlawful arrest, detention, torture, rape, amongst other abuses, and death of many civilians; see *AA Iran* [2011] UKUT 00339 (IAC) 29 July 2011; A Cordesman, Center for Strategic and International Studies *Iran's Revolutionary Guards, the Al Quds Force, and Other Intelligence and Paramilitary Forces* (16 August 2007); Channel 4 News, L Hilsum *Former Iranian Basij militiaman: We became like machines* (18 February 2010) www.channel4.com/news/basij-militia-man-jailed-full-transcript. In the demonstrations following the June 2009 elections, the *Pasdaran* and the *Basij* were ordered to suppress the demonstrations "by force in the most brutal manner"; F Ghadar, Center for Strategic International Studies *Iran's Latest Protests* (29 December 2009). The same report stated that a number of the *Basij* had refused to attack demonstrators and had joined the demonstrations themselves.

[54] The Tribunal questioned the appellant closely on her involvement with the *Basij*, both as a regular and active member, and is satisfied that she did not participate, in any manner, in the commission of war crimes or crimes against humanity. She joined the *Basij* as a passive member in 2007, having recently become a divorcee and solely motivated through desperation to keep her employment. The Tribunal notes in this respect the stigma and limited means of support available to divorcee women and the knowledge that a number of regular members of the *Basij* comprise those who have been primarily motivated to join in order to enhance or preserve education or employment prospects; see United Nations Economic and Social Council *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living* E/CN.4.2006/51/Add.2 (21 March 2006); Saeid Golakar "The Reign of Hard-line Students in Iran's Universities" (Summer 2010) 17(3) *Middle East Quarterly* pp 21-29. Further, the appellant was convinced that, as a regular member only, she would not be required to commit any injustice or violations against her fellow citizens. She never reported anyone to the organisation and attended minimal training and meetings only. Upon being ordered to become actively involved, she promptly left the country.

[55] In light of the above, we find that the evidence does not establish there to be serious reasons for considering that the appellant has committed a war crime or crimes against humanity. On the evidence available to the Tribunal there is no

basis upon which the exclusionary effect of Article 1F(a) of the Refugee Convention applies with respect to this appellant.

The Convention Against Torture

[56] Section 130(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

Conclusion on Claim under Convention Against Torture

[57] The appellant is recognised as a refugee. In accordance with New Zealand's obligations under the Refugee Convention, she cannot be deported from New Zealand, by virtue of section 129(2) of the Act (the exceptions to which do not apply). Accordingly, the question whether there are substantial grounds for believing that she would be in danger of being subjected to torture if deported from New Zealand must be answered in the negative. She is not a person requiring protection under the Convention Against Torture. She is not a protected person within the meaning of section 130(1) of the Act.

The ICCPR

[58] Section 131(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

Conclusion on Claim under ICCPR

[59] For the reasons already given, the appellant cannot be deported from New Zealand. Accordingly, the question whether there are substantial grounds for believing that she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand must be answered in the negative. She is not a person requiring protection under the ICCPR. She is not a protected person within the meaning of section 131(1) of the Act.

CONCLUSION

[60] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture; and
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[61] The appellant is recognised as a refugee. The appeal is allowed.

“S. A. Aitchison”

S A Aitchison
Chair

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S A Aitchison
Member