This is an appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a citizen of the People's Republic of China who, in the 14 years preceding his arrival in New Zealand, lived in Hong Kong and who holds a Hong Kong Certificate of Identity current to 31 January 2001.

INTRODUCTION

The appellant is a 63-year-old married man who arrived in New Zealand on 14 August 1995 travelling on his Hong Kong Certificate of Identity. His wife, who is also the holder of a Hong Kong Certificate of Identity, continues to live and work in Hong Kong where the couple own their own flat. The appellant's wife is some 13 years younger than the appellant. There are no children.

The appellant's application for refugee status was lodged on 14 September 1995 but the Refugee Status Branch interview did not take place until 18 July 1996. There was a further delay before the Refugee Status Branch issued a decline decision on 11 December 1996.

Before this Authority, the appellant's appeal has had a chequered history. The case was first scheduled for hearing on 20 March 1997 but Mr Ryken successfully applied for an adjournment on the grounds that one of the central figures in the appellant's past had recently been granted a New Zealand residence visa and was due to arrive in New Zealand in early May 1997. The circumstances of the adjournment and the consequential directions given by the Authority are fully set out in the Memorandum dated 20 March 1997. The appeal was next scheduled for hearing on 3 June 1997. An adjournment of that three-day fixture became inevitable when only a few days before that hearing Mr Ryken gave notice that the appellant only speaks fluent Swatow and, in the time available, the Secretariat was unable to find an appropriate interpreter. The circumstances of the adjournment application as well as the consequential directions given by the Authority are fully set out in Memorandum No. 2 dated 3 June 1997.

In the result, the hearing of this appeal commenced on 23 July 1997 and occupied three full consecutive days. Two witnesses gave oral evidence at the hearing, namely the appellant and his witness Mr Z. Whereas the appellant gave his evidence entirely through an interpreter, Mr Z spoke fluent English. As to the quality of the translation, Mr Ryken in his closing submissions accepted that while there had been some shortcomings in the translation process, he accepted that those shortcomings had not resulted in an unfair hearing. The shortcomings related in the main to the fact that the interpreter, a young man who is not from the PRC or Hong Kong, occasionally had difficulty interpreting "code" phrases or expressions such as "The Great Leap Forward", "The Gang of Four" and the title of Mao Zedong's book which the appellant was required to study during his years of incarceration.

Other difficulties were caused by the fact that the appellant himself unwittingly hampered the translation process by often not addressing the questions put to him, failing to concentrate and speaking too quickly. Be that as it may, we agree with counsel's assessment that the appellant's case has not in any way been diminished or impeded by these difficulties and due allowance has been made for them in our assessment of his case.

In his submissions in support of the appeal Mr Ryken advanced an argument that past perscution alone is sufficient to justify the grant of refugee status under Article 1A(2) of the Refugee Convention. This is an entirely novel proposition as Article 1A(2) requires a forward looking assessment of future persecution. Apart from citing paragraph 136 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Mr Ryken cited no cases or texts in support of his argument. The Authority itself had to draw attention

to the decision of *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107; [1997] 2 All ER 723 (CA) which appeared to be relevant. Following the hearing, the Authority having received no assistance from counsel, conducted its own research into the issues raised. Subsequently, by Memorandum No.3 dated 22 August 1997, the Authority disclosed the results of its researches and invited the appellant to comment on the cases and material set out in the Memorandum. The Authority has now received, considered and taken into account Mr Ryken's submissions dated 8 September 1997.

THE APPELLANT'S CASE

In essence, the appellant's case is that from July 1958 until early 1980 (a period approaching 22 years) he was held as a political prisoner in China's labour reform (*laogai*) system. These labour camps are similar to, but different from, those described by Alexander Solzhenitsyn in *The Gulag Archipelago*. The Chinese communist labour reform camps (*laogaidui*) have been in existence for over 40 years and in every respect, in terms of scope, cruelty and the number of people imprisoned, they rival the Nazi and Soviet systems. Only in recent years has detailed information about the *laogaidui* become available. See in particular Hongda Harry Wu, *Laogai - The Chinese Gulag* (1992) and Harry Wu & Carolyn Wakeman, *Bitter Winds: A Memoir of My Years in China's Gulag* (1994).

Because the Authority accepts that the appellant has given a true account of his experiences in the *laogaidui*, we do not intend repeating the detail of that account as set out in his written statement and expanded upon during his two and a half days of evidence before the Authority. It was corroborated in important respects by Mr Z who we accept has given a truthful account of events he witnessed in China. What follows is a summary only of the facts.

The appellant was born in Shantou (Swatow) which is situated on the eastern seaboard of Guangdong Province. He is the third eldest of six children of whom only four presently survive. The second eldest child is a brother who presently lives in Hong Kong. The fourth eldest brother lives in Guangzhou (Canton). The youngest sibling (a sister) also lives in Guangzhou.

The appellant's father owned some land and a fishing operation in a township near [X.....]. Following the coming to power of the Chinese communists in 1949 he was executed during the Land Reform Movement (around 1950) and the appellant and other members of his family were detained for approximately six months. From that time they were branded members of the landlord class. At about this time two of the appellant's brothers fled to Hong Kong and never returned to China. >From this time the remaining brothers and sisters enjoyed uneventful lives. The appellant did not enjoy such good fortune.

In 1952 the appellant was permitted to enrol in [a college] from which he graduated in 1955. He was assigned to work [...] on the Yangtze River. He was third (junior) officer on a tugboat which worked the middle reach of the river between [A] and Wuhan in Sichuan Province. Over the next few years he was often seen in the company of other graduates of the [college] who shared a similar background and language. One of these men was Mr Z, the witness already referred to.

By way of background it should be mentioned that following the short-lived "Hundred Flowers" movement in 1957, Mao Zedong turned the campaign for free speech into a witch-hunt for dissident opinion. Many were labelled rightists and denounced as conspirators in what became known as the "Anti-Rightist Campaign".

In July 1958 the appellant was arrested at [A] and accused of being involved in a counter-revolutionary clique headed by Mr Z. Mr Z was sentenced to ten years' labour reform but he

and the appellant did not see each other again until after their respective release dates.
After two months of interrogation the appellant appeared before the Central District People's Court of [A] Municipality, Sichuan Province and was sentenced to two years' labour reform (*laogai*). The appellant was taken to a labour farm two hours from [A] where he worked in harsh conditions. Nineteen fifty-eight was also the beginning of the Great Leap Forward, a disastrous attempt at collectivized agriculture which led to a cataclysmic famine in China between 1958 and 1962 in which at least 30 million people starved to death. See generally Jasper Becker, *Hungry Ghosts: China's Secret Famine* (1996) 270-274. During this time the appellant nearly died of hard labour and starvation. He described in graphic terms how on one occasion he was taken to the farm mortuary, having been found unconscious. He was left with the dying or already dead prisoners who were waiting to be dumped into a common grave. He was saved only because the camp doctor discovered that the appellant was still alive.

At the expiry of the two-year term of re-education through forced labour, the appellant was required to remain in the labour camp as an ex prisoner-turned employee. There were no material changes to his situation except that he was now paid a token wage and on application, was permitted day-leave once per month. He was also permitted to write to his family. In May 1966 he was given two months' leave of absence to visit his ailing mother. Prior to his departure for Guangdong a classmate from the [college] who was also held at the labour farm asked the appellant to visit his (the classmate's) mother. In due course the appellant arrived in Guangdong and after visiting his own mother, visited the mother of his classmate. She asked him to take a letter to her son asking that he try to visit her. The appellant agreed.

After the appellant returned to the prison farm, the authorities discovered the letter and questioned the appellant daily for one month, accusing him of having plans to escape to Hong Kong along with the classmate referred to. During his interrogation the appellant was subjected to a number of severe beatings. Eventually the appellant signed a false confession admitting that he and his classmate had intended to escape to Hong Kong. The interrogations continued as did the beatings and the appellant described that his hands were also handcuffed.

It was at about this time that the Cultural Revolution began and in the turmoil the appellant's case was overlooked and no direct consequences flowed from his false confession. He continued to work on the farm.

Towards the end of 1968, the appellant received a letter from his sister advising that his mother was severely ill. He applied for leave but his application was declined. Anxious to see his mother, the appellant escaped one day in October 1968 while out working on the farm and managed to get as far as Changsha in Hunan Province where he was apprehended and returned to the labour camp. At the camp the appellant was placed in solitary confinement for six months in a small cell that had no daylight. His food rations were also reduced. During this period he was beaten on many occasions by officers of the Public Security Bureau. He estimates that the beatings took place every three or four days and lasted some 10 to 15 minutes. After six months he was moved to a cell in which there was one other prisoner. The beatings continued with the same regularity. Sometimes the beatings were severe. The appellant described how on one occasion a rope was tied around his thumbs and while he was thus suspended he was beaten over his entire body with batons. He was unable to walk for a week but received no medical treatment.

After three months the other prisoner was removed from the cell. That prisoner then made a false accusation that the appellant was planning to escape and had already started digging a hole in the cell wall. The authorities saw this as confirmation of the fact that the appellant was a die-hard counter-revolutionary.

After being held in solitary confinement for two years from 1968 to 1970, the appellant was transferred to [B], situated north of Chengdu in Sichuan Province where he was put to work in a labour camp which operated a coalmine. In 1970 he also appeared before the [B] District Intermediate People's Court, Sichuan Province and was sentenced to ten years' imprisonment with hard labour for conspiring to escape to Hong Kong and attempting to escape from his cell at the prison farm.

In the coalmine the appellant was assigned to pulling carts of coal by hand and for the next nine years worked in harsh conditions.

In 1976 Mao Zedong died and the so-called Gang of Four were arrested. Between 1977 and 1978, Deng Xiaoping consolidated his power and there was a major change in policy leading to the release of many categories of prisoners. See generally Hongda Harry Wu, *Laogai: The Chinese Gulag* (1992) 61-62. In the circumstances about to be described, the appellant himself was able to obtain a reversal of first the order of the [B] District Intermediate People's Court and then three months later, a reversal of the order of the Central District People's Court of [A] Municipality.

The appellant explains that in 1979 he wrote to the [B] District Intermediate People's Court to the effect that he was innocent of intending to escape to Hong Kong and innocent of attempting to escape from his cell at the prison farm. A short time later he was visited at the coalmine by a Public Security Bureau officer and interviewed about the allegations made against him in 1970. Four months later he received from the Court a document dated 19 November 1979 in which the original convictions were rescinded and the appellant formally acquitted. We do not intend setting out the document at length. It is sufficient to record that the document exonerates the appellant of the crimes of which he was convicted and recognizes that the original conviction and sentence were "inappropriate" and to be "rectified".

The appellant says that he was assisted in obtaining the exoneration by the fact that one of his brothers in Hong Kong wrote a letter to the authorities in Beijing expressing concern about what had happened to the appellant and the appellant himself wrote to the authorities in Beijing in similar terms. When he received the document from the [B] Court he was released from the prison compound at the coalmine but he continued to work in another department for a few months, receiving a minimal salary. He applied to return to [A] with the intention of resuming work on the Yangtze River and in this he was successful. He resumed work at [A] in March 1980 but was assigned to an administrative post and did not return to work on the tugboats.

The appellant also applied to the Court at [A] for a reversal of the two-year sentence imposed in 1958. Once again he was successful and on 22 February 1980 the Central District People's Court of [A] Municipality issued a formal document recording that the allegations made against the appellant in 1958 were groundless and that the conviction and sentence should be rescinded. In place, a verdict of acquittal was entered.

From March 1980 to November 1981 the appellant continued working for his old employer at [A]. He did not have to report to the authorities during this period. In October 1980 he married his present wife and the couple then applied to migrate to Hong Kong. He made this decision as he had no affection for the communist officials and wanted freedom. He had no

difficulty obtaining from the Public Security Bureau permission to migrate to Hong Kong and on 22 December 1981 the appellant and his wife crossed from Shenzhen into Hong Kong. By working seven days a week sewing clothes, the appellant and his wife successfully re-established themselves in Hong Kong and as mentioned, purchased their own flat.

It would seem that the appellant's life in Hong Kong was largely uneventful. Prior to the 1949 Revolution he had attended a school run by Methodists but after the Revolution he had no further involvement in Christianity though to be fair, it is clear that his faith sustained him during his 22 years of suffering. But it was not until 1990 that the appellant began attending church in Hong Kong. He says that up until then he did not have the time as he was working seven days a week. When he reduced his work routine on account of his age, he began attending a Baptist Church in Hong Kong because at this particular church the ceremonies were conducted in Swatow. His activities were confined to attending church on Sundays.

As far as political activities in Hong Kong are concerned, the appellant's involvement has been minimal. He did not take part in the protest activity in Hong Kong at the time of the Tiananmen Square massacre in June 1989. He merely observed from the sidelines. He believed that there were a number of spies taking pictures of the demonstrators and did not wish to place himself at risk. However, in 1990 and 1991 he took part in the annual commemorative march and in 1992, 1993 and 1994 he joined the crowd at Victoria Square for the annual memorial candle-lighting service. He accepts that on each occasion he was merely a participant and made no speeches. He also accepts that he was one of several hundred people who took part in the protests.

The appellant explains that he came to New Zealand because he is fearful of what will happen in Hong Kong after the changeover of sovereignty. He believes that the same thing will happen to him in the future as has happened in the past and believes that he will be "the first target" if the Public Security Bureau have occasion to crack down on dissent and to make arrests. He believes that he is blacklisted by the Chinese secret police because of his past and accords no weight to the two official court documents in which he is exonerated and rehabilitated. He sees great significance in the fact that in 1993 he began receiving newsletters from his work unit. He is adamant that no-one in his work unit knew of his address in Hong Kong and believes that the only way he was tracked down in Hong Kong was because the Public Security Bureau are keeping a note of his movements. In this regard it should be mentioned that Mr Z, who in November 1979 received a similar exoneration from the [A] Court for his sentence of imprisonment, was likewise reinstated to the work unit but was then transferred to Shanghai. He too began receiving newsletters from his old work unit in 1993. He said that it has become a common practice for Chinese institutions to send newsletters to alumni, similar to the practice followed in Western countries. He was not surprised to receive the newsletters as he had many ex-colleagues in Shanghai who knew of his whereabouts.

The appellant was reminded that the Sino-British accord leading to the sovereignty handover was signed in 1985 and it is remarkable that he left the decision to leave Hong Kong until the beginning of 1995. The appellant says that he did not find out about the handover until 1993. This is a surprising claim given the intense coverage of the issue over the past 10 to 15 years on television, radio and in the newspapers in Hong Kong. However, we attach no significance to this aspect of the case given its marginal relevance.

Looking to the future and in particular with a view to establishing the real chance of persecution were he to return to Hong Kong, the appellant's supplementary written statement contains the following evidence:

"21. I am fearful of the future and afraid of what will happen after Hong Kong is handed back to the Chinese at the end of June 1997. I believe that the same thing will happen to me as has happened to many other people who have been branded as counter- revolutionaries in the past. Sometimes local PSB stations have a quota to fill. I will be the first target if they need to have a certain number of arrests. Also if there is any trouble in Hong Kong which there is bound to be, then I will be the first one in my neighbourhood to be arrested because it is quite obvious from my own experiences that I am black-listed by the Chinese secret police because of my past. I believe that my position is just as bad as that of any other Communist dissident and that I will always have the label of being a very important person who has struggled against the Communist party. Even though I was rehabilitated', my record which is kept by the authorities clearly labels me as a prime suspect. My work unit know where I live in Hong Kong. As soon as the Chinese government takes over Hong Kong, my old files will be made known to the local Public Security Bureau in Hong Kong. I will have no way of escaping this.

...

23. I should also state that my hatred of the Chinese Government is very high. I cannot express this in words. Although God teaches me to forgive *people*, I cannot forgive the Chinese Government for what they have done to me. The anger that comes in me when I think that half of my adult life has been destroyed by this monster. I have been lucky to be living out of China. My anger and hatred is so great however that if I am forced to go back to China I will struggle against the Chinese government for the rest of my life. If I get a chance to protest I will protest. I will not sit down and let the Chinese Government destroy my life again."

In his closing submissions Mr Ryken emphasised the second of these two paragraphs and submitted that the Authority itself had been able to observe that the appellant is a complex man who has two sides. On the one hand is his deep-seated fear of the authorities and of future persecution. On the other hand is his deep-seated hatred which expresses itself as belligerence.

The witness Mr Z offered the opinion that the appellant was a Don Quixote-type and while he suffered from depression and anxiety, was not someone who could control himself. Mr Z returned to this theme in his further statement submitted with counsel's memorandum dated 30 June 1997.

As against this, however, the appellant has also tendered in evidence a report from Pramila Fernandez, Consultant Psychiatrist dated 12 June 1996. In this report the appellant is described as presenting with "symptoms of institutionalization", as "quite passive and with low self-worth". At one point he is described in the following terms:

"He presents as a repressed and institutionalized individual who is unable to take initiative and is described as quite dependent."

As to these findings, counsel submitted that they are generalizations and therefore not necessarily inconsistent with the appellant's hatred of the Chinese communist regime and of his belligerence towards it. In this regard the appellant's failure to participate in the 1989 Tiananmen Square protests in Hong Kong but later participation in the subsequent commemorative occasions was said to be attributable to any number of reasons. The appellant may just have felt different in the later years and in particular, may have felt more

belligerent. The Authority was asked not to draw hasty conclusions from the fact that the appellant did not take part in protest activity at a time when he was unaware of the sovereignty changeover scheduled for 1997 and when he was outside the country in which he had been persecuted.

Counsel's submissions downplayed the significance of the rehabilitation because, so it was submitted, it was not due to any specific case or justification established by the appellant. Rather, the rehabilitation occurred as part of a movement throughout the country and was therefore "meaningless, political expediency only". It was argued that while there may be no immediate clampdown on persons similarly situated to the appellant (because Hong Kong is still under the international spotlight), the fact of the matter is that the appellant's past will follow him to Hong Kong because of the personal file or *dang-an* system. It was said that the country information shows that within China itself human rights abuses are increasing and the appellant is particularly vulnerable given the past labels applied to him and which will be found on his file. He has tried unsuccessfully to live in obscurity but his former work unit managed to find his address. It was submitted that, although naïve in some respects, the appellant is deeply opposed to the Chinese communist regime and was described by counsel as a "walking timebomb". In these circumstances it was argued that there is a real chance of persecution in the future were the appellant to return to Hong Kong.

In the alternative, it was submitted by counsel that even if on an objective analysis there is no real chance of future persecution, the appellant should nonetheless be granted refugee status because he has ***in the past*** suffered under an atrocious form of persecution. In aid of this submission reliance was placed on the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* para 136 which is in the following terms:

"136.The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to "statutory refugees". At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who--or whose family--has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee."

It is to be observed, however, that this paragraph addresses the question of ***cessation*** in relation to so-called statutory refugees, namely refugees falling under Article 1A(1) of the Refugee Convention. Its application to the logically prior issue of ***inclusion*** in relation to the very differently worded Article 1A(2) is an open question and is a matter that will be addressed later. Recognizing these difficulties, counsel argued in the further alternative that the humanitarian principle said to be contained in paragraph 136 should inform the Authority's interpretation of Article 1A(2). The essence of the alternative argument is that if the Authority finds that the appellant in the period between 1958 and 1980 held a well-founded fear of persecution and/or suffered atrocious persecution, that is enough for him to meet the requirements of Article 1A(2) of the Refugee Convention even though he does not ***presently*** have an objective well-founded fear of persecution. In support there was cited *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107; [1997] 2 All ER

723 (CA) and the observations of the Authority in *Refugee Appeal No. 135/92 Re RS* (18 June 1993) at 40 to 49, although it was accepted that the latter decision is not directly on point. As to the Convention ground, it was argued that the appellant's case clearly fell within the political opinion ground. It was submitted that the religion aspect of the case was relevant only in the sense that his practising of a religion could possibly promote the real chance of persecution if there were to be a crackdown on Christians in Hong Kong.

THE LEGAL ISSUES

Because so much of what follows centres on Article 1A of the Refugee Convention, the full text of this provision follows:

Article 1

Definition of the term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) [As a result of events occurring before 1 January 1951 and] owing to a 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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either

(a) "events occurring in Europe before 1 January 1951"; or

(b) "events occurring in Europe or elsewhere before 1 January 1951", and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

The effect of the 1967 Protocol Relating to the Status of Refugees was to remove from Article 1A(2) the words indicated by square brackets. Without going into detail, the purpose of the Protocol was to remove the temporal and geographic limitations to Article 1A(2). See Professor James C Hathaway, *The Law of Refugee Status* (1991) 10-11. The Protocol leaves Article 1A(1) entirely unaffected, a point the appellant's submissions overlook.

The appellant's contention (albeit as an alternative submission) that he is entitled to recognition as a refugee even though he does not presently have a well-founded fear of persecution is novel and cuts directly across the Authority's long-established jurisprudence,

namely that the appropriate date at which the well-foundedness of a fear of persecution is to be assessed is the date of determination of the refugee application. If the appellant's alternative submission is upheld, it will make unnecessary any inquiry into the present well-foundedness of the appellant's fear. We therefore intend to address the submissions in reverse order to that in which they were presented. The essential issues for determination are first, whether past persecution alone satisfies the requirements of Article 1A(2) and second, the appropriate date at which the well- foundedness of a fear of persecution is to be assessed.

To understand why the Authority must reject the appellant's submission and affirm its established jurisprudence that past persecution alone is insufficient and that the appropriate date at which the well-foundedness of the fear of persecution is to be assessed is the date of determination of the refugee application, reference must be made to the drafting history of Article 1 of the Refugee Convention.

WHETHER PAST PERSECUTION ALONE SATISFIES ARTICLE 1A(2)

Drafting History

The present refugee regime came into effect from 1 January 1951 and replaced the pre-Second World War arrangements as well as the refugee protection system set up in 1946 under the Constitution of the International Refugee Organization (IRO). We intend to say nothing about the pre-Second World War arrangements. They are adequately addressed in Atle Grahl-Madsen, *The Status of Refugees in International Law* Vol 1 (1966) 12-14; 102-142 and in Professor James C Hathaway in *The Law of Refugee Status* (1991) at 2 to 6. See also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 (HCA) per Gummow J at 370-371.

We intend to take as our starting point the IRO which was established as a temporary specialized agency of the United Nations and functioned between 1946 and the establishment of the office of the United Nations High Commissioner for Refugees in 1950. What follows is a paraphrase of Professor Hathaway's treatment of the subject at *op cit* 66. The IRO definition of a refugee included persons who expressed "valid reasons" for not returning to their country of nationality, including "persecution, or fear, based on reasonable grounds of persecution". That is, the Organization had competence over persons who had ***already*** suffered persecution in their home state, as well as over persons judged by the administering authorities to face a ***prospective risk*** of persecution were they to be returned to their own country. The distinction between persons who have already suffered persecution and those who have not, but who can establish a prospective risk of persecution is an important one, but is overlooked by the appellant's submission. The question is whether Article 1A(2), in addition to protecting the latter category, also protects the former. In the opinion of Professor Hathaway at *op cit* 67:

"The [IRO] definitional framework itself nonetheless authorized an ***objective*** assessment of risk: Was the refugee claimant an individual who, even though she had not already been persecuted, might be in jeopardy in her state of origin because of who she was or what she believed? The establishment of the alternative formulation of refugee status was thus intended to recognize the importance not only of sheltering those who had already been persecuted, but equally of extending protection to those who could be spared from prospective harm. Both groups were viewed as having valid reasons' for not returning to their home state."

In this passage we see, in addition to the distinction between those who have already suffered persecution and those who face a prospective risk of persecution, a second element, namely the objective assessment of risk.
Professor Hathaway points out at *op cit* 67 that the definitional structure of the IRO Constitution was the initial point of reference in formulating the Convention refugee definition. Its dualistic central criterion - including either past persecution or prospective risk of persecution - was clearly the major influence on the three draft definitions submitted to the first session of the Ad Hoc Committee on Refugees and Stateless Persons.
However, it is necessary to divert for a moment in order to point out that the office of the United Nations High Commissioner for Refugees (UNHCR) was set up ***before*** the 1951 Refugee Convention was drafted. The office was set up by the General Assembly of the United Nations in the form of the Statute of the Office of the United Nations High Commissioner for Refugees which was adopted on 14 December 1950 as Annex to Resolution 428(V). The UNHCR was established by the General Assembly to provide "international protection" and to seek "permanent solutions for the problem of refugees". See Chapter I, para 1 of the Statute. The functions of the High Commissioner are defined in the Statute and in various Resolutions subsequently adopted by the General Assembly. See further UNHCR, *Collection of International Instruments Concerning Refugees* (1988) 3 fn 1. Professor Guy S Goodwin-Gill in *The Refugee in International Law* (2nd ed 1996) 7-8 points out that the Statute first brings within UNHCR's competence refugees covered by various earlier treaties and arrangements. It next includes refugees resulting from events occurring before 1 January 1951, who are outside their country of origin and unable or unwilling to avail themselves of its protection "owing to well-founded fear of being persecuted" or "for reasons other than personal convenience". This latter provision would cover the situation of a person who, by reason of persecution already suffered, remains unwilling to return even though the circumstances which gave rise to his or her refugee status have ceased to exist. In this regard a comparison can be made with Article 1C(5) and (6) of the 1951 Refugee Convention to which we will return. Finally, the Statute extends to all other persons who are outside their country of origin and unable or unwilling to avail themselves of its protection owing to a well-founded fear of being persecuted. For this category of persons, there is no allowance made "for reasons other than personal convenience". The full text of paragraph 6 and 7 of the Statute follow:
Chapter II - FUNCTIONS OF THE HIGH COMMISSIONER
6. The competence of the High Commissioner shall extend to:
A. (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the constitution of the International Refugee Organization.

(ii) Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, 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 or for reasons other than personal convenience, is unwilling to return to it.

Decisions as to eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of the present paragraph;

The competence of the High Commissioner shall cease to apply to any person defined in section A above if:

(a) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(b) Having lost his nationality, he has voluntarily re-acquired it; or

(c) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(d) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(e) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, claim grounds other than those of personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked; or

(f) Being a person who has no nationality, he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist and he is able to return to the country of his former habitual residence, claim grounds other than those of personal convenience for continuing to refuse to return to that country;

B. Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

7. Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:

(a) Who is a national of more than one country unless he satisfies the provisions of the preceding paragraph in relation to each of the countries of which he is a national; or

(b) Who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or

(c) Who continues to receive from other organs or agencies of the United Nations protection or assistance; or

(d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

The points to note are that the UNHCR Statute distinguishes between three categories of refugees:

(a) Those refugees already considered to be refugees. They were to benefit from the UNHCR mandate without a renewed test of their eligibility.

(b) Refugees who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, were outside the country of nationality and unable or owing to such fear, ***or for reasons other than personal convenience*** were unwilling to avail themselves of the protection of that country. In the 1951 Convention, the “reasons

other than personal convenience" formulation is to be found in the form of the compelling reasons exception to Article 1C(5) & (6), but is confined to statutory refugees, ie Article 1A(1) refugees. It does not apply to Article 1A(2) refugees.

(c) Individuals outside their country of nationality because they have ***or had*** a well-founded fear of persecution by reason of race, religion, nationality or political opinion and are unable or because of such fear, are unwilling to avail themselves of the protection of the country of origin. The "has or had" alternative provided by the Statute did not find its way into the 1951 Convention.

The differences between the UNHCR Statute and Article 1A(2) of the the Refugee Convention are telling against the appellant's argument. The Statute recognizes past persecution. The 1951 Convention does not.

Returning to Professor Hathaway's analysis of the *travaux préparatoires* in *The Law of Refugee Status* (1991) 66-69, it is to be recalled that the definitional structure of the IRO Constitution was the initial point of reference in formulating the Convention refugee definition and that its dualistic central criterion - including either ***past*** persecution or ***prospective*** risk of persecution - was clearly the major influence on the three draft definitions submitted to the first session of the Ad Hoc Committee on Refugees and Stateless Persons. Again, to paraphrase Professor Hathaway at *op cit* 68, the compromise that emerged from the drafting process was to establish ***present*** or ***prospective*** assessment of risk as the norm for refugee protection, but to continue to honour the past persecution standard for persons within the scope of a pre-1951 refugee agreement. The Israeli and American delegates took the lead in insisting that the victims of Nazism and other refugees already protected under earlier accords should retain their entitlement to protection either because of anticipated harm were they to be returned, or as a result of "sentimental reasons" based on past persecution. The propriety of extending protection to these refugees on the basis of their subjective concerns was explicitly argued as a justifiable exception to the norm of objective, prospective assessment. Professor Hathaway then quotes from the following statement by Mr Robinson of Israel at the 18th Meeting of the Ad Hoc Committee on 31 January 1950 (UN Doc E/AC.32/SR.18 (8 February 1950)) and reproduced in Alex Takkenberg & Christopher C Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* Vol 1 (1990) 273, 274-275:

"If the objective criteria of the first category were applied to such cases, an injustice would be committed. In point of fact, the reasons why some of the refugees did not return to their countries of origin were not objective but subjective. They were not being prevented from returning; in some cases they were even invited to return. But they no longer had the courage or the desire to do so. Thus, persons who had left Germany, not of their own accord, but for reasons outside their own desires, could not refer to persecutions which no longer existed. It was their horrifying memories which made it impossible for them to consider returning. German-occupied countries offered other examples which justified the reluctance of some refugees to return to their countries of origin."

Commenting on what is now the "compelling reasons" exception to the cessation clause contained in Article 1C(5) and (6) of the *Convention, Nehemiah Robinson, in Convention Relating to the Status of Refugees: Its History, Contents and Interpretation: A Commentary* (1953) at 60-61 states:

"However, the framers of the Convention had to take into account the psychological factor connected with the existence of previous persecution: having been persecuted by the government of a certain country, the refugee may have developed a certain distrust of the

country itself and a disinclination to be associated with it as its national. For this reason the framers of the Convention inserted the second part of par. C(5): a former persecutee need not avail himself of the protection of the country of his nationality if he can cite compelling reasons' justifying the refusal, which stem from his previous experience. This exemption is accorded only statutory' refugees because they alone - in the view of the framers of the Convention - could have been subjected to previous persecution'."

We return to Professor Hathaway's analysis in *The Law of Refugee Status* (1991) at 68. He points out that in the Convention as ultimately adopted, persons determined to be refugees under earlier arrangements are not required to demonstrate a well-founded fear of being persecuted, and are not automatically subject to cessation of refugee status if conditions become safe in their homeland. See the provisos to Article 1C(5) & (6). It was the intention of the drafters, however, that all other refugees should have to demonstrate a present fear of persecution. Professor Hathaway thus emphasizes the forward-looking nature of the test contained in Article 1A(2) of the 1951 Convention. We emphasize the following passage:

"Thus, it was agreed that the first branch of the IRO test which focused on past persecution should be omitted in favour of the well-founded fear of being persecuted' standard, involving evidence of a present or prospective risk in the country of origin. The use of the term fear' was intended to emphasize the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind. This interpretation is buttressed by the fact that the Convention provides for the cessation of refugee status upon the establishment of safe conditions in the country of origin, whether or not the refugee continues to harbour a subjective fear of return. In consequence, it is not accurate to speak of the Convention definition as containing both a subjective and an objective element': it is rather an objective test to be administered in the context of present or prospective risk for the claimant."

We respectfully endorse this analysis and the immediately following paragraph to be found at *op cit* 69. In this paragraph Professor Hathaway points out the anomalies which would arise were any other interpretation to be adopted:

"In addition to the historical reasons why fear' should be interpreted as mandating an anticipatory, objective assessment of risk rather than a subjective evaluation of the claimant's concerns, it would be anomalous to define international legal obligations in such a way that persons facing the same harm would receive differential protection. Why should states be expected to distinguish among persons similarly at risk on the basis of variations of individual temperament or tolerance? Why should an individual of stoic disposition be viewed as less worthy of protection that one who is easily scared, or who proclaims her concerns with great fervour? Yet surely this is the implication of giving substantial' if not primary weight to a claimant's own assessment of his or her own situation.

Logic dictates that since the central issue is whether or not an individual can safely return to her state, the claimant's anxiety level is simply not a relevant consideration. This is in keeping with the basic nature of the international human rights undertaking, which binds states to respect objective indicators of human dignity as defined in universal terms. These standards are common to all, and do not vary as a function of particularized perceptions or concerns."

If accepted, the appellant's submission would require the Authority to entirely put aside the drafting history of Article 1A of the Refugee Convention as traced through the IRO Constitution and the Statute of the Office of the United Nations High Commissioner for Refugees. In particular we find that:

(a) There was a clear intent that the Refugee Convention distinguished between those who had suffered persecution prior to 1 January 1951 and who had been considered to be a refugee, and those who could establish a present or prospective risk of persecution. The former category were included in Article 1A(1), the latter were included in Article 1A(2).
(b) It was clearly intended that past persecution *per se* could not establish eligibility for refugee status under Article 1A(2).
(c) The 1967 Protocol expressly affects the temporal and geographic limitations of Article 1A(2). It leaves entires unaffected Article 1A(1) and the provisions affecting statutory refugees.
In the result, the appellant's alternative submission is not sustainable.

Article 1C

Our analysis is confirmed by the Convention's cessation clause, namely Article 1C.
By way of introduction, we observe that both categories of refugees, ie statutory refugees in Article 1A(1) and Convention refugees in Article 1A(2) are, of course, subject to the cessation provisions contained in Article 1C of the Refugee Convention. As Professor Hathaway points out at *op cit* 189, the Convention conceives of refugee status as a transitory phenomenon, which expires when a refugee can either reclaim the protection of her own state or has secured an alternative form of enduring protection. Because refugee law is intended simply to afford surrogate protection pending the resumption or establishment of meaningful national protection, the Convention explicitly defines the various situations in which the cessation of refugee status is warranted. Article 1C provides:
C. This Convention shall cease to apply to any person falling under the terms of Section A if:
(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
(2) Having lost his nationality, he has voluntarily re-acquired it, or
(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
(6) Being a person who has no nationality he is, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.
For present purposes, the relevant provisions are Article 1C(5) and (6). It will be seen that the prescribed cessation of refugee status does not apply in every case. Both provisions are subject to a proviso affecting statutory refugees (ie, refugees falling within Article 1A(1) of the Convention). Cessation of refugee status does not apply to statutory refugees who are able to invoke "compelling reasons arising out of previous persecution" for refusing to avail

themselves of the protection of the country of nationality or (as the case may be) the country of former habitual residence.
The compelling reasons exception does ***not*** apply to refugees covered by Article 1A(2).
The *Handbook* paragraph so much relied on by the appellant (para 136) is to be found in the section addressing Article 1C(5) and in particular, the compelling reasons exception. For convenience we repeat para 136:
"136. The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to "statutory refugees". At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who--or whose family--has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee."
As it is clear that the appellant is not a statutory refugee, the compelling reasons exception does not in any way apply to his circumstances. We cannot understand how para 136 assists the appellant.
An additional difficulty faced by the appellant is that it has not yet been determined whether he does fall within Article 1A(2). The question of how he could lose refugee status, once granted, hardly assists in the determination of the question whether he is eligible for such grant in the first place. This rather obvious point is reinforced by the opening words of Article 1C:
"This Convention shall cease to apply to any person falling under the terms of Section A if..."
For the appellant it was submitted that "from a humanitarian point of view" the proviso to Article 1C(5) & (6) should be read as applying to Article 1A(2) refugees. Prayed in aid of this submission were "the *travaux préparatoires* and the rules of interpretation which apply to treaties [and which] clearly indicate that a humanitarian approach was to be given to persons who suffered, like the Jews in Germany, atrocious past persecution". As to this submission:
(a) The *travaux* make the submission untenable.
(b) The clear and unambiguous wording of the provisos to Article 1C(5) & (6) confine the compelling reasons exception to statutory refugees and no others.
(c) The humanitarian aims of the Convention are limited and are not pursued at all costs: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331, 345-346 per Dawson J with whom Gummow J at 374 expressed general agreement. As Dawson J points out in his reasons for judgment at 346:
"It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them."
The appellant's reliance on the Authority's decision in *Refugee Appeal No. 135/92 Re RS* (18 June 1993) 42 is therefore misguided as the question there was whether, once the requirements of Article 1A(2) are satisfied, recognition as a refugee can still be denied by application of the relocation (or internal flight alternative) principle. There is no suggestion

in Article 1C(5) or para 136 that for the purpose of ***inclusion***, past persecution alone and in the absence of a current well-founded fear of persecution will qualify a claimant for recognition as a refugee.

While the Authority can understand and indeed, has applied, the humanitarian principle underlying the compelling reasons exception to the cessation clause and the urgings contained in para 136 of the *Handbook* to apply the exception to Article 1A(2) refugees (see *Refugee Appeal No. 135/92 Re RS* (18 June 1993) 40-49), the Authority is nevertheless constrained by the clear language of the Convention. It is also constrained by the Terms of Reference and by administrative law principles to act within its jurisdiction. In particular, it is unable, on its own motion, to effectively amend Article 1A(2) by reading into it words which are not there and which, as the drafting history shows, were deliberately excluded. In short, refugee status cannot be granted simply because the individual has suffered persecution in the past, even persecution of an atrocious nature. Furthermore, Part 2, para 5(3) of the Authority's Terms of Reference specifically precludes the Authority from considering humanitarian circumstances which lie outside of the Refugee Convention:

"It shall not be a function of the Authority to consider any immigration matters relating to an appellant's case or to consider whether, in respect of claimants who are not refugees within the meaning of Article 1A(2), there exist any humanitarian or other circumstances which could lead to the grant of a residence or other permit to remain in New Zealand."

In short, the Terms of Reference as presently drafted do not confer on the Authority the jurisdiction to accept the appellant's submission.

Past Persecution - Canada

The solution devised in other countries is to apply, by way of domestic legislation, the compelling reasons exception to Article 1A(2) refugees. See for example the Canadian Immigration Act 1976-77 which specifically incorporates the compelling reasons exception in the cessation context, but does not limit the application of that exception to statutory refugees. The provision applies to all persons recognized as refugees. But importantly, the legislation does not alter the terms of Article 1A(2). Thus even in Canada a claim to refugee status based solely on past persecution will inevitably fail. Section 2 of the Act provides:

"(2) A person ceases to be a Convention refugee when

(a) ...

(b) ...

(c) ...

(d) ...

(e) the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, ceased to exist.

(3) A person does not cease to be a Convention refugee by virtue of paragraph (2)(e) if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution."

Past Persecution - The United States Experience

A different approach has been taken in the United States of America where the statutory definition of the term "refugee", while similar to the Convention definition, is not the same. It specifically permits eligibility for asylum to be established by a showing of past persecution alone. See the Immigration and Nationality Act §101(a)(42)(A). The INA definition recognizes refugee status when one is outside the country of origin "because of ***persecution or*** a well-founded fear of persecution" (emphasis added). Applying this definition, the Board of

Immigration Appeals in *Matter of Chen* Int Dec 3104 (BIA 1989) first gave recognition to past persecution as a basis for granting asylum and the Federal Courts have since accepted this as good law. See by way of example *Acewicz v INS* 984 F 2d 1056, 1061-62 (9th Cir 1993). The reasoning process in *Matter of Chen* is that a rebuttable presumption arises that an alien who has been persecuted in the past by his country's government has reason to fear similar persecution in the future. In addressing the fact that in the United States asylum is a discretionary form of relief, the Board of Immigration Appeals also held that the favourable exercise of discretion is warranted for humanitarian reasons to victims of past persecution even if there is little prospect of future persecution. Specific reference was made to para 136 of the UNHCR *Handbook*. Subsequently, in 1990 the Board's approach was codified by the Code of Federal Regulations and in particular 8 CFR §208.13(b)(1)(i) & (ii):

208.13Establishing refugee status; burden of proof

(a) ...

(b) The applicant may qualify as a refugee either because he has suffered actual past persecution or because he has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if he can establish that he has suffered persecution in the past in his country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion, and that he is unable or unwilling to return to or avail himself of the protection of that country owing to such persecution.

(i) If it is determined that the applicant has established past persecution, he shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return.

(ii) An application for asylum shall be denied if the applicant establishes past persecution under this paragraph but is determined not also to have a well-founded fear of future persecution under paragraph (b)(2) of this section , unless it is determined that the applicant has demonstrated compelling reasons for being unwilling to return to his country of nationality or last habitual residence arising out of the severity of the past persecution. If the applicant demonstrates such compelling reasons, he may be granted asylum unless such a grant is barred by paragraph (c) of this section or § 208.14(d).

The difficulties created by *Matter of Chen* and 8 CFR §208.13(b) are briefly adverted to in Deborah E Anker, *The Law of Asylum in the United States: A Guide to Administrative Practice and Caselaw*(2nd ed 1991) 65 fn 334, 93 fn 480, 165-171 fn 884. See also Aleinikoff, Martin & Motomura, *Immigration: Process and Policy* (3rd ed 1995) 792-793.

Past Persecution - Europe

With the exception of Denmark, the United States of America appears to be alone in expressly recognizing past persecution as being sufficient on its own to justify the grant of refugee status. A recent comparative study of European asylum law, Carlier, Vanheule, Hullmann & Galiano (eds), *Who is a Refugee? A Comparative Caselaw Study* (1997) reveals that in most countries, prior acts of persecution can give more credibility to the statements of an asylum-seeker, but are not on their own sufficient and refugee status is not connected with the existence of persecution in the past. We list the countries concerned (the page number of the text is also shown): Austria 23, Belgium 62-64, Canada 177, France 379-381, Germany 238-239, Greece 446, Italy 462-463, Luxembourg 475, the Netherlands 487,

Portugal 532, Spain 343, the United Kingdom 570. Other countries appear to adopt the view that once past persecution has been established, the asylum-seeker is presumed to continue to have a well-founded fear of persecution, at least until that presumption is interrupted (eg Switzerland, 123-131). Denmark on the other hand adopts a position similar to that of the United States, that is, if an asylum-seeker has been subjected to very serious persecution, the Refugee Appeals Board usually acknowledges that the refugee should not be required to return even though the risk of future persecution is minor: *op cit* 304.

Finally, in this regard, it should be noted that the *Joint Position on the Harmonized Application of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees* adopted by the Justice and Home Affairs Council of the European Union on 4 March 1996 on the basis of Article K.3 of the Treaty on European Union(1) provides in para 3 that:

"3. **Establishment of the evidence required for granting refugee status**

The determining factor for granting refugee status in accordance with the Geneva Convention is the existence of a well-founded fear of persecution on the grounds of race, religion, nationality, political opinions or membership of a particular social. The question of whether fear of persecution is well-founded must be appreciated in the light of the circumstances of each case. It is for the asylum-seeker to submit the evidence needed to assess the veracity of the facts and circumstances put forward. It should be understood that once the credibility of the asylum- seeker's statements has been sufficiently established, it will not be necessary to seek detailed confirmation of the facts put forward and the asylum-seeker should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The fact that an individual has already been subject to persecution or to direct threats of persecution is a serious indication of the risk of persecution, unless a radical change of conditions has taken place since then in his country of origin or in his relations with his country of origin.

The fact that an individual, prior to his departure from his country of origin, was not subject to persecution or directly threatened with persecution does not *per se* mean that he cannot in asylum proceedings claim a well-founded fear of persecution."

There is no suggestion in this paragraph that past persecution alone is sufficient to warrant the grant of refugee status. This is emphasized by the terms of the last two clauses.

Past Persecution - Conclusions

Leaving aside for one moment *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107; [1997] 2 All ER 723 (CA), the conclusion we draw from general refugee jurisprudence as evidenced by state practice is that there is little support for the contention that a person who has been persecuted in the past and suffered atrocious persecution *ipso facto* meets the requirements of Article 1A(2) of the Refugee Convention even though he does not ***presently*** have a well-founded fear of persecution. Certainly there is no New Zealand or Australian decision to support the proposition. The appellant's argument would receive a sympathetic hearing in the United States but only because the domestic legislation specifically provides that past persecution alone is sufficient to qualify for asylum.

Against this background we are of the view that in relation to Article 1A(2) refugees, Professor Hathaway is correct in stating that there are historical reasons why "fear" should be interpreted as mandating an anticipatory assessment of risk. That is, the inquiry into refugee status is concerned only with the prospective assessment of risk of persecution: *The*

Law of Refugee Status (1991) 69, 75, 87-88. This has long been an established fundamental of New Zealand refugee jurisprudence.

It does not follow, however, that past persecution is irrelevant in assessing the risk of future persecution. It has been expressly recognized that while a refugee applicant is not required to establish past persecution, where evidence of past persecution exists, it is unquestionably an excellent indication of the fate that may await the individual upon return to the country of origin. See for example*Refugee Appeal No. 55/91 Re RS* (10 August 1992) 11 and *Refugee Appeal No. 300/92 Re MSM* (1 March 1994) 8-9. The position in Australia appears to be the same. See *Minister for Immigration and Ethnic Affairs v Singh* (1997) 144 ALR 284, 292 (FC:FC) (Black CJ, Lee, von Doussa, Sundberg and Mansfield JJ):

"Although it does not follow as of course that fear of persecution is a well-founded fear by showing that a person has suffered persecution in the past for a Convention reason, it is a relevant matter in determining whether there is a real chance that person would suffer such persecution in the future if returned to the country of nationality."

Even more recently, in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 144 ALR 567, 578 (HCA) Brennan CJ, Dawson, Toohey, Gaudron & McHugh JJ observed:

"The course of the future is not predictable, but the degree of probability that an event will occur is often, perhaps usually, assessable. Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability - high or low - of their recurrence. The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur."

This then brings us to a related point, namely the relevant date at which the well-founded fear of persecution must be established.

THE RELEVANT DATE FOR DETERMINATION OF REFUGEE STATUS

It is a fundamental principle of refugee law in both Australia and New Zealand that the relevant date for the assessment of refugee status is the date of determination.

As to Australia, see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA); *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (No 2) (1993) 117 ALR 455, 458-463 (Wilcox J); *Minister for Immigration, Local Government and Ethnic Affairs v Mok Gek Bouy* (1994) 127 ALR 223, 254 (FC:FC) (Black CJ, Lockhart & Sheppard JJ); *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 277, 293 (HCA); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 (HCA) per Kirby J at 382; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 142 ALR 191, 194-196 (FC:FC) (Black CJ, Lee, von Doussa, Sundberg & Mansfield JJ) and *Minister for Immigration and Ethnic Affairs v Singh* (1997) 144 ALR 284, 287 (FC:FC) (Black CJ, Lee, von Doussa, Sundberg & Mansfield JJ).

For some of the New Zealand caselaw see *Refugee Appeal No. 2254/94 Re HB* (21 September 1994) 58 (cited in *Minister for Immigration and Ethnic Affairs v Singh* (1997) 142 ALR 191, 196 (FC:FC)) and *Refugee Appeal No. 70120/96 RE ORAAS* (1 April 1997) 3.

As pointed out by Wilcox J in *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (No 2) (1993) 117 ALR 455, 462, to choose the date of lodgement of the application instead of the date of determination is to risk rejecting the claim of a person who in fact fulfils the requirements of the definition at the date of determination and to countenance the possibility of accepting as a refugee a person who fulfilled the requirements at the date of the application, but who has since lost that status because of improved conditions in the country of nationality. To choose the date of determination as the relevant date is to confer the benefit of refugee status on all those, and only those, who are adjudged to have that status at the moment of determination. The same theme is to be found in the decision of the Full Court of the Federal Court in *Minister for Immigration and Ethnic Affairs v Singh* (1997) 142 ALR 191, 194 (FC:FC). The Court drew attention to the fact that Article 1A(2) requires of a refugee who has a nationality that that person be unwilling to ***avail*** himself of the protection of that country whereas refugees who are stateless must show that they are unwilling to ***return*** to the country of former habitual residence. The Court observed:

"Although cast in different language, doubtless reflecting the different situations of a person who has a nationality and one who does not, the expressions unwilling to avail himself of the protection of that country' and unwilling to return to it' both look to whether the applicant answers the description of a person who has a well-founded fear of persecution if he is returned to the country of his nationality or former habitual residence. The well-founded fear is thus tied to the time at which the question of return arises.

The fact that in many cases there will be an interval between a person's departure from the country of nationality or former habitual residence and arrival in Australia and application for a protection visa, and a further interval, perhaps a lengthy one, between the application and the minister's determination, does not alter the fact that the definition of refugee', and thus s 36(2), require the applicant to show a well-founded fear of being persecuted if returned to the country of nationality or former habitual residence. The fear is not a fear in the abstract, but a fear owing to which the applicant is unwilling to return, and thus it must exist at the time the question of return arises, namely at the time the decision is made whether the applicant is a refugee.

To require an applicant to show a well-founded fear at the time of determination rather than at the time of lodgement of the application produces a sensible result in cases where events occurring between the two dates makes a choice between them necessary. To choose the application date is to risk rejecting the claim of a person who in fact satisfies the requirement at the date when the question of return arises, and to countenance the possibility of accepting as a refugee a person who may have satisfied the requirement at the date of the application but, because of improved conditions in the country of nationality or habitual residence, no longer satisfies it at the date when the question of return arises."

The Court also pointed out at p 194 the injustice which could arise in the Australian context where, since 1 September 1994, only one application for refugee status is permitted. If the relevant time is the date of the making of an application for refugee status, an applicant who could not show a well-founded fear at the date of the application, but by reason of changed circumstances could do so at the time of the determination, would be rejected and would be unable to make a further application so as to take the benefit of the new circumstances. The Court observed that this "would hardly accord with the humanitarian aims of the Convention". The Court then noted at p 196 that its views accorded with the position

reached in New Zealand, the United Kingdom, Canada, the United States and several European countries:

"For the reasons given independently of authority, the crucial time is the date of determination of the application. That view accords with the position reached in New Zealand on the basis of *Chan* as explained and applied in *Lek v Minister for Immigration and Ethnic Affairs (No 2)* (1993) 45 FCR 418 at 422-5; 117 ALR 455: see the decision of the Refugee Status Appeals Authority in *Re HB* (21 September 1994). It also accords with the position in the United Kingdom (*R v Home Secretary; ex parte Sivakumaran* [1988] AC 958 at 992-4, 998) and in Canada: *Salinas v Canada (Minister of Employment and Immigration* (1992) 93 DLR (4th) 631, a decision of the Federal Court of Appeal. The survey of European jurisdictions in Lambert,*Seeking Asylum, Comparative Law and Practice in Selected European Countries* (1995), pp 85-7, shows that the decision-making authorities in the United Kingdom, France, Sweden, Germany and Switzerland operate on the basis that the relevant date is the date of determination. The focus on the existence of the well-founded fear of persecution at, and prospectively from, the date of determination also exists in decisions in the United States: See Hathaway, *The Law of Refugee Status* (1991), pp 75-83."

A more recent study of European jurisprudence confirms the opinion expressed by Lambert in the text cited in Singh (142 ALR 191). See Carlier, Vanheule, Hullmann & Galiano (eds), *Who is a Refugee? A Comparative Caselaw Study* (1997). By and large the study establishes that the broad division is between countries which prefer the date of departure (seemingly only Austria, 26-27) and those countries which favour of the date of determination (Belgium 67, Switzerland 129, Canada 181, Germany 244, Denmark 308, Spain 347, France 381, Italy 476, the Netherlands 493, Portugal 536, United Kingdom 578, United States 625).

The holding that past persecution cannot per se found a claim does not in any way minimize the evidentiary significance of past persecution, should such have occurred. But the manner in which past persecution is given recognition can lead to confusion. In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA) it was argued for Chan that once a person comes within the definition of refugee in Article 1A(2) of the Convention, that person continues to be a refugee until such time as one or other of the cessation provisions in Article 1C operates to remove that status. In other words, once Chan had established that he had a well-founded fear of persecution at any time in the past, he was entitled to recognition as a refugee. See the summary of counsel's argument at p 382 of the report and the decision of McHugh J at p 432 (Mason CJ at 386-387 concurring). On the facts of Chan's case, it was said that the well-founded fear of persecution existed at the time he first left China for Macau in 1974. The Court was unanimous in rejecting this interpretation (and this hardly helps the appellant). However, in doing so each of the justices approached the question of how to deal with changing circumstances in the applicant's country in different ways. For example, Mason CJ at 390-391 stated:

"The Full Court placed insufficient weight upon the circumstances as they existed at the time of departure which grounded Mr Chan's fear of persecution. In the absence of compelling evidence to the contrary the Full Court should not have inferred that the grounds for such fear had dissipated. While the question remains one for determination at the time of the application for refugee status, in the absence of facts indicating a material change in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded

at the time when he left the country of his nationality. This is especially the case when the applicant cannot, any more than a Court can, be expected to be acquainted with all the changes in political circumstances which may have occurred since his departure."
Dawson J at 399-400 said:
"Of course, the circumstances in which an application for recognition of refugee status fled his country of nationality will ordinarily be the starting point in ascertaining his present status and, if at that time he satisfied the test laid down, the absence of any substantial change in circumstances in the meantime will point to a continuation of his original status. "
Toohey J, after affirming that refugee status is a contemporaneous assessment, stated at 406:
"Of course, such an approach does not and cannot exclude consideration of an applicant's circumstances at the time he left the country of his nationality; these circumstances are a necessary starting point of the inquiry. All that the approach demands is that a determination whether a person has a well-founded fear of being persecuted is a determination whether that circumstances exists at the time refugee status is sought. If circumstances have changed since the applicant left the country of his nationality, that is a relevant consideration."
Gaudron J at 414-415 suggested the decision-maker should not give much weight to what may turn out to be a transitory or temporary improvement in the state of affairs and of all the justices, came closest to accepting Chan's argument by effectively incorporating Article 1C(5) into the Inclusion Clause context.
McHugh J at 432-433 did not think that there was much practical difference between beginning by asking whether an applicant was a refugee when he left his country of nationality and whether the circumstances have since changed or whether one simply examines the circumstances in the country of nationality at the time a claim for recognition is made.
Since then, it has sometimes been argued that *Chan* mandates a two-stage process. That is, to ascertain first of all whether the asylum-seeker's fear was well-founded either at the time of departure from the country of origin or upon arrival in the country of refuge and then deciding whether changes in relevant circumstances are such that the original fear of persecution is no longer well-founded at the time the decision is made. This approach has been rejected in Australia. See *Minister for Immigration, Local Government and Ethnic Affairs v Mok Gek Bouy* (1994) 127 ALR 223, 254 (FC:FC) (Black CJ, Lockhart & Sheppard JJ). The reasoning of the Court appears to have been partly motivated by the air of unreality which surrounds the two-stage process. That is, a person who may satisfy the Convention requirements at the date of departure from the country of origin, may not be able to satisfy the requirements upon arrival in the country of asylum. Or, who being able to satisfy the requirements at the date of arrival, may not be able to satisfy the requirements at the date of determination. Likewise, a person who leaves the country of origin without a well-founded fear of persecution may later, due to a change of circumstances in the country of origin, later acquire a well-founded fear of persecution. See the following quote from the decision of Sheppard J at 254 in which the other members of the Court concurred:
"It is enough, I think, to say that the decision in *Chan* makes it clear that there is no two-stage process. The circumstances to be considered are those which exist at the time the decision is made. Of course, it is relevant to take into account the circumstances which existed at the time the applicant for refugee status left the country of his or her nationality. But what needs to be done is to take into account the whole of the circumstances and make

a decision as to what the position is at the date that the matter is decided. The point is illustrated by the fact that it is quite possible that a person may leave a country for reasons quite unassociated with any fear of persecution. Events taking place in the country after the person's departure may warrant his or her developing a well-founded fear of persecution long after departure."

Very much the same point is made by Black CJ, Lee, von Doussa, Sundberg and Mansfield JJ in *Minister for Immigration and Ethnic Affairs v Singh* (1997) 142 ALR 191, 194 (FC:FC), the text of which has already been set out.

There are decisions of this Authority which have stated, relying on Chan, that where the fear of persecution was well-founded at an earlier date, such as the date of departure from the country of origin or entry into New Zealand, before a finding can be made that the individual is not a refugee, there needs to be "compelling evidence" establishing that the grounds for the previously well-founded fear have dissipated. It was said that evidence of a "material change" in the state of affairs in the country is required. See for example *Refugee Appeal No. 474/92 Re KA* (12 May 1994) 24. Refugee law, however, is not a static or rigid jurisprudence. As in other branches of the law, it will evolve on an incremental or case-by-case basis. As the understanding of the law develops, so too must the jurisprudence be refined and, on occasion, changed. We are of the view that the two- stage process thought to have been sanctioned in *Chan* must now be reconsidered in the light of *Mok Gek Buoy* and *Singh* (142 ALR 191). For the reasons given by the Full Court of the Federal Court in both decisions, the better view is that not only are the circumstances to be considered those which exist at the time the decision is made, but also that the creation of a presumption of a continuing well-founded fear of persecution is an uncalled-for gloss which can only complicate the jurisprudence and lead to the formulation of rules for one class of asylum-seeker which are not applicable to another. This is wholly undesirable in the humanitarian context. There is much to be said for both simplicity and clarity. See further in this regard *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331, 381 (HCA) per Kirby J. This indeed is already the direction the jurisprudence of the Authority has recently taken. See *Refugee Appeal No. 70120/96 Re ORAAS* (1 April 1997) 3.

In the circumstances, the appellant's argument that because he suffered persecution in the past, he therefore qualifies under Article 1A(2) of the Refugee Convention, must fail unless the Authority can be persuaded that the decision in *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107; [1997] 2 All ER 723 (CA) was correctly decided and can be made relevant to the appellant's case.

THE DECISION IN *ADAN*

Adan v Secretary of State for the Home Department [1997] 1 WLR 1107; [1997] 2 All ER 723 (CA) was a case which emphasized the distinction drawn between the "unable" and "unwilling" limbs of Article 1A(2). The four appellants relied on the "unable" limb and their success before the English Court of Appeal must be seen in that light. The Court (Simon Brown and Hutchison LJJ (Thorpe LJ dissenting on this point)) held that an asylum-seeker unable to return to his country of origin may be entitled to recognition as a refugee provided only that the fear or actuality of past persecution still plays a causative part in his presence in the country of asylum (1118B; 733d). Leave to appeal to the House of Lords was refused (1134 B; 748h) and the Authority understands that no application for special leave is intended.

In the present case the appellant expressly disavowed any reliance on the "unable" limb, claiming instead that he was "unwilling" to avail himself of the protection of the People's

Republic of China. Strictly speaking, therefore, the Adan decision is distinguishable but we intend to deal with the decision nevertheless in view of counsel's argument that the decision assists the appellant's case.

General Observations

The Court of Appeal was concerned with two different fact situations. First there were the Somali appellants, Adan and Ms Nooh. Second there were the two Yugoslav appellants, Lazarevic and Radivojevic. The Somali appellants claimed that each would face a risk to life upon return to Somalia (if such return where physically possible, which realistically it was not) because Somalia remains riven by clan and sub-clan based ethnic conflict involving widespread killing, torture, rape and pillage and the country's infrastructure has broken down to the extent that neither appellant could obtain effective protection from any recognized state authority. They had been declined refugee status by the Immigration Appeal Tribunal on the grounds that the fighting and disturbances in the civil war were indiscriminate and the situation was no worse for Adan's and Ms Nooh's ethnic groups than for the general population (1111H-1112E; 727d-h). This was notwithstanding a finding by the special adjudicator that were Adan to be returned to Somalia there was a reasonable degree of likelihood that he would be in danger of persecution by reason of his membership of the Isaaq clan or the Habrawal sub-clan and in particular, because of the political opinion that would be attributed to him by reason of his membership of the Habrawal sub-clan, namely that he was a supporter of President Egal (1122E-F; 737f-g). In Ms Nooh's case the first instance finding by the special adjudicator was that because of clan inter-marriage, she had a set of conflicting perceived allegiances which would render her personal position particularly dangerous. She would be at great risk in Mogadishu, because of being a Marehan, and because she was known as a former supporter of President Barre. It was also established that after Ms Nooh had fled Somalia, precisely what she had herself feared occurred to most of her family; 31 members were raped or murdered (1122G-1123A; 737h-738b).

From a New Zealand perspective, neither of the Somali cases would present any difficulty as the facts found by the special adjudicator clearly establish a current real chance of persecution for a Convention reason. As to the dismissal of the claims by the Immigration Appeal Tribunal on the grounds that the Somali appellants were not at risk of Convention as opposed to indiscriminate danger, the answer is to be found in the treatment of this subject by Professor Hathaway in *The Law of Refugee Status* (1991) 90- 97.

As the Court of Appeal ultimately recognized that both Somali appellants held a current well-founded fear of persecution, the Court did not, strictly speaking, have to decide whether they would have qualified for refugee status were the findings of the Immigration Appeal Tribunal to remain undisturbed. That is, to decide the question whether an asylum-seeker who leaves his country as a result of a well-founded fear of persecution for a Convention reason but who at the date of determination cannot show a current well- founded fear of persecution is nevertheless entitled to recognition as a refugee. See 1110H; 726d:

"Issue one is whether it is always necessary for a person unable to return to his home country to show a current well-founded fear of persecution or whether a historical fear may sometimes suffice - whether, to put it more precisely, the Secretary of State is right in submitting that to be a refugee a person must in every case have a current well-founded fear of persecution were he to be returned to his country of origin, or whether (as the appellants argue) if in fact he is currently unable... to avail himself of the protection of' his country of origin, it is sufficient that at some time past he has come to be abroad through

fear of persecution - fear which made him either flee his country of origin or, if he was already abroad, remain abroad due to circumstances arising in his country of origin during his absence (a refugee sur place as such are known)."
In answering this issue in the affirmative, Simon Brown LJ at 1118A-B; 733c-d for the majority stated that:
"...an asylum-seeker unable to return to his country of origin may indeed be entitled to recognition as a refugee provided only that the fear or actuality of past persecution still plays a causative part in his presence here."
Leaving entirely to one side the problems associated with the causation element introduced by this passage (problems which were dismissed by Simon Brown LJ at 1115G; 731b-c as "theoretical"), the Authority is struck by the air of unreality to the holding. For in our view, once the fear or actuality of past persecution is required to play a causative part in the person's continued absence outside his or her country of origin, there is little practical difference between that position and the more conventional view that the Refugee Convention requires a current well-founded fear of persecution.
The point is perhaps illustrated by the Yugoslav appellants who were draft evaders, though not for any reasons of conscience (1124A; 739a). Were they to return to Yugoslavia they were not at risk of punishment for draft evasion because on 18 June 1996, with immediate effect, Yugoslavia passed an amnesty law granting amnesty to all conscripts who, between 1982 and December 1995, deserted, evaded conscription, or left the country before call-up papers were received (1112H-1113A; 728e-f). The problem, however, was that Yugoslavia was refusing to accept the return of all refused asylum- seekers until a bilateral agreement was signed with the United Kingdom. On the facts, there never was a well-founded fear of persecution in the past, nor was there a well- founded fear of persecution in the future. The claim was bound to fail in any event. The issue (known as Issue One) postulated by the majority in the passage quoted above was therefore entirely academic and did not fall for determination. Yet in this regard the Yugoslav appellants succeeded on the law (1132E-G; 747c-e) although they ultimately failed on the facts.
Another interesting aspect of the majority judgments is that they contain no attempt to interpret the Refugee Convention in an ordered yet holistic way. Nor do the majority judgments attempt to address the question as to what purpose would be served by extending protection to individuals who once had a well-founded fear of persecution but who do not now possess such a fear.

Treaty Interpretation

The attempt by the English Court of Appeal to interpret the Refugee Convention without reference to principles of treaty interpretation and without reference to the object and purpose of the Convention is in marked contrast to the approach taken by the High Court of Australia in a judgment delivered eleven days later in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 (HCA). The subject of the decision is the meaning of the phrase "particular social group" in Article 1A(2). Brennan CJ, although dissenting from the majority comprising Dawson, McHugh and Gummow JJ on the result, was in agreement with McHugh J on the appropriate principles of interpretation. Brennan CJ stated at 333:
"In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretive rules. The political processes by which a treaty is negotiated to a conclusion precludes such an approach. Rather, for the reasons given by McHugh J, it is necessary to adopt an holistic but ordered approach. The holistic approach to interpretation may require a consideration of both the text and the object and purpose of the treaty in order to

ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text."

McHugh J dealt extensively with the interpretive principles at 349-354 and the passage is too long to cite in full. We mention only that, after referring to the general rule of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, McHugh J pointed out that the Article contains three separate but related principles. First, an interpretation must be in good faith, which flows directly from the rule *pacta sunt servanda*. Secondly, the ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties' intentions. This principle has been described as the very essence of a textual approach to treaty interpretation. Thirdly, the ordinary meaning of the language is not to be determined in a vacuum removed from the context of the treaty or its object or purpose. After referring to differences of opinion as to the circumstances in which the context, object and purpose of the treaty may be used to supplement the ordinary meaning of the treaty, McHugh J approved the opinion of Zekia J in the European Court of Human Rights in *Golder v United Kingdom* (1975) 1 EHRR 524, 544 and 547 that interpretation is a ***single combined operation*** which takes into account all relevant facts as a whole and that:

"When all elements are put together and considered compositively, to my mind the combined effect lends greater force to the correctness of the opinion submitted."

At 351 McHugh J concluded:

"Thus Zekia J emphasized an ordered yet holistic approach. Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered."

McHugh J then went on to make four additional points which confirm the correctness of an ordered yet holistic approach. For present purposes we intend only to refer to the fourth point which is to be found at p 352:

"Fourthly, international treaties often fail to exhibit the precision of domestic legislation. This is the sometimes necessary price paid for multinational political comity. The lack of precision in treaties confirms the need to adopt interpretive principles, like those pronounced by Zekia J, which are founded on the view that treaties cannot be expected to be applied with taut logical precision'."

Later, at 353 McHugh J returned to the point that a treaty must be interpreted as a whole:

"It is therefore a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole."

Regrettably, none of these interpretation principles are referred to or applied in Adan.

In view of what we later say about the overly literal approach to interpretation adopted in *Adan*, we believe it is appropriate to bear in mind what was said by the High Court of Australia in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 141 ALR 59, 64-65 (Brennan CJ, Dawson, Toohey, Gaudron & McHugh JJ):

"The meaning attributed to individual words in a phrase ultimately dictates the effect or construction that one gives to the phrase when taken as a whole and the approach that one adopts in determining the meaning of the individual words of that phrase is bound up in the syntactical construction of the phrase in question. In *R v Brown* [1996] 2 WLR 203 at 218; [1996] 1 All ER 545 at 560, a recent House of Lords decision, Lord Hoffman said:
"The fallacy in the Crown's argument is, I think, one common among lawyers, namely to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence ... This is not the way language works. The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole.""

Whether *Adan* Correctly Interpreted Article 1A(2)

The analysis of Simon Brown LJ at 1114H-1115A; 730c-e is premised upon the following breakdown of the Convention definition:
"A refugee is someone who: 1(a) owing to well-founded fear of being persecuted (for a Convention reason) is outside the country of his nationality, and (b)(i) is unable to avail himself of the protection of that country or (ii) owing to such fear is unwilling to avail himself of the protection of that country; or who 2(a) not having a nationality and being outside the country of his former habitual residence, (b)(i) is unable to return to it, or (ii) owing to a well-founded fear of being persecuted (for a Convention reason) is unwilling to return to it."
Simon Brown LJ (Hutchison LJ agreeing) was of the view at 1115H; 730f and 1117E;732h that:

(a) It was impossible to attribute any useful purpose whatever to 1(b)(i) and (ii).

(b) So far as stateless persons are concerned, clause 2(a) and (b)(i) construed literally requires of those presently unable to return home nothing more. Such persons did not have to establish that at some point in the past they had held a well-founded fear of persecution nor that they held a well-founded fear of persecution in the future.

We believe this overly literal approach to interpretation to be contrary to established principles of treaty interpretation and we in any event respectfully disagree with the interpretation which found favour with the majority. For convenience we repeat the text (in its original form) of Article 1A(2):
"[As a result of events occurring before 1 January 1951 and] owing to a 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.
In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."
In the first paragraph the phrase "owing to" where it first occurs clearly qualifies the word "unable", just as the phrase "owing to" as it occurs the second time clearly qualifies the word "unwilling". In the result, both "unable" and "unwilling" are qualified by "owing to". Simon Brown LJ has held, however, that "unable" is not so qualified. We cannot see how this can be so. Indeed, the way in which Article 1A(2) has been paraphrased at 1114H; 730c-e

rather suggests that "unwilling" is ***twice*** subjected to the phrase "owing to". See 1115D; 730g-h.

If there is a degree of lack of precision in Article 1A(2), it lies in the fact that the requirement to be outside the country of nationality, while explicitly attaching to refugees who are "unable" to avail themselves of the protection of their country, is not explicitly attached also to refugees in the "unwilling" category. But the omission (if there is one) is remedied by the phrase "is unwilling to avail himself of ***the protection of that country***. With the greatest of respect, we see none of the difficulties adverted to by Simon Brown LJ. Addressing the first paragraph of Article 1A(2), that is, refugees who have a single nationality, the requirements of the Convention (in its unamended form) are as follows:

(a) ***Either***: - As a result of events occurring before 1 January 1951 and 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*** to avail himself of the protection of that country.

(b) ***Or***:- As a result of events occurring before 1 January 1951 and 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 ***unwilling*** to avail himself of the protection of that country.

Thus the only difference is that some refugees may be unable to avail themselves of the protection of their country while others may be unwilling. Otherwise, the requirements are identical. Whether there is any substantive difference between the "unable" and "unwilling" limb is open to question. Certainly nothing significant was perceived by the Supreme Court of Canada in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 712, 717-721 (SC:Can).

In relation to refugees who have no nationality (ie are stateless) the position is identical except that for the concept of availment of protection there is substituted (necessarily) the concept of return to the country of former habitual residence. Thus, the requirements are:

(a) ***Either***: - As a result of events occurring before 1 January 1951 and 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 former habitual residence and is ***unable*** to return to it.

(b) ***Or***:- As a result of events occurring before 1 January 1951 and 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 former habitual residence and is ***unwilling*** to return to it.

Addressing now the point which Simon Brown LJ at 1117E; 732h saw as the "single most telling point", namely the impossibility of attributing any useful purpose whatever to his cll 1(b)(i) and (ii), it is to be remembered that these clauses introduce the concept of state protection as they relate to the requirement that the refugee be unable or unwilling (owing to the well-founded fear of persecution for a Convention reason) to avail himself of the protection of the country of his nationality. The concept of protection of the country of nationality is emphasized in the second paragraph of Article 1A(2) which addresses the situation of multiple nationality:

"...a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

So important is state protection that every provision of Article 1C (the cessation clause) turns on the issue of protection, either impliedly or explicity. Yet the majority in Adan makes

no mention of the centrality of state protection to refugee determination. This is a failure of some magnitude.

The protection principle cannot be separated from the object and purpose of the Refugee Convention. We agree with the statement by Professor Hathaway in The Law of Refugee Status (1991) 59 that refugee law exists to interpose the protection of the international system where a domestic government fails to protect an individual or collectivity under its national jurisdiction. At *op cit* 57 he explains the protection principle in the following terms:

"It is an underlying assumption of refugee law that wherever available, national protection takes precedence over international protection. In the drafting of the Convention, delegates were clear in their view that no person should be recognized as a refugee unless she is either unwilling or unable to avail herself of the protection of ***all*** countries of which she is a national. Even if an individual has a genuine fear of persecution in one state of nationality, she may not benefit from refugee status if she is a citizen of another country that is prepared to afford her protection."

At *op cit* 104 he adds:

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

Thus Professor Hathaway at *op cit* 104-105 suggests that persecution may be defined as the "sustained or systemic violation of basic human rights demonstrative of a failure of state protection". This definition has been adopted in both New Zealand (eg *Refugee Appeal No. 523/92 Re RS* (17 March 1995) 86), and in Canada *(Canada (Attorney- General) v Ward* [1993] 2 SCR 689, 734 (SC:Can)).

The protection principle has rightly been described as the "lynch-pin" of the Inclusion Clause: *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 722 (Can:SC):

"It is clear that the lynch-pin of the analysis ***is*** the state's inability to protect, it is a crucial element in determining whether the claimant's fear is well-founded, and thereby the objective reasonableness of his or her unwillingness to seek the protection of his or her state of nationality."

[emphasis in text]

Delivering the decision of the Supreme Court of Canada in *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 709 (SC:Can), La Forest J emphasized the principle that international protection under the Refugee Convention is intended as a surrogate form of protection:

"At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see The Law of Refugee Status (1991), at p 135."

At 752, La Forest J stated:

"The rationale underlying international refugee protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option."
The impact of this principle on the objective component of the "well-founded fear" required by the Refugee Convention is that if a state of nationality is able to protect the claimant, then his or her fear is not, objectively speaking, well-founded: 712, 722.
As can be seen, the protection principle has a direct impact on the objective component of the "well-founded fear" and also on the issue of relocation (as it is known in New Zealand and Australia) or internal flight alternative. See by way of example *Refugee Appeal No. 523/92 Re RS* (17 March 1995) 27-47 and *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 124 ALR 265, 274, 277 (FC:FC). There Beaumont J at 277 pointed out that although one will not find in the language of the Convention any reference to a doctrine of "safe haven" or "internal flight", yet these are, in truth, no more than convenient shorthand expressions describing what is really a question of fact, namely whether the fear of persecution is well-founded and whether the asylum-seeker can access effective protection in some part of the state of origin. See further Professor James C Hathaway, *The Law of Refugee Status* (1991) 133-134.
Regrettably, although *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 (SC:Can) is cited in the judgment of Simon Brown LJ, the interpretive approach adopted by the Supreme Court of Canada has not found its way into his Lordship's judgment, nor has recognition of the principle of state protection.
Nor does the judgment of Simon Brown LJ deal in any meaningful way with the difference (if any) between the "unable" or "unwilling" branches of the definition. This notwithstanding that the Supreme Court of Canada, in overruling the Federal Court of Appeal, found that the majority there had placed undue emphasis on the distinction between the two words. It is clear from [1993] 2 SCR 689, 712h that the Supreme Court did not accept that the "unable" limb is not qualified by the requirement to establish that the fear is "well-founded". Cf Simon-Brown LJ at [1997] 1 WLR 1107, 1115D-E; [1997] 2 All ER 723, 730g-h. It is equally clear from the discussion of unable/unwilling at [1993] 2 SCR 689, 717 to 721 that the Supreme Court of Canada accepted that the Article 1A(2) Convention requirements are identical except that being unable to avail oneself of protection implies circumstances that are beyond the will of the person concerned whereas the term unwilling refers to refugees who refuse to accept the protection of the government of the country of their nationality. See in particular [1993] 2 SCR 689, 718.
There are further aspects of the decision of Simon Brown LJ which give rise for concern. We refer to the "signs" he perceived in the Convention that "past persecution was indeed intended to have a continuing relevance when it comes to determining entitlement to refugee status". See 1117A-D; 732c-g. These signs are five in number:
(a) Prior to the 1967 Protocol, refugee status had to derive from events occurring before 1 January 1951.
(b) Article 1A(1) provides for "historic" refugees.
(c) The "compelling reasons" exception to Article 1C(5).
(d) There must surely have existed in the authors of the Convention a feeling that those displaced from their homelands by the horrors of the Holocaust years, and were still unable to return, were particularly deserving of refugee status and the protection and security that that would bring.

(e) As far as the stateless are concerned, the latter part of Article 1A(2), construed literally, requires of those presently unable to return home nothing more.

It is convenient to address the first four "signs" together. With respect, the points are misconceived. For the reasons already explained, at the time the Convention was drafted, the clear intent was to distinguish between those who had ***already*** been recognized as refugees as at 1 January 1951 and those who had not. It was intended that Article 1A(2) focus on those who had a present or prospective risk of persecution in the country of origin albeit as a result of events occurring before 1 January 1951. Both the historical context and the language of Article 1 establish that it is not possible to qualify for refugee status under Article 1A(2) merely by establishing past persecution. It is simply not possible to conflate Article 1A(2) refugees with the statutory refugees of Article 1A(1). Thus the compelling reasons exception to Article 1C(5) & (6) applies only to statutory refugees. The "signs" perceived by Simon Brown LJ are signs which, if anything, undermine the point he seeks to make.

As to the last "sign" in (e) above, this has already been dealt with. A holistic reading of Article 1A(2) precludes the illogical and clearly unintended result that stateless persons who are unable to return to their country of former habitual residence are entitled to refugee status without establishing a well-founded fear whereas stateless persons relying on the "unwilling" limb must establish such fear.

In conclusion it is our view that the decision of Simon Brown LJ (Hutchison LJ agreeing) in Adan should not be followed in New Zealand. This conclusion does not mean that past persecution is irrelevant in the refugee determination process. On the contrary, where such persecution has occurred it is undoubtably a mandatory relevant consideration and while the circumstances to be considered are those which exist at the time the decision is made, account must be taken of the circumstances which existed at the time the applicant for refugee status left the country of origin and of any persecution which may have occurred before that. Recognition must be given to the fact that what has happened in the past is directly relevant to the prediction of future events. The principle is cogently summarized by Professor James C Hathaway in *The Law of Refugee Status* (1991) at 88:

"The issue is not the fact of the past persecution, but rather whether that which happened in the past may happen in the future'."

We note that very much the same principle informed the decisions of *R v Secretary of State for the Home Department, ex parte Direk* [1992] Imm AR 330, 334-335 (Macpherson J) and *Musisi v Secretary of State for the Home Department* [1992] Imm AR 520 (IAT) and we have already referred to the Australian decisions of *Minister for Immigration, Local Government and Ethnic Affairs v Mok Gek Bouy* (1994) 127 ALR 223, 254-255 (FC:FC); *Minister for Immigration and Ethnic Affairs v Singh* (1997) 142 ALR 191, 196-197 (FC:FC) and *Minister for Immigration and Ethnic Affairs v Guo*(1997) 144 ALR 567, 578-579 (HCA).

CONCLUSIONS ON THE LEGAL ISSUES

The submission that refugee status can be granted to a person by reason only of the fact that that person, in the past, has suffered under an atrocious form of persecution must fail for the following reasons:

1. The ordinary meaning of the words in Article 1A(2) of the Refugee Convention preclude the interpretation urged by the appellant. The words require a forward- looking or anticipatory, objective assessment of risk, not an examination of past persecution with a view to determining, whether on humanitarian grounds, a person who has suffered

atrocious persecution in the past (but who no longer faces a risk of persecution) should be required to return to the country of origin. The relevant date for determining refugee status is the date of determination. At that date the refugee claimant must establish a well-founded fear of persecution in the country of origin.

2. The object and purpose of the Refugee Convention is to interpose the surrogate protection of the international community where the maltreatment anticipated by the refugee claimant is demonstrative of a breakdown of national protection. Where the refugee claimant does not possess a well-founded fear of persecution, no purpose whatever is served by extending such protection. If this is allowed to occur, however, the international protection system will be discredited and in turn weakened.

3. The Convention antecedents and *travaux préparatoires* weaken, rather than strengthen the appellant's argument.

4. The reliance on the compelling reasons exception to the cessation clause provisions in Article 1C(5) & (6) as well as the reliance on para 136 of the *Handbook* are misplaced. First, it is to be expected that once refugee status has been recognized, the circumstances in which the ***loss*** of that status arises are not unnaturally strictly circumscribed. It is fallacious to attempt to discover from the principles applicable to the ***cessation*** of refugee status the principles applicable to the logically prior issue of ***inclusion***. Second, the compelling reasons exception to cessation based on past persecution is expressly limited to statutory refugees covered by Article 1A(1). This excludes the application of the exception to non- statutory refugees, assuming for the moment that somehow the issue of cessation is relevant to the issue of inclusion. Thirdly, para 136 of the *Handbook*, in advocating the application of the compelling reasons exception to Article 1A(2) refugees is still of no assistance to the appellant as the argument begs the question as to whether the appellant is a refugee in the first place.

5. The Authority's conclusions on the interpretation of Article 1A(2) are confirmed by the fact that, with two exceptions, international practice of the state parties to the Convention shows that past persecution alone is not accepted as sufficient to ground refugee status. The principal exception is in the case of the United States of America, where the non-conformist approach is specifically enabled by domestic legislation. In the circumstances, little weight can be given to the Danish example.

6. The majority decision in *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1108; [1997] 2 All ER 723 (CA) is wrong in law and is not to be followed in New Zealand. It follows that whether the relevant date for determination is taken as being at some point prior to the appellant's departure from China, at the time he arrived in New Zealand, at the time he applied for refugee status or the date of determination itself, the appellant cannot succeed on his application for refugee status solely because of the atrocious persecution he has suffered in the past.

The appellant's refugee application can only succeed if he, at the date of determination, possesses a well-founded fear of persecution for a Convention reason. In making its assessment of this issue, the Authority must certainly take into account the persecution the appellant has undoubtedly suffered in the past. The Authority's duty is to take into account ***all*** of the facts and in making its assessment as to whether there is a real chance of persecution in the future, recognition must be given to the principle that what has happened in the past is directly relevant to the prediction of future events.

FORMULATION OF THE ISSUES

For the reasons given, we do not intend to depart from the formulation of issues contained in *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996). Those 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 persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

The Authority accepts, without reservation, the account given by the appellant of his experiences in the People's Republic of China as well as his account of his life in Hong Kong. We also accept the account of events given by Mr Z.

We do not, however, accept their assessment that there is a real chance of persecution of the appellant in the future.

WHETHER A REAL CHANCE OF PERSECUTION

We turn to the first issue, namely whether on the facts as found, there is a real chance of the appellant being persecuted if returned to Hong Kong.

We accept that in the period 1958 to 1980 the appellant was subjected to cruel and severe persecution. That having been said, however, equal recognition must be given to the following facts:

1. While the appellant's file or *dang-an* will show his dark history and that allegations of the most serious kind were made against him in the 1950s and 1960s, it will also show that he now has two official verdicts from the respective courts exonerating him.
2. The fact that millions of individuals held in the *laogaidui* received similar exonerations at this time does not, as counsel submits, weaken the significance of the rehabilitation, rather it underlines the fact that following the death of Mao Zedong there was a sea-change in the attitude of the Communist Party to the policies instituted by Mao. Since his death in 1976 there has been no indication that China will once again revert to the cataclysmic excesses which characterized the period 1949 to 1976. This does not mean to say that repression does not continue in China. Far from it. We accept that there are cycles in which periods of liberalization and change are followed by periods of repression. But these cycles are of a different nature and scale to those in which the appellant himself was caught up. When this issue was raised with the appellant, Mr Z and counsel, none were able to direct the Authority to any substantial evidence to suggest that persons of similar circumstances to the appellant and who were rehabilitated in the late 1970s and early 1980s have since then been further persecuted. The most that the Authority could glean from the evidence submitted by the appellant was that: (i) in June 1989 dissidents of the appellant's generation were warned to keep a low profile. One such warning was given directly to Mr Z in Shanghai; (ii) it was said that this showed that they were still treated with suspicion. This does not, however, remotely approach persecution.

The appellant then compared himself with Wei Jingsheng who, when the Democracy Movement was launched in 1978, founded a magazine and was one of the most vocal and radical democrats. He coined the term The Fifth Modernization, arguing that Deng Xiaoping's Four Modernizations were insufficient, and that China needed a fifth political modernization, based on democracy and human rights. He was arrested in March 1979 and sentenced in October to 15 years as a "counter-revolutionary" and for revealing "state secrets" to a foreigner. He was released from prison in September 1993, six months before he was due to complete his sentence in an effort by China to improve its international image

as part of its bid to secure Beijing as the site for the Olympic Games in the year 2000. Upon his release, Wei immediately began speaking out and publishing articles on the need for democratic change. He was seized by police while travelling between Tianjin and Beijing on 1 April 1994. On 13 December 1995 he was sentenced by the Beijing Intermediate People's Court to a 14-year prison term and three years' deprivation of political rights for "conspiracy to subvert the government" and "communicating with hostile foreign organizations and individuals, amassing funds in preparation for overthrowing the government and publishing anti-government articles abroad." See further Human Rights Watch, *China: The Cost of Putting Business First* (July 1996) 5.

We intend no disrespect to the appellant when we say that there is ***no*** comparison between his case and that of Wei, Jingsheng. The appellant has been rehabilitated, Wei has not. The appellant has had no political profile at any stage of his life and for the 17 years since his release he has had no political involvement.

3. Following his rehabilitation, the appellant was reinstated in his work unit. He continued to work there without incident for the next two years.

4. He was able to obtain permission to migrate to Hong Kong. He encountered no difficulty in this regard.

5. During his 14 years in Hong Kong he had no involvement in politics and the Authority sees little or no significance in the fact that he took part in an inconsequential way in a few Tiananmen Square commemorations.

6. It is now 17 years since the appellant was released from the *laogai*. He is 63 years of age. Our assessment of his character is that he is not the kind of man to take rash steps or to confront authorities. We do not believe that if he returns to Hong Kong he will take part in demonstrations or protests. Having closely observed him give evidence for a period of two and a half days, we prefer the assessment made by the consultant psychiatrist, namely that he is a repressed and institutionalized individual who is unable to take initiative. We saw no signs at all of belligerence. While we accept that he is justifiably angry at the treatment he has received, there is nothing in his character or personality that will lead him, one way or another, to a confrontation with the authorities. In view of this assessment we do not accept his statement that had he been in the People's Republic of China in 1989, he would have taken part in the pro-democracy movement.

Our view of the facts is that the appellant would only be at risk of harm if the following scenario unfolded sequentially in Hong Kong:

(a) A political or social upheaval

(b) Investigation of the appellant

(c) A decision by the authorities to go behind the appellant's rehabilitation and to resurrect the past allegations

(d) A decision to treat the appellant harshly.

Without a political or social upheaval, we cannot see how realistically events in (b) to (d) could be triggered. The prospect of such an upheaval is remote and highly speculative. Progressively even more remote and speculative are the events in (b), (c) and (d).

Our conclusion in these circumstances is that the risk of future persecution is so remote that it exists in the realm of conjecture only. It follows inevitably that this risk falls well below the "real" chance required by the law. As pointed out recently by the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 144 ALR 567, 577 (HCA), conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is "well-founded" when there is a real substantial basis for it. But no fear can be well-

founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.

Because the appeal must accordingly fail, no point would be served by addressing the second issue as resolution would require the Authority to speculate as to what might be the reason for the appellant's persecution were one to conjure a set of facts which have no connection with reality.

OVERALL CONCLUSION

For the reasons given, the Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"R P G Haines"

.....

[Chairman]

(1) The full text of the Joint Position of 4 March 1996 is to be found in Carlier, Vanheule, Hullmann & Galiano (eds), Who is a Refugee? A Comparative Caselaw Study (1997) as Appendix C, 723, 725.