INTRODUCTION

The central factual issue in this appeal is whether the appellant has a well-founded fear of persecution based on one of the five grounds recognized by the 1951 Refugee Convention and 1967 Protocol.

The central legal issue for determination is whether refugee status should be granted to an individual who has cynically manipulated circumstances in New Zealand to create a well-founded fear of persecution in his country of origin which did not previously exist.

The appellant is an Iranian national who arrived in New Zealand on 3 March 1992 travelling on a false French passport. He was refused a permit and detained in custody under the "turnaround" provisions of s 128 of the Immigration Act 1987. While in custody he was interviewed twice. On each occasion he insisted that he was not in fear of persecution in Iran and had come to New Zealand only to find a better life for his family comprising a wife and two children then aged approximately three years. However, on 6 March 1992, the appellant filed an application for refugee status, together with a brief one- page statement in which he advanced two grounds in support:

(a) On a previous trip to Japan he had purchased a copy of *The Satanic Verses* by Salman Rushdie and taken the book to Iran.

(b) He had told some friends that he was interested in finding out about Christianity.

The appellant knew full well that both claims were entirely untrue.

As a result of the lodging of this application, the appellant was released from custody on 6 March 1992.

On 29 July 1992, the appellant was interviewed by the Refugee Status Section of the New Zealand Immigration Service. By letter dated 23 October 1992, he was advised that his application for refugee status had been declined on the grounds that his account was not credible and that, in any event, his alleged fear of persecution was not well-founded. From that decision the appellant appealed to this Authority.

This first appeal to this Authority was heard on 13 October 1993. At the hearing the appellant requested that the Authority give an indication of its decision, even though full written reasons might not be available until a later date. The reason for this unusual request was because the appellant claimed that the passport held by his wife was about to expire. In the event, the appellant was told that the appeal would not succeed.

Subsequently, in a written decision delivered on 30 March 1994, the appeal was formally dismissed on the grounds that the Authority did not believe any part of the appellant's evidence and reached the conclusion that he had lied. His entire story was rejected.

It should be mentioned that from the time the appellant lodged his refugee application up to and including the first appeal to this Authority, he was legally represented.

Some time between April and July 1994, notwithstanding that he was aware that his removal from New Zealand was imminent, the appellant arranged for his wife and children to travel from Iran to New Zealand in the deluded belief that the reunion of the family in New Zealand would make it difficult, if not impossible, for them to be deported. In the event, the plan failed when on or about 17 August 1994, following the arrival of his wife and children in Bangkok, they were refused permission to board a flight to New Zealand following the discovery that they were travelling on a false French passport.

Having foolishly terminated his instructions to his experienced solicitor and acting under the advice of an Auckland immigration consultant, the appellant decided to take his case to television and the print media. Following an interview on 22 August 1994, a substantial item was broadcast on the TV3 "Nightline" programme at 10.30 p.m. on Tuesday, 23 August

1994. This programme was broadcast nationally. In addition, an article appeared in *The Dominion* on Thursday, August 25, 1994. This newspaper circulates primarily in the Wellington area in which the Iranian Embassy is situated. Various articles also appeared in the *Western Leader*, a suburban newspaper which circulates in the western suburbs of Auckland. This publicity led to the disclosure both on television and in the print media of the appellant's name, his nationality, the fact that he had applied in New Zealand for recognition as a refugee and that the basis of his application was the claim that he had been arrested in Iran for being found in possession of a copy of *The Satanic Verses*. In seeking out this publicity the appellant was entirely deceitful as he knew that he had never been in possession of *The Satanic Verses* and that his refugee application was based on a series of lies.

On 23 August 1994, the appellant was taken into custody pending his removal from New Zealand under Part II of the Immigration Act 1987. At 2.00 p.m. on Wednesday, 24 August 1994, a second refugee application by the appellant was lodged with the New Zealand Immigration Service via the immigration consultant through whom the publicity had been sought.

This second refugee application was declined by the Refugee Status Section of the Immigration Service in a letter dated 25 August 1994 on the narrow grounds that the appellant's application did not meet the jurisdictional criteria stipulated by the Refugee Status Determination Procedures for the lodging of a second application. >From this decision the appellant lodged an appeal. It will be referred to as his second appeal.

In view of the fact that the appellant was in custody, his second appeal to this Authority was accorded urgency. The hearing of the appeal commenced at Mount Eden Prison on Wednesday, 31 August 1994. By this stage the appellant had re-engaged the solicitor who had acted for him on the first refugee application. The New Zealand Immigration Service was represented by two counsel. Much of the morning was occupied with legal submissions as to the scope of the Authority's jurisdiction to hear the appeal. At the conclusion of argument on the question of jurisdiction, the Authority ruled that as the issues for determination were questions of mixed fact and law, it would proceed to hear the facts of the appellant's case and, at the conclusion of the hearing, give a ruling on the jurisdiction question.

In opening the case for the appellant, Ms Robins, who conducted the appellant's case with ability and commendable candour, initially invited the Authority to deal with the case on the basis that the first decision of the Authority on the first appeal was correct and that the Authority consider only the events which had transpired subsequent to the date of the delivery of that decision, namely 30 March 1994. However, she properly drew the Authority's attention to the fact that her instructions from the appellant were that the claims made by him on his first refugee application were in fact true and that he did not accept the credibility finding made by the Authority on the first appeal. That is, he continued to insist that he had purchased a copy of *The Satanic Verses* in Japan, returned to Iran with it in his possession, obtained a translation or resumé and had then been found in possession by the authorities. Having been arrested, he was able to escape after paying a substantial bribe. He then fled Iran overland to Pakistan.

The Authority ruled that as the appellant claimed that his first refugee application was based on true facts, on the hearing of the second appeal all issues of fact and credibility were at large and that the Authority was bound to enquire into the whole of the case in order to determine first the issue of jurisdiction and, if jurisdiction existed, to determine whether the appellant was a refugee within the meaning of Article 1A(2) of the Refugee Convention.

The rest of the day was occupied by the appellant's evidence. Unfortunately, due to the complexity of the case it was not possible to complete his evidence before the hearing was adjourned at 5.00 p.m.

On the following day, Thursday, 1 September 1994, the appellant appeared in the Auckland District Court for the determination of the question whether, in terms of s 56 of the Immigration Act 1987, he would continue to be detained in custody or released. Through the good offices of the Registrar of that Court the Authority was able to continue with the hearing of this appeal in the precincts of the Court.

The case took a dramatic turn when, half-way through the morning of this second day, after the Authority had adjourned to enable Ms Robins to take further instructions from the appellant, the appellant confessed to the Authority that his entire story on which the original refugee application had been founded was untrue. It had been invented as a vehicle for the appellant to bring his wife and children to New Zealand for a better life.

A brief adjournment was taken at approximately 3.30 p.m. when a Judge of the District Court became available to enquire into the issue of custody. In the event, the warrant of commitment under s 55 of the Immigration Act 1987 was renewed for a further seven day period. The hearing of the appeal continued until the conclusion of the evidence and submissions at 4.40 p.m.

The Authority initially indicated that it was hopeful that a decision would be delivered by Tuesday, 6 September 1994. In the event, it became impossible to deliver a reasoned decision within that time frame as the issues raised by this appeal are substantial, complex and of far-reaching importance.

The appellant's confession that his original refugee application was entirely untrue completely vindicated this Authority's first decision delivered on 30 March 1994. It is a matter of regret both that the appellant was not removed from New Zealand promptly after the delivery of that decision and also that the appellant persisted with his deception when soliciting media publicity for his case and when conducting his appeal. In the result, precious resources have been squandered.

The appellant's case now rests on two grounds:

(a) He claims that there is a real chance that the Iranian authorities know that he has applied for political asylum in New Zealand; and that

(b) There is a real chance that the Iranian authorities will now be aware that he has **claimed** (falsely) to have been in possession of *The Satanic Verses* in Iran.

It is said that these grounds, either taken separately or cumulatively, give rise to a real chance of persecution for a Convention reason, namely an imputed political opinion or religious belief.

The three principal issues which are raised by this appeal are:

1. Whether under the Terms of Reference which came into force on 30 August 1993 the Authority has jurisdiction to hear this second appeal by the appellant.
2. Whether actions undertaken for the sole purpose of creating a pretext for invoking a claim to a well-founded fear of persecution should be considered as supporting an application for refugee status.
3. Whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

We have decided that the answer to the first issue is "Yes" and that the answer to the second and third is "No".

To understand our analysis of these issues, it is necessary to examine in greater detail the appellant's original claims and the case as finally presented at the second appeal hearing.

THE FACTUAL BASIS OF THE APPELLANT'S FIRST REFUGEE APPLICATION

As previously mentioned, when the appellant arrived in New Zealand on 3 March 1992, he stated that his reason for coming to New Zealand was to find work opportunities and to provide his family with a better life and with education opportunities. He said that he had no fear of returning to Iran and in fact intended returning there to bring his family to New Zealand. Interviewed again on 4 March 1992 in the presence of his (then) solicitor, the appellant reiterated that he was not in fear of returning to Iran and that neither he nor any member of his immediate family had ever been arrested, detained or questioned by the authorities in Iran. He had come to New Zealand for economic reasons only and did not wish to apply for refugee status.

However, on 6 March 1992, an application for refugee status was lodged through his then solicitors. Little information was given in the extremely brief one-page handwritten statement in which the appellant asserted only:

(a) That following a trip to Japan he had taken back to Iran a copy of *The Satanic Verses* by Salman Rushdie; and

(b) He had told some friends that he was interested in finding out about Christianity.

At the second appeal hearing, the appellant admitted (belatedly) that both grounds were entirely false and had been suggested to him by Iranians with whom he had come into contact subsequent to his arrival in New Zealand.

Almost simultaneously the appellant pressured the New Zealand Immigration Service to authorize the immediate entry to New Zealand of his wife and children on the supposed basis that they were in immediate danger of persecution at the hands of the Iranian authorities. He claimed that his wife had been dismissed from her employment as a school teacher and his two young children expelled from their creche because the authorities had discovered that the appellant had applied for refugee status in New Zealand. The appellant, at the hearing of his second appeal, acknowledged that the claim that his wife and children were in imminent danger was a mere stratagem to enable the reunion of the family in New Zealand with a minimum of delay. He admitted that his statement dated 4 April 1992 reporting a purported phone call from his wife was entirely false and conceded that a letter from his wife dated 11 June 1992 had been written at his instructions in order to lend support to his case.

It is a matter of record that the New Zealand Immigration Service declined permission for the wife and children to enter New Zealand.

In a written statement dated 30 March 1992, the appellant elaborated his claims. He asserted that in January 1991 he went to Japan to work and did not return to Iran until eight months later on 1 August 1991. While in Japan he purchased a copy of Salman Rushdie's *The Satanic Verses* printed in English. He brought the book back to Iran. As he was not searched at the airport, the presence of the book was not discovered. Five months later he arranged for a friend to translate the book. After the translation had been prepared, on 15 February 1992 he uplifted both the book and the translation. On his way home he was stopped and searched by the Komiteh. When the book was discovered he was arrested and taken for interrogation. However, he escaped after bribing one of the officers. He immediately went into hiding and did not return home. A few days later with the help of an agent he left Iran on 20 February 1992 by land and crossed into Pakistan. He then made his way to New Zealand.

In providing this abbreviated account of the appellant's original claims, we have omitted a number of additional details which cast doubt on his credibility.

At the Refugee Status Section interview on 29 July 1992, the appellant claimed also that since his departure from Iran his wife had been dismissed from her teaching job and his children prevented from returning to their creche. He also claimed that his wife had been arrested by the authorities after receiving an audio tape sent by the appellant to his family.

As previously mentioned, in the Refugee Status Section decision dated 23 October 1992, the appellant's application was declined on two grounds, namely that he was not a credible witness and that in any event, the alleged fear of persecution was not well-founded.

At the hearing of the first appeal to this Authority on 13 October 1993, the central issue was that of the appellant's credibility. For the reasons set out in the Authority's first decision delivered on 30 March 1994, the appellant was disbelieved. The Authority stated at 7:

"The appellant's story is not credible. We do not believe it. We have no doubt that the appellant has told us lies."

THE APPELLANT'S CASE ON THE SECOND REFUGEE APPLICATION

At the appellant's express request, the Authority at the first appeal on 13 October 1993 took the unusual step of acceding to the appellant's request for an immediate indication as to the outcome of his appeal. The following quote is taken from p 2 of the Authority's first decision:

"At the date of the hearing the appellant was anxious to receive an indication from the Authority of its decision, even though full written reasons might not be available. The reason for seeking this indulgence was because of the imminent expiry of the passport of the appellant's wife in respect of whom, if the appeal was successful, arrangements would have to be made to travel to New Zealand. On the afternoon of the hearing the Authority's secretary was instructed to relay to the appellant's solicitors that, subject to whatever might be contained in any subsequent memorandum, the appeal would not succeed."

Following the delivery on 30 March 1994 of the written decision declining the refugee application, the appellant realized that it was inevitable that he would be removed from New Zealand pursuant to a removal order which had been served on him on 6 March 1992 but which had not been executed pending the resolution of his refugee application.

He decided upon a stupid but aggressive plan to use his wife and children as a means of preventing his removal. He instructed his wife to leave Iran with their two children with the intention of coming to New Zealand.

In mid-August 1994, the appellant's wife and two children arrived in Bangkok travelling on a false French passport. They have remained there since that time as they have been refused permission to enter New Zealand. At the same time instructions were withdrawn from Ms Robins, the appellant now taking advice from an immigration consultant. On or about 17 August 1994, approaches were made by this consultant to the Minister of Immigration to obtain the immediate authorization of a visitor's visa for the wife and children to enter New Zealand. Simultaneously a fax was sent by the consultant to the Deputy Director of Protection at the UNHCR office in Geneva seeking assistance for both the appellant and his wife. A few days later an appeal was made to the Prime Minister of New Zealand. In none of these communications was it ever revealed that the appellant's case in its entirety was a fabrication, a fact the appellant was only too well aware of. The papers record that a member of Parliament, at the behest of the immigration consultant, also made representations to the Minister of Immigration on behalf of the appellant. Presumably he too was unaware of the enormous fraud that was being perpetrated by the appellant.

As a result of arrangements made by the immigration consultant, the appellant was interviewed at the consultant's home by an Auckland suburban newspaper known as the *Western Leader*. Photographs were taken of both the appellant and of a family portrait showing his wife and two children now almost six years of age.

That afternoon the appellant was interviewed by a television journalist at the consultant's home and extensive footage taken. The appellant was filmed entering a garden through a gate and during the course of the interview the camera focused closely on his face. The portrait of the appellant's wife and two children was also filmed close up.

At both interviews the appellant disclosed his full name and the first names of his wife and two children. The interviews also highlighted his claim to have fled Iran after being found in possession of a copy of *The Satanic Verses* and of the fact that he had applied for refugee status in New Zealand. The plight of his wife and children at Bangkok airport was stressed. The appellant kept to himself the fraudulent nature of his refugee application.

On the following day, 23 August 1994, the appellant was arrested at a West Auckland home and taken into custody in preparation for his removal from New Zealand. He had been found hiding in a cupboard.

On the evening of Tuesday, 23 August 1994, the television item was broadcast nationwide on the "Nightline" programme of TV3.

On Thursday, 25 August 1994, the *Western Leader* featured the case prominently on its front cover under the heading "Deportation Spells Death for Iranian". The appellant's photograph occupies half the page. He is shown holding the portrait photograph of his wife and two children. On the same day *The Dominion* carried an article on the case under the heading "11th-hour Appeal to be Heard". As previously mentioned, *The Dominion* circulates in the Wellington district where the Iranian Embassy is located. Again the article had three features, namely the appellant's full name, the fact that he had applied for refugee status in New Zealand and that the ground of his application was that he had been found by the Iranian authorities in possession of a copy of Salman Rushdie's *The Satanic Verses*.

At 2.00 p.m. on 24 August 1994, the appellant, through the immigration consultant, lodged a second application for refugee status. That application, on its face, appears to be identical to the first refugee application, namely that the appellant having allegedly been found in possession of *The Satanic Verses* claimed a well-founded fear of persecution upon return to Iran. However, an additional feature appears by way of endorsement, apparently in the hand of the immigration consultant, in the following terms:

"I have been on NZ television TV3 on Nightline 11.00 p.m. on 23rd Aug giving my story so I am in deep trouble with the authorities."

Following the lodging of the second refugee application the appellant re-engaged Ms Robins.

THE SECOND DECISION BY THE REFUGEE STATUS SECTION

In her submissions to the Refugee Status Section, Ms Robins emphasized the following aspects of the appellant's new claim:

(a) There was a high degree of likelihood that staff at the Iranian Embassy in Wellington had seen the television item; and that in any event, given the relatively close Iranian communities both in Auckland and Wellington, news of the item would have been passed on to the Embassy.

(b) The information given on television identified the appellant by name, age and nationality. Also revealed was the fact that he was married with two children. It emphasized his claim to have been in possession of *The Satanic Verses* and that he had applied for

refugee status in New Zealand. His estimated date of departure from New Zealand was disclosed.

(c) In the light of the information which had been broadcast and which was subsequently published in *The Dominion*, the authorities in Iran would impute to the appellant a political opinion and that upon his return to Iran there was a real chance of persecution on the inter-related grounds of:

(i) Having in his possession in Iran *The Satanic Verses*;

(ii) Applying for refugee status in New Zealand.

(d) The submissions also emphasized the recent Human Rights Watch publication *Guardians of Thought: Limits on Freedom of Expression in Iran* (August 1993) which, it was submitted, establishes that the Iranian authorities are hostile to adverse media publicity. By inference, the soliciting by the appellant in New Zealand of publicity claimed to be adverse to the present Iranian regime would make him more vulnerable to punishment on return to his home country.

Ordinarily, an applicant for refugee status would be interviewed by the Refugee Status Section before the making of a decision. See paragraph 6(1) of the Terms of Reference for the Refugee Status Section which provides that, subject to certain exceptions, the Refugee Status Section must in all cases give the claimant the opportunity of attending an interview before making a refugee determination. However, as this was the appellant's second refugee application, the Refugee Status Section was required to consider also paragraph 3 of its Terms of Reference. That paragraph provides:

"A person who has previously had a claim to refugee status finally determined by the Refugee Status Section or the Authority has no right to have a further claim accepted for consideration by the Refugee Status Section, unless since the original determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the original claim."

In a decision delivered on 25 August 1994, the Refugee Status Section recognized that circumstances had changed in Iran since the determination of the appellant's original claim, but were nonetheless of the view that the appellant's further claim was not based on "significantly different grounds to the original claim". That is, in their opinion the appellant continued to advance his case on the basis that he had been found by the Iranian authorities in possession of a copy of *The Satanic Verses*.

The Refugee Status Section did not address the issue whether the publicity given to the appellant's case could have come to the attention of the Iranian authorities and if so, whether this could lead to a real chance of persecution - either on the ground of the appellant's admitted possession of Salman Rushdie's book or on the ground that he had disclosed that he had applied for refugee status in New Zealand, or both.

In addition to failing to address this central issue, the Refugee Status Section ventured the tentative opinion that the only change to the appellant's circumstances had occurred in New Zealand and that:

"... it cannot be **conclusively** demonstrated that the authorities in Iran are or will become aware of the Nightline programme or of its contents ...."

[emphasis added]

The requirement that the appellant "conclusively demonstrate" a fact central to his claim imposes a standard of proof almost impossible to attain. This is contrary to the central tenet of New Zealand refugee jurisprudence, namely that an applicant for refugee status need establish only a "real chance" of persecution. See *Chan v Minister for Immigration and Ethnic*

Affairs (1989) 169 CLR 379 (HCA) which was incorporated into New Zealand refugee jurisprudence by the Authority's first decision, namely *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991).

The appellant now appeals to this Authority.

THE APPELLANT'S CASE AT THE HEARING OF THE SECOND APPEAL

As earlier mentioned, at the hearing at Mount Eden Prison on Wednesday, 31 August 1994, the appellant insisted that his original claim was true, namely that when he returned to Iran in 1991 he was in possession of a copy of *The Satanic Verses* and that he was later caught in possession of both the book and a translation. After paying a very substantial bribe to secure his release he escaped to New Zealand.

When on the second day of the hearing the appellant confessed that his original claims were a complete fabrication, he was bowing to the inevitable. For reasons which do not now require elaboration, by the time the appellant acknowledged the falsity of his claims the Authority had reached the very clear conclusion that the appellant was not a credible witness and that his evidence was a tissue of lies.

The appellant having confessed to the falsity of his original claims, Ms Robins attempted to salvage what little was left of the case. The grounds of his claim for refugee status, as finally re-formulated, were three-fold:

(a) He is a person who has falsely claimed to have been in possession in Iran of Salman Rushdie's *The Satanic Verses*.

(b) He has applied for refugee status in New Zealand in reliance on this false allegation.

(c) There is a real chance that the Iranian authorities are now aware of factors (a) and (b).

Given the repressive nature of the present Iranian regime it was submitted that on these grounds (taken singly or cumulatively), the appellant **now** has a well-founded fear of persecution for a Convention reason, namely religion or an imputed political opinion.

Before the Authority can address the question whether the appellant is a Convention refugee, we must be satisfied that we have jurisdiction to hear the appeal in the first place.

THE JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

Mention has been made of the Terms of Reference which came into force on 30 August 1993 and which govern the Refugee Status Determination Procedures of both the Refugee Status Section and the Refugee Status Appeals Authority.

The Authority has no statutory basis. It has been established by the Executive under the Prerogative: *Singh v Refugee Status Appeals Authority* [1994] NZAR 193, 209-212 (Smellie J).

The extra-statutory and informal nature of the refugee determination process has been remarked upon adversely. See, for example, *Ali v Minister of Immigration* (High Court Auckland, 13 December 1991, M2270/91, Barker J) [1992] BCL 361. The New Zealand Government has not yet responded to this criticism nor to an express recommendation that the procedures be placed on a statutory footing: W.M. Wilson, *Report to the Rt Hon. W.F. Birch, Minister of Immigration, on the Process of Refugee Status Determination* (29 April 1992) 18.

The Terms of Reference which came into force on 30 August 1993 are in fact the third. The first came into effect on 11 March 1991 and the second on 1 April 1992. It would not be unfair to say that the Terms of Reference have become progressively more complex and restrictive in their effect. The drafting of the documents, particularly the third Terms of Reference, leaves much to be desired.

GENERAL OUTLINE OF THE REFUGEE STATUS DETERMINATION PROCEDURES

In broad outline, the Terms of Reference prescribe a procedure for the determination of refugee claims lodged by so-called "spontaneous" refugees. In contradistinction to "resettlement" refugees (who by and large are persons in refugee camps overseas and who are selected for resettlement in New Zealand), spontaneous refugees are persons who either claim refugee status at an airport or seaport upon arrival in New Zealand or who, having arrived and having been issued with a temporary permit under normal immigration policy, subsequently lodge an application for refugee status either before or after the permit has expired.

Since January 1991, New Zealand has operated a two-tier system for determining "spontaneous" refugee applications. At first instance the applications are processed within the New Zealand Immigration Service by immigration officers in a specialized section of the Service known as the Refugee Status Section. Upon receipt of an application the Refugee Status section schedules an appointment at which the applicant is interviewed. Interpreters from outside the Immigration Service are provided at no cost to the asylum seeker. The applicant is entitled to be accompanied by a lawyer or other representative who is given the opportunity to make submissions in support of the case. The asylum seeker is subsequently given an opportunity to comment in writing on the interview report compiled by the Refugee Status Section, on any prejudicial information and upon the course of action under consideration by the Refugee Status Section.

Where the application for refugee status is declined there is a right of appeal to the Refugee Status Appeals Authority, an independent body presently staffed by practising or recently retired lawyers drawn entirely from outside Government. A representative of the Office of the United Nations High Commissioner for Refugees is *ex officio* a member of the Authority. Appeals proceed by way of a hearing *de novo*. There is no burden on an appellant to establish that the decision of the Refugee Status Section is wrong. All issues of law, fact and credibility are at large. The appellant is interviewed once more and where necessary an independent interpreter is provided. The appellant is entitled to be accompanied by a lawyer or other representative who is invited to make submissions both before and after the appellant's evidence is given. All decisions of the Authority are delivered in writing. The Authority considers only the question whether the appellant is a refugee. It has no jurisdiction to consider immigration issues and in particular, whether the particular individual should be granted a permit under the Immigration Act 1987. This is a decision only the Minister of Immigration or his delegate may make.

Legal aid is available to asylum seekers for the appeal but not for the first instance hearing by the Refugee Status Section: Legal Services Act 1991 section 19(1)(j).

For present purposes two features of the procedures need to be emphasized:

(a) There is a right of appeal to this Authority against a decision taken at first instance by the Refugee Status Section.

(b) The appeal proceeds by way of a hearing *de novo* and the appellant is interviewed by the Authority which reaches its own independent conclusion as to whether the individual is a refugee. In this respect, the procedures are unique and manifest a high degree of fairness. This is entirely appropriate given the difficult and complex issues of credibility, fact and law which fall for consideration and also given the potentially life-threatening consequences of a mistaken decline of refugee status.

SECOND APPLICATIONS

As previously mentioned, paragraph 3 of the Refugee Status Section procedures provides that a second or further refugee application can be lodged provided certain criteria are met. Paragraph 3 provides:

"A person who has previously had a claim to refugee status finally determined by the Refugee Status Section or the Authority has no right to have a further claim accepted for consideration by the Refugee Status Section, unless since the original determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the original claim."

The Terms of Reference therefore anticipate that a second or further claim to refugee status may be declined at first instance on two grounds:

(a) Where the Refugee Status Section is of the view that the requirements of paragraph 3 are not met. This would follow a finding that since the original determination, circumstances in the claimant's home country had not changed to such an extent that the further claim could be said to be based on significantly different grounds to the original claim; or

(b) That while it could be said that the threshold criteria stipulated by paragraph 3 are met, **on the facts** the second claim to refugee status must fail due to the Convention criteria not being established, e.g. where it is determined that the fear is not well- founded, or that there is no Convention reason, or that the asylum seeker is not a credible witness.

The Authority's Terms of Reference permit an appeal in both circumstances. Paragraph 5(1) of the Authority's own Terms of Reference stipulate that the Authority's functions include the following:

"(f) To determine an appeal, by a person who has made a further claim to refugee status, against the decision of the RSS not to accept the claim for consideration because, since the original determination, circumstances in the claimant's home country have not changed to such an extent that the further claim is based on significantly different grounds to the original claim.

(g) To determine an appeal, in respect of a person who has had a further claim to refugee status accepted and considered by the RSS on the grounds set out in paragraph 3 of the Terms of Reference of the RSS, against the decision of the RSS, following consideration of the merits of that further claim, that the person does not meet the criteria for refugee status."

All counsel were in agreement that the appellant's appeal has been brought under paragraph 5(1)(f) and that were the Authority to determine that it had jurisdiction under that paragraph, the Authority would necessarily then proceed to determine the appeal, that is, to make a decision as to whether the appellant is a refugee as defined in Article 1A(2) of the Refugee Convention. The procedures do not envisage the Authority ruling on the narrow point as to whether the Refugee Status Section was correct in the application of paragraph 3 of the Terms of Reference of the Refugee Status Section and then remitting the case to the Refugee Status Section for a determination of the question whether the individual is a refugee. The Authority is of the view that this concession by counsel is correct. Not only is there no provision for a referral back to the Refugee Status Section in these circumstances, paragraph 5(1)(f) would not allow the implication of such power. Furthermore, there would be little sense in such procedure as the Authority on an appeal under paragraph 5(1)(f) would necessarily need to enquire into the facts of the claim in any event in order to determine the issue of changed circumstances and the issue whether the further claim is based on significantly different grounds to the original claim.

NZIS SUBMISSIONS ON JURISDICTION

At the commencement of the hearing, Mrs Carr advised that she and Ms Scott were appearing only to make submissions on the issue of the Authority's jurisdiction. The New Zealand Immigration Service did not intend making submissions on the actual merits (if any) of the appellant's claim for refugee status. Ms Robins for her part conceded that counsel for the NZIS were entitled to be heard.

The thrust of the submissions presented on behalf of the Immigration Service is that the Executive has limited the circumstances in which an applicant may make a second application for refugee status. It is argued that such application can only be made where (in the language of paragraph 3):

"... since the original determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the original claim."

The submission advanced was that:

"Accordingly before the application could be accepted for consideration the onus is on the Appellant to demonstrate:

(a) Circumstances in Iran have changed.

(b) The change of circumstances have generated the new claim.

(c) The new claim is based on grounds that are significantly different to the original claim."

It was further submitted that the strong policy reasons for the imposition of these threshold requirements are:

"(a) *Interest reipublicae ut sit finis litium*. There must be some finality to the process and the claim cannot continue to be reconsidered because of every subtle societal change that affects the applicant.

(b) It must not be open to an applicant to manipulate the process for his or her own ends.

(c) The cost to the New Zealand taxpayer in terms of the process and in terms of consequential social welfare benefits dictate a limitation must be made and maintained."

RULING ON JURISDICTION

Ms Robins did not challenge the foregoing submissions. It was her submission that the threshold criteria were, on the facts, met.

In these circumstances, the only observation the Authority need make is that it has some reservations as to the claim that the Terms of Reference require that the change of circumstances "have generated a new claim". This is not how paragraph 3 of the Terms of Reference of the Refugee Status Section is worded. While generally the Immigration Service formulation may be a useful guide, it cannot supplant the words actually employed by the Terms of Reference. In any event, on the facts of the case, we are of the view that the outcome would be no different even if the Terms of Reference employed the word "generated".

Two further NZIS submissions need to be noted:

(a) Mrs Carr and Ms Scott made it clear that the Immigration Service was **not** submitting that **all** persons who make a claim to refugee status must establish that they are acting in good faith. It was submitted, however, that in the context of a second application for refugee status (and appeal) there was a good faith requirement.

(b) The change of circumstances envisaged by the Terms of Reference did not include the attitude of the agent of persecution in the country of origin.

As to the issue of good faith, the Authority is of the view that there is no good faith requirement for the purposes of establishing **jurisdiction** under paragraph 3 of the Terms of Reference of the Refugee Status Section and paragraph 5(1)(f) and (g) of the Authority's

Terms of Reference. That does not mean to say that the issue of good faith is entirely irrelevant in the context of a second application for refugee status. This is an issue to which we return later in this decision.

As to the second submission, namely that the change of circumstances referred to in paragraph 3 does not include a change in the attitude of the agent of persecution, the Authority rejects this submission without hesitation. Refugee status is premised on the risk of serious harm and the interposition of what Professor Hathaway in *The Law of Refugee Status* (1991) 133, 135 describes as the "surrogate" protection of the international community to remedy the absence of meaningful national protection. The most obvious form of persecution is the sustained or systemic abuse of human rights by organs of the state and in assessing whether a fear of persecution is well-founded, the enquiry must necessarily focus on the question whether there is a real chance of persecution at the hands of a state agent of persecution. Unless it can be said that the fear of persecution is well-founded, the application for refugee status must necessarily fail.

The difficulty is that all too often the facts on which a refugee application is based are in a state of flux. Thus, a fear of persecution may at a particular point in time be found to be not well-founded because the agent of persecution is unaware of the particular claimant's circumstances, activities or beliefs. However, the situation can change suddenly and dramatically. An agent of persecution who in one moment may have no interest whatsoever in an individual, may in the next, upon receipt of further information, determine that the individual is to be detained and severely punished. Thus, whether a fear of persecution is well-founded at any particular point in time depends on an assessment of risk in the country of origin. That assessment must necessarily focus on the attitude of the agent of persecution. As the attitude of the agent of persecution changes, so will the strength or weakness of the claimant's case. These changes are unquestionably:

"... circumstances in the claimant's home country ...."

The next issue is whether a claim which is initially determined not to be well-founded can be resubmitted upon the receipt of evidence establishing that the agent of persecution, previously uninterested in the claimant, has undergone a change in attitude and embarked upon a course to locate and persecute the individual. Would a further application for refugee status be said, in these circumstances, to be:

"... based on significantly different grounds to the original claim."

Again, the Authority is of the clear view that an affirmative answer must be given. Were it otherwise, it is difficult to envisage circumstances in which a second application for refugee status could ever meet the requirements of the Terms of Reference. Nor can any policy grounds be discerned for excluding a second claim for refugee status where a previously benign state agent turns on an individual with persecutorial intent.

Put another way, suppose a case where an individual has been politically active and escapes from the country of origin in the belief (mistakenly held) that state agents are about to descend with malevolent intent. On the first refugee application it transpires that not only are the state agents unaware of the claimant's activities, there is also no real chance of them becoming aware in the future. However, shortly before the claimant is removed from New Zealand, the authorities in the country of origin discover the nature and extent of the claimant's dissident activities and now unquestionably intend persecuting her upon return. If a second application for refugee status is then lodged, the **claim** is identical except that whereas on the first application there was no real chance of persecution at the hands of the state, now there is. The Authority cannot see how the paragraphs of the Terms of Reference

under discussion can be so interpreted as to exclude from consideration changes in the attitude of the agent of persecution in the country of origin. The only available conclusion is that such a change constitutes a "significantly different ground" to the original claim.
Returning to the facts of the present case, the most significant aspect of the appellant's second application for refugee status is that whereas he earlier faced no chance of persecution at the hands of the Iranian authorities (his case was a mere invention), the supervening publicity now, so he says, puts him at risk of harm in Iran. The appellant is entitled to claim that because there is a real chance that the Iranian authorities are now aware of both his claim to have been in possession of *The Satanic Verses* and of the fact that he has applied for refugee status in New Zealand, circumstances in his home country have changed to such an extent that his second application for refugee status is based on significantly different grounds to the original claim. In short he claims that on the second application his fear of persecution is **now** well-founded.
The Authority shares the concern of the Immigration Service that the refugee determination procedures not be abused. However, this end cannot be achieved by the adoption of an artificial or forced interpretation of the provisions of the Terms of Reference.
The Authority therefore concludes that it has jurisdiction under paragraph 5(1)(f) of the Terms of Reference of the Authority to determine the appellant's appeal.

THE INCLUSION CLAUSE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:
"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."
Subject to what we have to say later in this decision, the four principal issues in this appeal are:

1. Is the appellant genuinely in fear?
2. Is it a fear of persecution?
3. Is that fear well-founded?
4. Is the persecution he fears persecution for a Convention reason?

In this regard we refer to our decision in *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991).
In the same decision this Authority held that in relation to issue (3) the proper test is whether there is a real chance of persecution.

ASSESSMENT OF THE APPELLANT'S CASE

Before the four principal issues can be addressed, it is necessary to make a finding of credibility. In this regard the Authority has concluded that the appellant is not a credible witness. We have taken into account the following factors:
(a) The appellant is a self-confessed liar.
(b) His demeanour. The appellant presents as a cunning and resourceful young man who is quick to take advantage of any opportunity offered. Unencumbered by any duty to adhere to the truth he is agile at seizing any fact or circumstance which might advance his case. Frequently during the hearing the Authority observed the appellant carefully calculating the most advantageous way of dressing his case. He would retreat only after being firmly confronted with inconsistent testimony or statements.

(c) The appellant's persistent adherence to his original claim right through until the second day of his second appeal hearing is illustrative of the fact that he has set his mind to manipulate facts and circumstances until the desired result is obtained, namely the grant of New Zealand residence status to him and his family. He has become blind to the truth and will say anything that will serve his ends.
In these circumstances, the Authority has concluded that no reliance can be placed on anything the appellant says. His account is not accepted in any respect.
The only facts accepted by the Authority are:
(a) That the appellant's case has been publicized in New Zealand on television and in the print media.
(b) There is a real chance that the Iranian Embassy in Wellington is now aware that:
(i) The appellant is in New Zealand.
(ii) He has applied (unsuccessfully) for refugee status.
(iii) He has claimed (albeit falsely) to have been found in Iran in possession of Salman Rushdie's *The Satanic Verses*.

(c) The appellant instructed his wife and children to leave Iran and come to New Zealand as a means of preventing his removal from New Zealand.
(d) The appellant's purpose of approaching the media was to manipulate circumstances to ensure that he was not returned to Iran and that his wife and two children would be given permission to enter New Zealand. He was well aware at that stage that there was no risk at all of him coming to harm upon his return to Iran.
(e) We note his continued claim that his wife was dismissed from her employment and his children barred from attending a creche on the grounds that the Islamic Committee at his wife's place of work suspected that the appellant's prolonged absence from Iran was explicable on one basis only, namely that he had applied for refugee status overseas. We do not accept the appellant's evidence. For the reasons already given, we do not accept anything that the appellant says. Nor were we impressed by the fact that the appellant has variously claimed that his wife:
(i) Is a high school teacher (second statement dated 30 March 1992);
(ii) Is an accountant (evidence at the second appeal hearing) who then worked as a clerk in a girls' school;
(iii) Is a qualified teacher (evidence at the second appeal hearing);
(iv) Is not a qualified teacher (evidence at the second appeal hearing);
(v) Was dismissed from her employment one and a half years ago (evidence at the second appeal hearing);
(vi) Had only lost her job after the appellant had been absent from Iran for approximately three years (evidence at the second appeal hearing).
As we do not accept that we have been given a true account by the appellant, we cannot attach any weight to his evidence. Nor can we attach weight to a document submitted in evidence by him on 7 September 1994, some six days after the hearing. It is a letter dated 1 July 1992 on the letterhead of the Ministry of Education and said to have been issued by the Islamic Committee at the school at which the appellant's wife was employed. It states that the wife is suspended from employment from 6 July 1992 on the grounds of:
"Suspicion of Islamic Group Education about your husband."
[English translation]

Not being able to question the appellant's wife directly as to the authenticity of the document and the veracity of the claims made in relation to the alleged suspension, we are not prepared to attach any significance to the document.

Leaving aside the issue of good faith, the four Inclusion Clause issues must be determined on the basis that the Iranian authorities are aware that the appellant:

(a) Has applied for refugee status in New Zealand.

(b) Has **claimed** (falsely) to have been in possession of Salman Rushdie's *The Satanic Verses* in Iran.

Ms Robins conceded that there was no evidence before the Authority as to:

(i) The attitude of the Iranian authorities to persons who have been in possession of *The Satanic Verses*.

(ii) The attitude of the Iranian authorities to persons who have never been in possession of *The Satanic Verses*, but who have falsely claimed to have been in possession.

(iii) The attitude of the Iranian authorities to returning nationals who have unsuccessfully applied for refugee status outside Iran.

The central core of the appellant's case being entirely unsupported by evidence, the findings of the Authority are:

1. The appellant is not in subjective fear of **persecution**. Rather he is disappointed, if not frustrated, by the prospect of having to leave behind the economic opportunities available in New Zealand. He probably now regrets the disruption he has caused to the lives of his wife and children and is uneasily facing his responsibilities to them. None of these factors, however, are relevant for the purpose of determining whether he is a Convention refugee. The first issue is answered in the negative.

2. As we have found that the appellant is not in subjective fear of persecution, the second issue is answered with the first. We are prepared to accept that the appellant may well be questioned by the Iranian authorities about his stupid and irresponsible actions in New Zealand. But such questioning would not by any means amount to persecution. The second issue is answered in the negative.

3. The third issue raises the question whether the appellant faces a real chance of persecution were he to return to Iran. There is no evidence of such a chance and the third issue is likewise answered in the negative.

4. The fourth issue (presence of a Convention reason), must also be answered in the negative. There is simply no evidence that the Iranian authorities will impute to the appellant a religious belief or political opinion as a result of his actions in New Zealand. Ms Robins relied heavily on *Guardians of Thought: Limits on Freedom of Expression in Iran* (August 1993) to support the argument that:

(a) Iranian authorities are hostile to adverse media publicity.

(b) The soliciting by the appellant in New Zealand of publicity adverse to the present Iranian regime could lead to a finding of apostasy or the imputation of an adverse political opinion.

In our view the evidence cannot be stretched that far. While Salman Rushdie (as author), translators, publishers and others involved in the dissemination of *The Satanic Verses* are clearly at risk, nowhere is any reference made in this detailed book of punishment being inflicted on Iranians for reason only of having been found in possession of *The Satanic Verses*. Were Iranian citizens at risk of punishment in this way it would be reasonable to assume that this would have been mentioned somewhere in the voluminous literature on the *fatwa* and Salman Rushdie. The absence of any evidence to support the appellant's case

leads inevitably to the conclusion that there is no basis for holding that the Iranian authorities attribute to persons in the appellant's position a religious belief or political opinion.

As all four issues are answered in the negative, it is inevitable that the refugee application must be declined.

***REFUGEE APPEAL NO. 265/92 RE SA* DISTINGUISHED**

The Authority has recently, on entirely different facts, granted refugee status to an Iranian national who acquired a copy of *The Satanic Verses* in Iran and who also obtained a translation from a friend. He was arrested and detained for ten days. During his period in detention he received severe beatings. Following his release he was served with a summons requiring his attendance before a Revolutionary Court for trial on a charge of being in possession of an unauthorized book. The Authority found that appellant credible notwithstanding minor discrepancies in the account and the fact that aspects of that appellant's case were described as "fortuitous". Whether there is any connection between that case (the particular appellant arrived in New Zealand on 24 December 1991 and lodged the application for refugee status on 23 January 1992) and the present appeal is entirely speculative. If, in the future, a succession of claims are received based on possession of *The Satanic Verses*, the bona fides of the applicants will be very much in question.

Be that as it may, in *Refugee Appeal No. 265/92 Re SA* the Authority was required to consider background material relating to the attitude of the Iranian authorities to *The Satanic Verses*. At the hearing on 31 August 1994, the parties to the present appeal were provided with a copy of this decision and have had an opportunity to make submissions in relation to it. In summary, on 14 February 1989, Ayatollah Khomeini pronounced his religious edict (*fatwa*) against Salman Rushdie, the author of *The Satanic Verses*. We observed at 13:

"It is acknowledged that little, if anything, is known of the punishment prescribed by Iranian law for the possession of *The Satanic Verses*. What is known is that the justice system of the Islamic Republic of Iran falls far short of internationally-accepted standards. See Lawyers Committee for Human Rights, *The Justice System of the Islamic Republic of Iran* (May 1993) and Department of *State Country Reports on Human Rights Practices for 1993: Iran* (February 1994) 1176, 1177 from which the following quote is taken:

"In January the Special Representative reported that trials in Iran continue to fall far short of internationally-accepted standards. Trials by revolutionary courts, especially, cannot be considered fair or public. Some trials are conducted in secret. If the trial is staged publicly, it is generally because the prisoner has already been forced to confess to a crime. Persons tried by the revolutionary courts (including drug trafficking cases) enjoy virtually no procedural or substantive safeguards. The accused are often indicted under broad and all-encompassing charges such as "moral corruption", "antirevolutionary behavior", and "siding with global arrogance". Trials lasting 5 minutes and less are common.

The right to a defense counsel is theoretically provided for in Iranian law and in the Constitution, but in the revolutionary courts defendants are not known to have access to a lawyer; moreover, they are not able to call witnesses on their behalf or to appeal. Courts have failed to investigate allegations by defendants that they were subjected to torture during pretrial detention. Some persons have been imprisoned beyond the limit of their sentence and even executed after the formal expiration of their prison term."

Addressing now the issue of well-foundedness, recognition must be given to the extreme, if not fanatical, intensity behind the *fatwa*. Not only has Salman Rushdie been sentenced to

death, but also Hitoshi Igarashi, the Japanese translator of *The Satanic Verses*, was stabbed to death in July 1991 by an unknown assailant who evaded capture. In the same month, Ettore Capriolo, the Italian translator of the book, was stabbed and injured, and has also been forced to live under police protection. Around the world, numerous book stores carrying the book have been bombed and its publishers threatened: Middle East Watch, *Guardians of Thought: Limits on Freedom of Expression in Iran* (August 1993) 89. In October 1993, William Nygaard, the Norwegian publisher of *The Satanic Verses* and long-time friend of Salman Rushdie was shot and seriously injured: *NZ Herald*, Tuesday, October 12, 1993; *Time*, October 25, 1993, 15. Those Iranians in exile who have condemned the *fatwa* have themselves been subjected to intense vilification in the Iranian press for being instruments of Western culture and interests, enemies of Islam and the Islamic revolution, monarchists and imperialist lackeys. Their work has been banned in Iran by the pronouncement of a senior cleric, and the terms of the original *fatwa* extended to them by the official news organ of Supreme Religious Leader Ayatollah Khamenei: Middle East Watch, *Guardians of Thought: Limits on Freedom of Expression in Iran*(August 1993) 91. Given the lengths that the Iranian government has gone to to enforce the ban on Rushdie's book and to attack those responsible for its publication and dissemination, both inside and outside Iran, there is no doubt that there is a real chance of persecution were the appellant to return to Iran. The third issue is answered in the affirmative.

Addressing now the final issue, namely whether the persecution feared by the appellant is for a Convention reason, this too must be answered in his favour. The relevant Convention grounds are political opinion and religion. In a theocratic state such as Iran, religion and politics are inseparable, a point we have made on repeated occasions. See, for example, *Refugee Appeal No. 452/92 Re FCS* (11 December 1992) and *Refugee Appeal No. 300/92 Re MSM* (1 March 1994). The point is underlined by Middle East Watch, *Guardians of Thought: Limits on Freedom of Expression in Iran* (August 1993) 89, commenting specifically on the *fatwa* against Salman Rushdie:

"In reality, it is not possible to draw a line of separation between the Iranian government and Ayatollah Khomeini's *fatwa*. In a system of governments based on *velayat-e faqih*[mandate of the jurists of Islamic law and faith], there is no authority superior to that of the supreme religious leader. Since February 1989, the *fatwa* has been reaffirmed by the new Supreme Religious Leader Ayatollah Ali Khamenei, president Rafsanjani, Head of the Judiciary Ayatollah Yazdi, and members of the parliament. On February 17, 1993, for example, two-thirds of the *Majlis*, endorsed the death sentence against Rushdie. The $1 million reward offered on February 15, 1989 by Hojatoleslam Hassan Sane'i, an influential Iranian cleric at the head of the semi-autonomous Fifteenth of Khordad Foundation and former aid to Ayatollah Khomeini, to anyone who kills Salman Rushdie has been twice increased - in March 1991 to $2 million, and in February 1993 by an unspecified amount. In sum, the Iranian government is responsible for the *fatwa*."

While it could be said that many of these observations have direct application to the appellant's case, the two cases are clearly distinguishable:

(a) The appellant has never been in possession of *The Satanic Verses*.

(b) The appellant has never been arrested or charged for being in possession of the book.

(c) There is no evidence that persons who have never been in possession of *The Satanic Verses*, but who have falsely claimed to have been in possession of the book, are at risk of punishment.

(d) The appellant has never had any problems with the Iranian authorities.

Therefore, there is no real chance of the appellant being subjected to persecution for his (false) claim to have been in possession of *The Satanic Verses*.

ALTERNATIVE GROUND FOR THE DECLINE OF REFUGEE STATUS

There is a further and alternative ground for the Authority's decision. As it is our finding that the appellant did not act in good faith in creating the circumstances on which his second application for refugee status was based, he is not a person to whom the Refugee Convention applies.

To explain this alternative ground of our decision, it is necessary to examine in greater detail further aspects of the Refugee Convention. We begin with the notion of refugees *sur place*.

REFUGEES *SUR PLACE*

Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who, 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 ...."

[emphasis added]

The Refugee Convention thus not only includes persons who have fled from their home country, but also those who have become refugees *sur place*. As explained by Grahl- Madsen in *The Status of Refugees in International Law* Vol 1 (1966) 94, a refugee *sur place* is:

"A person who claims to be a refugee as a result of political events in his home country or because of his own actions that have taken place after his departure from said country ...."

Further elaboration is found in the UNHCR *Handbook on Procedure and Criteria for Determining Refugee Status*:

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

95. A person becomes a refugee *"sur place*" due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.

96. A person may become a refugee *"sur place*" as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities."

A more thorough exposition of refugees *sur place* is found in Professor Hathaway's text, *The Law of Refugee Status* (1991) 33-39.

Conceptually, the appellant's second application for refugee status being founded on his activities in New Zealand (applying for refugee status and attracting publicity) is properly called a *sur place* refugee claim.

REFUGEES *SUR PLACE* - IS THERE A GOOD FAITH REQUIREMENT

The obvious question which arises is whether a person may become a refugee *sur place* as a result of his or her own actions and whether there is any requirement that those actions be

carried out in good faith; or is it possible for refugee status to be granted to an individual who, having no well-founded fear of persecution, deliberately creates circumstances exclusively for the purpose of subsequently justifying a claim for refugee status. Put another way, are issues of good and bad faith relevant to determining whether a refugee claimant in a *sur place* situation is eligible for refugee status. It is an important issue given the limitless potential for non-refugees to manipulate circumstances to their advantage in order to secure a status to which they would not otherwise be entitled.
International refugee jurisprudence provides an affirmative answer.
We will refer first to textbook writers and then to the case law.

ACADEMIC OPINION

The opinion expressed by Grahl-Madsen in *The Status of Refugees in International Law* Vol 1 (1966) 242-249, 251-252 is that asylum seekers who have acted in bad faith can be excluded from the Refugee Convention. His analysis is that in the *sur place* context politically pertinent actions in exile can be classified under three headings:

1. Actions undertaken out of genuine political motives.
2. Actions committed unwittingly, or unwillingly (eg. as a result of provocation), but which nevertheless may lead to persecution "for reasons of (alleged or implied) political opinion".
3. Actions undertaken for the sole purpose of creating a pretext for invoking fear of persecution.

We believe that the entire passage at 247-248 deserves quotation:
“It is entirely in keeping with the latter dictum when Zink emphasizes that a person may become a refugee not only if he joins an emigrant organization or its equivalent for political motives, but also if the authorities of his home country imply such motivation for his membership and he may become liable to persecution on that score. [Zink, 107].
Linn, on the other hand, shows concern with respect to the relative ease with which one may win recognition on the basis of what he calls *“Nachfluchtgründe*”:
“Wenn die Erreichung der Anerkennung so einfach ist, dass sie mit hoher Sicherheit durch den blossen Eintritt in eine Emigrantenorganisation oder durch den obendrein noch gut bezhalten Eintritt in eine nebenmilitärische Formation zu erlangen ist, so muss man die *Frage* stellen, *ob nicht dadurch das Asyl in seinem Kern entwertet ist*. Sie haben gehört, wie schwierig es ist und *wieviel Angst und Gefahr derjenige* durchstehen musste, dem eine *begründete Furcht vor Verfolgung* zugebilligt werden kann - und wie lächerlich einfach es ist, das gleiche Ziel zu erreichen, wenn man völlig ungefährdet, dann wenn man schon im Asylland sich befindet, die “richtigen” Wege geht’ [Linn in Heilsbronn, 34].[1]
Quoting a decision of the Bayerischer Verwaltungsgerichtshof, Linn sums up his concern in the words: “dass damit die Entscheidung über die Anerkennung als ausländischer Flüchtling von dem - nicht stets auf anerkennenswerten Motiven beruhenden - Willensentschluss des Flüchtlings abhängen kann [Linn, ibid, 35]”.[2]
We can understand the concern of a presiding judge with a situation in which one of the parties may, in fact, create the relevant circumstances and thereby bind the other party and the Court as well. But as we shall see in the following paragraph, Linn is perhaps unduly pessimistic in this respect, and so is the statement of the Bayerischer Verwaltungsgerichtshof which he quotes.
It seems that politically pertinent actions in exile may be brought under the following three headings:

(1) Actions undertaken out of genuine political motives.

(2) Actions committed unwittingly, or unwillingly (e.g. as a result of provocation), but which nevertheless may lead to persecution "for reasons of" (alleged or implied) political opinion.
(3) Actions undertaken for the sole purpose of creating a pretext for invoking fear of persecution.
Linn's concern notwithstanding, it seems as if there is consensus to the effect that persons falling under the two former headings may win recognition as refugees, while those falling under the latter heading may be excluded from the benefit of Convention status."
Later, at 251 under the heading "Good Faith", Grahl-Madsen continues:
"If a person has committed some act and as a result is liable to persecution because the authorities of his home country read a political motivation into his action, we have a repetition of the theme that the behaviour of the persecutors is decisive with respect to which persons shall be considered refugees: he is in fact a (potential) victim of persecution "for reasons of (alleged or implied) political opinion" and may consequently invoke the Convention on an equal footing with those who were motivated by true political beliefs. But we may have to draw a distinction among the former, between those who unwittingly or unwillingly have committed a politically pertinent act, and those who have done it for the sole purpose of getting a pretext for claiming refugeehood. The former may claim good faith, the latter may not. The principle of good faith implies that a Contracting State cannot be bound to grant refugee status to a person who is not a *bona fide* refugee. Thus, there is a possibility for screening out those unworthy ones whose claim to refugeehood goes back to their own "nicht stets auf anerkennenswerten Motiven beruhenden Willensentschluss", and there is therefore scant reason for Linn's concern in this respect. [cf. § 95 above]."
The good faith issue in the context of *sur place* refugees is described by Professor Hathaway in *The Law of Refugee Status* at 39 as "poignant":
"This issue is most poignantly raised when it is alleged that the fact of having made an unfounded asylum claim may *per se* give rise to a serious risk of persecution. While these cases provide perhaps the most obvious potential for "bootstrapping", there must nonetheless be a clear acknowledgement and assessment of any risk to basic human rights upon return which may follow from the state's imputation of an unacceptable political opinion to the claimant. The mere fact that the claimant might suffer some form of penalty may not be sufficiently serious to constitute persecution, but there are clearly situations where the consequences of return may be said to give rise to a well-founded fear of persecution. For example, in *Slawomir Krzystof Hubicki* evidence was adduced that under then-prevailing Polish criminal law, the claimant would face imprisonment of up to eight years because he had made a refugee claim in Canada. In such situations, the basis of claim is not the fraudulent activity or assertion itself, but is rather the political opinion of disloyalty imputed to the claimant by her state. Where such an imputation exists, the gravity of consequential harm and other definitional criteria should be assessed to determine whether refugee status is warranted."
Implicit in this passage is the possible need, in such cases, to take into account both the nature of the harm faced and the degree of the risk.
What emerges from these various texts is the tension, on the one hand, between the impulse to focus only on the risk of persecution in the country of origin as opposed, on the other hand, to the need to assess whether the refugee protection system is being manipulated and abused. For it could be said that the debasing and discrediting of the

refugee regime will inevitably jeopardize the *bona fide* asylum seeker for whose protection the regime was intended.

Commenting on American practice, Aleinikoff & Martin in *Immigration: Process and Policy* (2nd ed 1991) at 778, after referring to Grahl-Madsen's three-tiered analysis and opinion that claimants may be denied refugee status under the general legal principle requiring good faith, observe:

"To our knowledge, this principle has not been used, as such, in American practice. Should it be? How would such bona fides be determined? Is it any comfort, if the person is persecuted on return, to know that he brought it on himself by committing a political act that he need not have committed? Isn't the threat equally avoidable for virtually anyone persecuted because of political opinion - even those who escape only after their political activities have put them in danger and hence would unquestionably merit refugee status? After all, in most circumstances, they *could* simply have kept their political opinions to themselves."

The Authority does not agree that the last sentence in this passage is a fair representation of the implications of the good faith principle. Professor Grahl-Madsen does not assert that while abroad individuals are under an obligation to refrain from expressing political opposition. He would clearly permit voluntary activities of this nature even though the well-founded fear of persecution then arises as a result of the claimant's own actions. Likewise, Grahl-Madsen would allow actions committed unwittingly or unwillingly. The only exception he makes to the *sur place* refugee principle is the case where actions have been undertaken for the sole purpose of creating a pretext for invoking fear of persecution. It is therefore inappropriate to suggest that the implicit consequence of his analysis is that individuals in the first and second categories should keep their political opinions to themselves. Grahl-Madsen does not expect them to do so.

CASE LAW

The jurisprudence of the Federal Republic of Germany is difficult to access at a meaningful level, largely because of the provisions of the German Basic Law and the fact that the Authority cannot access primary sources. There is also the consideration that the Basic Law has recently been amended with effect from 1 July 1993. See Federal Ministry of Interior, "Recent Developments in the German Law on Asylum and Aliens" (1994) 6 International Journal of Refugee Law 265, 266. The effect of the amendments on refugees *sur place*, if any, is not discussed in this article, nor in Michael Devine, "German Asylum Law Reform and the European Community: Crisis in Europe" (1993) 7 Geo.Immigr.L.J. 795. The following brief description of the pre-amendment law is taken from Walter Kälin, "Well-founded Fear of Persecution: A European Perspective" in Coll & Bhabha, *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (1st ed 1992) 21, 22-23:

"Article 16, para. 2 of the German Basic Law guarantees political asylum to "political persecutees". For many years, the German Administrative Court and most authors, assumed identity of this term and the notion of refugee as embodied in Article 1A of the Refugee Convention. Today, however, the Administrative Court seems to withdraw from this position and to follow the German Constitutional Court which has stressed differences between German constitutional law and the Refugee Convention. The Administrative Court has been influenced by new case law developments in the German Constitutional Court concerning refugees with post- flight reasons. Since a decision of the Constitutional Court on November 26, 1986, persons having a well-founded fear of persecution because of political activities in exile are only granted asylum under **qualified conditions**. However, even if they do not get this status, they cannot be deported to their country of origin if pursuant to Article A [sic] of

the Refugee Convention they are still refugees, and thus protected against forcible return as prohibited by article 33 of the Refugee Convention. The German Administrative Court has joined in this practice of distinguishing between refugees who are granted asylum according to article 16, para 2 of the Basic Law and those who, as Convention refugees, are only protected by the principle of non- refoulement. Thus, the notion of "political persecutee", as embodied in article 16, para 2 of the Basic Law, and the definition of "refugee", as set forth in the Refugee Convention coincide in important aspects but are not identical."
[emphasis added]
In a footnote to the expression "qualified conditions", the author states:
"The post-flight political activities have to concern the expression of political opinions **already held** before departure from the country of origin and the applicant has to have a well-founded fear of persecution because the authorities of his country know about his post-flight activities and are likely to persecute him on account of them in case of return."
The German jurisprudence as reported in the International Journal of Refugee Law appears, from the New Zealand perspective, to be unnecessarily complicated and technical. 3 What emerges, however, is that actions undertaken outside of the country of origin for the sole purpose of creating a pretext for invoking a fear of persecution will not be considered. The rationale is that subjective post-flight reasons (*Nachfluchtgründe*) for persecution cannot lead to a grant of asylum. See, for example, the 1989 decision of the Bundesverwaltungsgericht (Federal Administrative Court) reported as Case Abstract **IJRL/0061** (1990) 2 International Journal of Refugee Law 654; the 1989 decision of the Bundesverfassungsgericht (Federal Constitutional Court) reported as Case Abstract **IJRL/0087** (1991) 3 International Journal of Refugee Law 739 and more recently see the 1992 decision of the Bundesverwaltungsgericht (Federal Administrative Court) reported as Case Abstract **IJRL/0165** in (1993) 5 International Journal of Refugee Law 475.
In Switzerland, prior to 1989, the administrative practice was that persons who had left their native country without being persecuted, but were later threatened with political persecution due to their political activities in Switzerland (because of illegal departure from or non-return to their country - so-called "Republikflucht"), were neither granted asylum nor recognized as refugees. A single exception was made for persons who became refugees *sur place* due to circumstances such as a revolution or a *coup d'état* arising in their country of origin independently of their own behaviour: Walter Kälin, "Well-founded Fear of Persecution: A European Perspective" in Coll & Bhabha, *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (1st ed 1992) 21, 24-25. The current position is summarized at *op cit* 25 in the following terms:
"The *Swiss* Federal Council has joined this position [paras 94, 95 and 96 of the UNHCR *Handbook*] in 1989 and clarified that although refugees "sur place" are not granted asylum in Switzerland if their fear of persecution is due to their own behaviour, they are refugees within the meaning of article 1A, para. 2 of the Refugee Convention, and are thus protected from forcible return as prohibited by article 33 of the Convention. In 1990 the Swiss Asylum Act has been amended with a provision clarifying that persons fearing persecution for activities undertaken after their departure from the country of origin are not granted asylum but may nevertheless remain in Switzerland as recognized refugees."
The position in France is less clear. There is no indication in the following passage as to what conditions must be met by asylum seekers who rely on post-flight reasons or *Nachfluchtgründe*. The quote is from *op cit* 25:

“A similar approach [to the 1990 Swiss Asylum Act] has long been taken by the *French* authorities. On the one hand, asylum is granted under certain conditions to refugees with post- flight reasons who have, at the time of the decision, a fear of persecution because of their political activities while in exile; on the other hand improvements of the political situation in the country of persecution since the time of flight are also taken into consideration to the debit of the asylum seeker.”

The situation pertaining in Austria is described in Erich Kussbach, “The 1991 Austrian Asylum Law” (1994) 6 International Journal of Refugee Law 227, 233:

“Article 2(2) of the Asylum Act provides a number of exceptions to the right of asylum. According to subsection 1, asylum shall not be granted if the refugee falls under the terms of Article 1(C) or (F) of the Geneva Convention. Equally important is the exception under subsection 2, bearing upon the so-called “post-flight reasons” (*Nachfluchtgründe*). This provision, which is based on similar regulations in the German Federal Act on Asylum Procedure and the Swiss Asylum Act, excludes from asylum persons who deliberately produce circumstances within the territory of Austria which would otherwise justify the grant of asylum. This is considered to be a typical act of abuse of the right of asylum. The exception therefore does not apply to cases where the post-flight reasons are not attributable to a deliberate act of the asylum seeker.”

As to the English law, the only reported decision directly on point located by the Authority is *R v Immigration Appeal Tribunal, Ex parte B* [1989] Imm AR 166 (QBD). An Iranian national, whose political activities in Iran had been minimal, arrived in the United Kingdom and became the treasurer of an Iranian Monarchist society, distributed pamphlets, attended anti-Khomeini demonstrations and was photographed at them. The Secretary of State refused his application for refugee status, characterizing his activities in the United Kingdom as self-serving. On judicial review, it was argued on behalf of the applicant that only activities that were undertaken in bad faith should be discounted; and that on the facts, his activities should not be so characterized. For the Tribunal, it was contended that all unreasonable political activities in the United Kingdom should be disregarded. Simon Brown J opened his judgment at 167 with the following observation:

“What is singular and important about it [the asylum case] is that the Tribunal have refused to regard the applicant as qualifying for political asylum even whilst expressly recognizing that he could well suffer persecution upon return home. That on the face of it is a surprising and disturbing conclusion, not readily to be arrived at. Rather than that the applicant remain any longer in suspense, I must nevertheless say at the outset of this judgment that I regard the decision to be valid in law and so immune from interference by this court.”

The dilemma raised by self-serving activities is addressed at 170-171 of the judgment which reads:

“At its [the case’s] heart lie the applicant’s contentions that only activities plainly undertaken in bad faith could vitiate what would otherwise be recognized as a valid claim for political asylum and that it was not here open to the adjudicator and the Immigration Appeal Tribunal to regard his activities in this light. I turn to consider separately the two limbs of that argument.

It will readily be apparent that there must exist some principle whereby an immigrant cannot become entitled to political asylum merely by choosing so to conduct himself in the host country as to create the very risk of persecution which then founds his claim to refugee status. But the precise limits of such a principle are not altogether easily determined. I am not disposed to accept that the position is precisely as was suggested by the European

Commission of Human Rights in *A v Switzerland* in the analogous context of an Article 3 complaint that expulsion would expose the immigrant to political persecution and torture. The Commission, in rejecting A's complaint at a 1986 hearing into admissibility and merits added this:

"Nor can he invoke his political activities in Switzerland in order to avoid being expelled, as any asylum seeker must restrict his political activities in his own interest, otherwise he must bear the consequences."

That seems to me to put the principle somewhat too widely and harshly against the immigrant. Surely not all voluntary activity in the host country which enhances the risk of persecution should be disqualified from consideration. If for instance, someone was so disaffected by his home regime that, having taken whatever steps were there safely open to him, he felt impelled to go abroad to expose and campaign against its evils, I would not myself regard the consequences of that conduct abroad as necessarily irrelevant to his asylum claim. But of course at the other end of the spectrum would fall a case where an asylum seeker, with no history of political antagonism towards his home country's regime, nevertheless on leaving it acts out a pretended hostility calculated to attract refugee status.

...

It is I think sufficient for the purposes of the instant application to conclude, as I do, that not only bad faith will disqualify an applicant for asylum from relying upon post-arrival activities; so too on occasions will unreasonable conduct. How unreasonable must be left to be decided hereafter on a case by case basis."

Commenting on this decision Macdonald & Blake in *Immigration Law and Practice in the United Kingdom* (3rd ed 1987) 294 point out that the relevant date to assess whether a fear is well-founded is the date of the determination of refugee status, not the date when a person leaves the country of origin:

"So such acts occurring after the date of departure should be taken into account if there is a reasonable risk [in NZ read "real chance"] that they have come to the attention of the authorities in the applicant's own country. But if these acts appear to be reckless or contrived, having regard to an individual's previous history, they may be regarded as self-serving and result in a conclusion that the person is not deserving of protection."

As far as the United States is concerned, no cases directly on point can be found. None are cited by Aleinikoff & Martin in *Immigration: Process and Policy* (2nd ed 1991) at 777-779 even though the question of "bootstrap refugees" is specifically discussed. Nor are any found in Anker, *The Law of Asylum in the United States: A Guide to Administrative Practice and Case Law* (2nd ed 1991); Anker, *The Law of Asylum in the United States: Administrative Decisions and Analysis* (3rd ed 1994) and Martin, *Asylum Case Law Sourcebook* (1994). The nearest case is that of *Cisternas-Estay v INS* 531 F.2d 155 (3d Cir. 1976), *cert. denied*, 429 U.S. 853, 97 S.Ct. 145, 50 L.Ed. 2d 127 (1977). Cisternas- Estay and his wife, Chilean citizens, originally applied for asylum on the grounds that the Allende government would persecute them on their return to Chile. However, the INS decision was not made until approximately five months after the fall of the Allende government. The application was declined on the grounds that with the fall of the Allende government there was no basis for granting political asylum. A month and a half after the denial of the asylum request and sixteen days before the deportation hearing, the Cisternas- Estays and their counsel held a press conference where the Cisternas-Estays read a very brief statement attacking the denial of liberties in Chile under the Pinochet regime which succeeded the Allende government. At the deportation hearing it was claimed that this statement would result in the loss of Chilean

citizenship and leave them open to criminal action under a Junta proclamation forbidding crimes against the "essential interests" of Chile by nationals living abroad. There was, however, no evidence as to any manifestation of hostility by the Pinochet government towards the couple.

The Board of Immigration Appeals took the position that the press conference was "staged" to enable the Cisternas-Estays to take advantage of the withholding of deportation provision contained in s 243(h) of the Immigration and Nationality Act 1952. It went on to hold that on the facts it had not been shown that there was a "clear probability" of persecution in Chile. The United States Court of Appeals, Third Circuit, held that on the facts it could not be said that the assessment of the risk of persecution was wrong with the result that the decision of the Board of Immigration Appeals was upheld. There was no discussion of the "good faith" issue.

The only academic comment on this case available to the Authority is Kenneth R. Petrini in "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981) 56 Notre Dame Law Review 719, 729. He observes:

"Asylum law protects those who in good faith need to be sheltered from persecution. This protection was not meant to encompass those who make political statements for the sole purpose of becoming refugees. In *Cisternas-Estay v INS* the asylum claims of two Chileans failed. The Court found that the statements made by those aliens were made for the sole purpose of making themselves eligible for asylum. The two had no reason to fear persecution before they staged a press conference, and the Court refused to find that the statements made were sufficient to create a valid asylum claim. The same situation is presented by the alien who, with no prior asylum eligibility, makes an asylum claim solely for the purpose of justifying a subsequent asylum claim. The results should not differ."

A possible qualification to the good faith principle is to be found in *Bastanipour v INS* 980 F.2d 1129 (7th Cir. 1992). Bastanipour, an Iranian national was arrested in Chicago in possession of approximately nine pounds of heroin he had brought back with him from Iran. He was sentenced to fifteen years imprisonment but in fact served only nine years. Upon his release from prison, deportation proceedings were commenced. Bastanipour applied for refugee status on the grounds (*inter alia*) that while in prison he had converted from Islam to Christianity. He feared summary execution if returned to Iran for having violated Islamic religious law. His application was initially unsuccessful, the Board of Immigration Appeals doubting that Bastanipour's conversion was a genuine one. The United States Court of Appeals, Seventh Circuit, reversed the decision of the Board of Immigration Appeals on the grounds (*inter alia*) that it had asked the wrong question. It was held that it is not a matter whether Mr Bastanipour's conversion was sincere or genuine, rather it was a question of how the purported conversion would be viewed by the authorities in Iran:

"The opinion [of the Board] does not consider what would count as conversion in the eyes of an Iranian religious judge, which is the only thing that would count so far as the danger to Bastanipour is concerned. The offense in Moslem religious law is apostasy - abandoning Islam for another religion. Thomas Patrick Hughes, "Apostasy from Islam" in Hughes, *A Dictionary of Islam* 16 (1895). That is what Bastanipour did. He renounced Islam for Christianity. He has not been baptized or joined a church but he has made clear, to the satisfaction of witnesses whom the Board did not deem discredited, that he believes in Christianity rather than in Islam - and that is the apostasy, not compliance with formalities of affiliation. Whether Bastanipour believes the tenets of Christianity in his heart of hearts or, as hinted but not found by the Board, is acting opportunistically (though at great risk to

himself) in the hope of staving off deportation would not, we imagine, matter to an Iranian religious judge. 4

The decision of the Board of Immigration Appeals was set aside and the case remanded for the Board to reconsider the case. The Court of Appeals was clearly influenced by the fact that Bastanipour faced what was described as "very serious punishment, quite possibly death". In addition, he was at further risk not only because of his drug conviction but also because of his brother's political activities. Although not expressly articulated, the extreme nature of the harm and the exceptional nature of the risk were regarded as relevant considerations.

The issue of good faith in the *sur place* situation has not received detailed consideration in Canadian refugee jurisprudence. However, the trend of authority is in favour of a good faith requirement. Neither the basis nor the limits of this jurisprudence have been explored or articulated. In *Valentin v Minister of Employment and Immigration* [1991] 3 FC 390 (FC:CA) five citizens of Czechoslovakia (as it then was) sought refugee status on the grounds that they faced punishment under a law that imposed criminal sanctions for remaining abroad longer than their exit visas allowed. The Court held (at 395):

"Neither the international Convention nor our Act, which is based on it, as I understand it, had in mind the protection of people who, having been subjected to no persecution to date, themselves create a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application."

The Court nevertheless accepted that the grant of refugee status would be appropriate where the provision, either in itself or in the manner in which it was applied, was likely to add to a series of discriminatory measures to which a claimant has been subjected for a reason provided in the Convention, so that persecution could be found in the general way in which the person was treated in the country of origin. In other words, the penalty for overstaying an exit visa was relevant in the context of the principle of the cumulative effect of discrimination. On the facts, the Court found that there was no reason to believe that the punishment feared by the appellants was connected to any of the five Convention grounds.

There are two relevant decisions of the Immigration and Refugee Board, Refugee Division. The first is *Z.(A.G.) (Re)* [1991] C.R.D.D. No. 632 QL; (T91-00260) (November 29, 1991). The claimant had participated in the pro-democracy movement in China but following his "re-education" was allowed to travel to Canada as a student. There he made a claim for refugee status. It was found on the facts that there was no reasonable chance of persecution. However, the Panel went on to consider "the claimant's risk, if any, for voluntarily making known to the Chinese authorities that he had applied for Convention refugee status in Canada and/or for the possibility that the claimant may choose to violate China's exit control laws in the future". The panel held, citing *Valentin*, that violation of China's exit control laws would result in prosecution, not persecution. The reasoning with regard to the risk generated by the application for refugee status is in the following terms:

"Since on the basis of his past activities in China, the panel has already found the claimant not to have a well-founded fear of persecution, the panel is of the opinion that the claimant's decision to file a Convention refugee claim can only be regarded as a deliberate action taken by him for the sole purpose of making a refugee claim in Canada and not in good faith. The panel does not find this to be a reasonable basis for determination of the claimant as a Convention refugee."

In *D.(G.G.) (Re)* [1992] C.R.D.D. No. 349 QL; (M92-05642) (December 8, 1992) the applicant, a citizen of Zaire, after the hearing of his refugee claim but before the decision was given published in the Quebec City *Le Soleil* on November 1, 1992, an open letter in which he denounced President Mobutu. The panel found that the claimant was not credible. With regard to the *sur place* claim it held:
"... [t]he claimant's open letter, which was published in the newspaper after his hearing before the Refugee Division, in no way allows us to change our finding in respect of the claimant's credibility. As far as a possible reaction on the part of the Zairian authorities is concerned, the panel deems that the claimant acted in bad faith, given the lack of credibility in his testimony and the very recent date of his latest initiative, which was taken shortly after his hearing and seems to be linked to his claim."
In *Said v Canada (Minister of Employment and Immigration)* (1991) 16 Imm LR (2d) 94 (FC:CA) the applicant, a citizen of Kenya, arrived in Canada in July 1989 and claimed Convention refugee status. In November 1989, he was found not to have a credible basis for his claim. While in Canada he was active in a group critical of the Kenyan government and organized and participated in demonstrations against that government. The President of Kenya threatened to punish all refugee claimants who participated in the protests who might return to Kenya. At a demonstration in 1990, the applicant's photograph was taken by Kenyan Embassy officials. The applicant requested that his inquiry be re-opened so that the issue of whether there was a credible basis for his refugee claim could be further addressed. The application was denied on the basis that the applicant did not fulfil the statutory criteria for second applications. He applied to review and set aside that decision, arguing that he had become a refugee *sur place* since the credible basis hearing. The Federal Court of Appeal upheld the adjudicator's decision, holding that the relevant statutory provision precluded the applicant's request that the inquiry be re-opened. The decision appears to be confined to the interpretation of the Canadian statute and to considerations arising under the Canadian Charter of Rights and Freedoms. There is no discussion of refugee jurisprudence or the issue of good faith. Furthermore, in the light of recent developments in Canadian Charter jurisprudence, the decision is possibly now of historical interest only: *Canada (Minister of Employment and Immigration) v Chung* (1992) 18 Imm LR (2d) 151 (FC:CA).
Finally, in *Z. (Q.A.) (Re)* [1991] C.R.D.D. No. 401 QL; (M91-04881) (October 23, 1991) a refugee application by a Cuban was based to a large extent on an anti-Communist radio interview he gave in Canada **after** the refugee application had been made. The panel ruled:
"Panel is of the view that claimant spoke to Radio Marti to secure refugee status given the generally questionable character of the applicant's claim. Counsel argued that the panel should be concerned with whether claimant expressed his "true feelings" in the Radio Marti interview. It is difficult to establish what the claimant's "true feelings" are without delving into his psychology. The claimant had not only benefited from the Cuban regime's free education system, but purposely continued to benefit from it after he claimed he became disgruntled with the regime and had opportunity to "flee" this regime on at least two previous occasions in Gander. The regime even permitted him to visit Hungary after it fell away from Communism. Panel is of the opinion that claimant simply wanted to secure a better way of life, no more and no less. He may be anti-Communist, but the panel does not find that his speaking to Radio Marti was because of genuinely held political beliefs."
Taken on review in *De Corcho Herrera v Canada (Minister of Employment and Immigration)* [1993] FCJ No. 1098 QL; (A-615-92) (October 19, 1993) (FC:TD) the Federal

Court did not specifically consider the question of good faith, the issue being recast as an issue relating to the subjective fear:

"... [t]he Board's inquiry into the applicant's motivation in claiming refugee status led to the conclusion that he had no subjective fear of persecution and that the claim had not been made in good faith. It is in that context that the Board looked into the applicant's motivation in making his claim and I believe this was a consideration which the Board could properly entertain. The decision of the Federal Court of Appeal in *Tung v M.E.I.* (1991) 124 N.R. 388, is also cited for the proposition that the Board improperly considered Applicant's motivation in making his claim. In this respect, it should suffice to say that contrary to the situation in *Tung*, the Applicant's credibility was here in issue and the Board's inquiry targeted [sic] Applicant's subjective rather than objective fear."

As previously mentioned, none of the Canadian cases explore the policy considerations which both justify and limit the good faith principle as understood in that jurisdiction.

Very recently, the issue has arisen in Australia and the Federal Court (Full Court) decision in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 is of assistance. It is to be read with the related decision of *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 123, a decision delivered simultaneously by the same Court. Somaghi and Heshmati were Iranian nationals who, following their arrival in Australia, applied for refugee status. Both applications were declined. Following the decline decisions, the two men sent a letter to the Iranian Embassy in Canberra. The letter contained statements critical of the Iranian regime. Both men then sought a reconsideration of their refugee applications on the basis that as a result of the opinions expressed in the letter to the Iranian Embassy, they now had a well-founded fear of persecution on the grounds of their political opinion. The decision made by the Minister's delegate was that the dispatch of the letter was undertaken for the sole purpose of enhancing the claims for refugee status and was not an act committed in good faith. The view taken was that even if the action taken by the two men gave rise to a real chance of persecution, the fact that the act did not arise from a Convention-related criterion meant that they should not be extended the benefit of the protection of the Convention. In the delegate's view, persons who committed a politically pertinent act solely to bring themselves within the terms of the Convention could not claim good faith and refugee status was refused.

Both cases came before Lockhart J at first instance. The applications were dismissed on the grounds, *inter alia*, that a person who has deliberately created circumstances in the country of residence exclusively to establish the circumstances that may give rise to his persecution if he should return to the country of origin, for the purpose of subsequently justifying a claim of refugee status, is not entitled to be treated as a refugee *sur place*: *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 22 ALD 225.

However, on appeal, the decision of Lockhart J was reversed by a majority decision (Jenkinson and Gummow JJ, Keely J dissenting) upon the limited ground that the decision-maker had not accorded the two men procedural fairness in reaching the conclusion that the two men had not acted *bona fide*. It was held that procedural fairness required that the decision-maker communicate to the men what he judged to have been their purpose in writing the letter and to take into consideration whatever response was made before coming to the conclusion that the men had not acted in good faith. In short, an opportunity to be heard should have been afforded on the good faith issue.

However, the three Judges were unanimously of the view that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which are undertaken for the sole purpose of creating a pretext for invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. In this respect, the principal judgment was delivered by Gummow J in *Somaghi* at 117:

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

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

...

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

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

The Authority has been greatly assisted by this decision but has difficulty in accepting the last sentence of the passage quoted above. If a bad faith claim is to be held not to support an application for refugee status, the justification for this view must be founded on the interpretation of the Refugee Convention and not on a fiction, namely that the fear of persecution is not well-founded. This is the point made by *R v Immigration Appeal Tribunal, Ex parte B* [1989] Imm AR 166. A person who has created a pretext of invoking a claim to well-founded fear of persecution may well succeed in creating a real chance of persecution in the country of origin. Once a well-founded fear of persecution exists, the existence of that fear cannot be denied. The only issue is whether that fear is, in effect, to be excluded from consideration. Only policy grounds could justify arriving at a positive conclusion which, in the words of Simon Brown J in *R v Immigration Appeal Tribunal, Ex parte B* 167 is "a surprising and disturbing conclusion, not readily to be arrived at".

Our conclusion is that the weight of authority (both academic and case law) favours a good faith requirement. The issue which falls for consideration is whether in the New Zealand domestic context this interpretation of the Refugee Convention is to be recognized and applied. Until now the point has been expressly left open. See *Refugee Appeal No. 10/92 Re MI* (22 July 1992) 21.

THE INTERPRETATION ISSUE - ADOPTION OF THE GOOD FAITH PRINCIPLE IN NEW ZEALAND

As a party to the Refugee Convention, New Zealand is bound by Article 33 which prohibits the expulsion or return (*refoulement*) of a refugee in any manner whatsoever to the frontiers or territories where his or her life or freedom would be threatened on account of one of the Convention grounds. Article 33 provides:

"Article 33.

Prohibition of expulsion or return.

("refoulement")

(1) No Contracting State shall expel or return (*"refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

The fundamental nature of the *non-refoulement* obligation imposed by Article 33 is emphasized by the fact that it is one of the few provisions of the Refugee Convention to which no reservation may be entered: Article 42. The literature on the scope and application of the non-refoulement obligation is vast and no good purpose would be served by attempting a summary. It is sufficient to note only that as a party to the Refugee Convention New Zealand is bound by Article 33.

The question is whether the Convention is to be interpreted as being intended to protect from *refoulement* only those in genuine need of protection, or whether it was intended, in the words of Lockhart J (approved in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, 117):

"... to place in the hands of the applicant for refugee status [the] means of unilaterally determining in the country of residence his status as a refugee ...."

The Authority is of the view that there can be only one answer to the question. The reasons are largely, but not exclusively, those set out in *Somaghi and R v Immigration Appeal Tribunal, Ex parte B*. They include:

(a) First and foremost the Refugee Convention was intended to afford protection only to those whose fundamental marginalization distinguishes them from other persons at risk of serious harm. This connotes the notion of disfranchisement or breakdown of basic membership rights in the society of the country of origin: Hathaway, *The Law of Refugee Status* (1991) 135. An individual who, as a stratagem, deliberately manipulates circumstances to create a real chance of persecution which did not previously exist cannot be said to belong in this category.

(b) The Refugee Convention was intended to afford protection only to the *bona fide* individual who is unable or unwilling to avail him or herself of the protection of the country of nationality.

(c) If there is no good faith requirement in the *sur place* situation, it places in the hands of the applicant for refugee status the means of unilaterally determining the grant to him or her of refugee status.

(d) By allowing the cynical manipulation of a refugee status determination procedure, the entire system of protection is brought into disrepute. While *bona fide* refugees are required to pass through a stringent examination of the circumstances of their case, a *mala fide sur place* applicant is free to engage in the most outrageous and cynical conduct, the more outrageous and cynical, the surer the prospect of success. The *bona fide* asylum seeker would have little choice but to follow suit. The end result would be a system entirely lacking in integrity and indeed, entirely lacking in purpose. Asylum seekers would be able to demand, as of right, the grant of refugee status simply because that status was sought. A person could become a refugee as a matter of his or her own choice. All that would be necessary would be to establish two propositions:

(i) I am able to cynically manipulate circumstances in New Zealand in order to create a well-founded fear of persecution in my country of origin.

(ii) I will cynically manipulate circumstances.

This the Authority cannot accept as a ground for granting refugee status for it permits a person to obtain refugee status by means of a stratagem. It is the very situation anticipated by Linn in the quotation taken from Grahl-Madsen, *The Status of Refugees in International Law* Vol 1 (1966) 247-248 and which has been earlier cited. We intend repeating here only the English translation:

"That the decision regarding recognition of foreign refugee status can thus depend on the manifestation of will of the refugee [applicant] - which is not always based on motives that merit recognition."

See in this regard the analogous decision of *Mendis v Immigration Appeal Tribunal and Secretary of State for the Home Department* [1989] Imm AR 6, 22 (CA).

(e) In this regard the Authority was told by counsel for the appellant that she has been made aware by the immigration consultant concerned that there are approximately fifty other Iranians who are minded to follow the appellant's example should he succeed in his refugee application. Were this to happen, the New Zealand authorities might feel encouraged to recast the current liberal determination procedures and replace them with a Draconian regime which would inevitably have the severest impact on the *bona fide* asylum seeker. Under such a regime the expulsion of refugees from New Zealand would become a real possibility leading, in turn, to a breach of the *non-refoulement* obligation in relation

to *bona fide* refugees. In these circumstances it is important that the Authority not avoid its responsibility to determine whether the good faith principle is to be recognized and applied in New Zealand. For the reasons we have given the principle is to be applied.

This ruling does not deny the fact that the primary focus of the Convention definition is on the risk faced by the individual in the country of origin and that the enquiry is not so much into the asylum seeker's true beliefs, but on the view of the persecutor. This is explained in *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 747 (Can:SC):

"Second, the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to the other bases of persecution."

To this extent, the decision in *Ward* should therefore be seen as complementing the decision in *Bastanipour v INS* 980 F.2d 1129 (7th Cir. 1992).

Nor does our ruling deny the fact that it is a fundamental principle of refugee law in New Zealand that the relevant date for the assessment of refugee status is the date of determination. Thus, **all**circumstances which exist at that time must necessarily be relevant considerations: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, as explained and applied in *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (No. 2) (1993) 45 FCR 418, 422-425; 117 ALR 455, 458-463 (FC). That the relevant date at which the well-foundedness of a refugee applicant's fear is to be assessed is the date of determination of the refugee application has long been established in New Zealand refugee jurisprudence. See, for example, *Refugee Appeal No. 81/91 Re VA* (6 July 1992) 9 and *Refugee Appeal No. 474/92 Re KA* (12 May 1994) 24.

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

CONCLUSIONS ON GOOD FAITH: THE LAW

We intend adopting and applying the three-part classification devised by Grahl-Madsen, namely:

(1) Actions undertaken out of genuine political motives.

(2) Actions committed unwittingly, or unwillingly (e.g. as a result of provocation), but which nevertheless may lead to persecution "for reasons of" (alleged or implied) political opinion.

(3) Actions undertaken for the sole purpose of creating a pretext for invoking fear of persecution.

Our decision to interpret the Refugee Convention as requiring, implicitly, good faith on the part of the asylum seeker turns on a value judgment that the Refugee Convention was intended to protect only those in genuine need of surrogate international protection and that the system must be protected from those who would seek, in a *sur place* situation, to deliberately manipulate circumstances merely to achieve the advantages which recognition as a refugee confers. The sooner abuses of this kind are detected and eliminated, the longer the integrity of the refugee status determination procedures and the protection afforded by the Convention will enable the *bona fide* asylum seeker to escape persecution. Clearly this is the underlying assumption of the Convention.

However, the good faith principle must be applied with caution, not zeal. The precise application of Grahl-Madsen's third category must be determined on a case-by-case basis. It may be that a balancing exercise is called for and a careful assessment made of all the circumstances, including the degree of bad faith, the nature of the harm feared and the degree of risk. See, for example, the earlier discussion of *Bastanipour* and the passage cited from Hathaway, *The Law of Refugee Status* 39. We anticipate that only in clear cases (and the present case is undoubtedly one) will an asylum seeker fall outside of the Refugee Convention by reason of an absence of good faith.

On the facts of the present case, the balancing exercise leads to a very clear result. The degree of bad faith is high, the harm (questioning by the authorities) trivial and the risk non-existent.

We should mention that the potential for abuse of the refugee determination system would be very much reduced were the Immigration Service to remove promptly from New Zealand those who have been unsuccessful in their refugee applications. This would forestall the resort to desperate remedies in order to create a pretext for invoking a fear of persecution.

CONCLUSIONS ON GOOD FAITH: THE FACTS

It is our finding that the appellant has not acted in good faith by deliberately and deceitfully seeking and exploiting the publicity given to his case and then founding a second refugee application on the alleged consequences in Iran of that publicity. As we have found that he has not acted in good faith, he is not a person to whom the Refugee Convention applies.

CONCLUSIONS ON GOOD FAITH: PROVISO

The finding of bad faith we have made in relation to the appellant must not be seen as necessarily affecting his wife and children who have not been heard and in respect of whom no credibility assessment has been made. It is an issue which might become significant in another context given that the German jurisprudence recognizes that kinship is not a subjective or self-created post-flight reason for persecution, as it is independent of the refugee's own behaviour. See Case Abstract **IJRL/0021** (1989) 1 International Journal of Refugee Law 394 (Oberverwaltungsgericht Nordrhein-Westfalen (Higher Administrative Court, North Rhine-Westphalia)); Case Abstract **IJRL/0068** (1991) 3 International Journal of Refugee Law 129 (Verwaltungsgericht (Administrative Court, Braunschweig)). We are not, however, in any way suggesting that they are Convention refugees. This is an issue which, if it arises at all, falls for determination in another country by a different authority.

CONCLUSION

We find that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention for the following two reasons:

1. He does not have a well-founded fear of persecution for any of the reasons recognized by the Refugee Convention.
2. In any event, as the appellant did not act in good faith in creating the circumstances on which he based his second application for refugee status, he is not a person to whom the Refugee Convention applies.

Refugee status is declined. The appeal is dismissed.

"R P G Haines"

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[Chairman]

FOOTNOTES

1.The English translation of this passage and the next, as provided by Pieter Hos of UniServices Translation Centre, University of Auckland, is as follows:
"If attaining recognition is so simple that it can be achieved with a high degree of certainty merely by joining an *émigré* organization, or by joining a semi-military group (for which one is well-paid, what is more), the *question* has to be asked: *Does this not devalue the essential nature of asylum?* You have heard how difficult it is, and *how much fear and danger* will have had to be endured by *any party* whose *fear of persecution* may be deemed to be *well-founded* - and [in contrast to that] how ridiculously simple it is to achieve the same objective if one explores the "right" avenues - in complete safety and when one is already in the country of asylum."
2.'"That the decision regarding recognition of foreign refugee status can thus depend on the manifestation of will of the refugee [applicant] - which is not always based on motives that merit recognition."
3. See further Reinhard Marx, "The Criteria for Determining Refugee Status in the Federal Republic of Germany" (1992) 4 International Journal of Refugee Law 151.
4. "This quote has been accepted by this Authority as a correct statement of principle: Refugee Appeal No. 300/92 Re MSM (1 March 1994), a case involving an Iranian national who converted to the Hare Krishna faith. There were no doubts as to the genuineness of his conversion, however.