AT AUCKLAND

Before: R.P.G. Haines (Chairman), S.R. Sage (Member), G.W. Lombard (Non-voting Member)

Counsel for the Appellant: B.B. Toh

Appearing for the NZIS: No appearance

Date of Hearing: 13 May 1993

Date of Decision: 1 March 1994

DECISION

This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a national of Iran.

THE APPELLANT'S CASE

The appellant tendered to the Authority a very detailed statement of some nine pages in length. In its essentials it is identical to the statement on which he relied at the Refugee Status Section interview held on 4 December 1991, but some aspects have now been elaborated upon. However, vital aspects of the appellant's case did not emerge until the appeal hearing, with the result that the Authority has been able to arrive at a different conclusion to that reached by the Refugee Status Section. Because the Authority accepts the appellant's credibility, little point would be achieved by recounting his case in detail. It is sufficient to refer to some of its principal points:

1. The appellant is a thirty-five year old married man who arrived in New Zealand with his wife, on 11 October 1990. Both the appellant and his wife were born into Moslem families and have been educated in the Islamic faith. Whereas the appellant's wife continues to adhere to her faith, the appellant does not.

2. While at high school the appellant began reading books about other religions. As this was prior to the 1979 Revolution, such books were relatively easy to come by. In fact, the appellant spent most of his spare time reading about other religious beliefs and, unusually in an Islamic country, became a vegetarian at the age of fifteen.

3. The appellant supported the 1979 Revolution as he hoped that the overthrow of the Pahlavi regime would lead to greater political and social democracy and religious freedom and not because he supported any particular ideology or religion. After the fall of the Shah the appellant soon arrived at the conclusion that the Revolution had been captured by the Islamic clergy and was directly affected by the religious intolerance which flowed directly from this process.

The appellant continued his religious studies in private and came to the decision that he would change his religion and embrace Vedic beliefs. He arrived at this decision whilst studying at University and when he had reached the relatively mature age of twenty-five to twenty-seven years of age.

4. The particular Vedic beliefs he adopted are those espoused by the Hare Krishna movement, in particular by the branch known as the International Society of Krishna Consciousness (Iskcon).

The appellant described his movement away from Islam towards Vedic religion as a gradual and organic process. His movement towards the Hare Krishna religion in particular was possibly influenced by the fact that prior to the 1979 Revolution, this movement had an ashram in Tehran where the appellant lived, whereas the other Vedic faiths did not then have a noticeable profile, and in particular, did not have recognizable places of worship. After the Revolution, there remained in Iran a person whom the appellant described as an underground Hare Krishna

teacher or guru. He administered to the needs of the small underground group of Hare Krishna adherents in Tehran numbering some sixty to seventy persons. The appellant discovered this group quite accidentally after the Revolution. It operated in Tehran alone and held clandestine meetings in the homes of different members. Because of the religious oppression practised in Iran, the group was required, of necessity, to eschew the normal external manifestations of their beliefs.

5. The appellant's participation in this underground religious group, while obliquely referred to during the Refugee Status Section interview, was not put to the forefront of the appellant's case, nor even made explicit. When this information emerged at the appeal hearing, the appellant was challenged by the Authority as to why it was being offered for the first time at a very late stage. The appellant explained that he had originally been extremely reluctant to disclose the information as he feared the consequences were the information to come into the hands of the Iranian authorities. It is his belief that members of the Hare Krishna group in Iran, if discovered, will face severe retribution and punishment.

The Authority believes the appellant. Our principal reason is that the appellant's wife gave evidence which confirmed to a very large degree what the appellant himself told us. In particular, she gave evidence that she had attended these underground meetings from time to time, though not as often as her husband. She was able to give clear and specific details of the time, place and circumstances of the meetings and the Authority unhesitatingly accepts her as a witness of the truth. By way of contrast, the appellant presents as a rather vague, if not spiritual, individual who is not at home in describing events in terms of time, place, circumstance and related specific details. His evidence was more "impressionistic". These are not, of course, reasons for disbelieving him, but the Authority was assisted in accepting him as a credible witness by the evidence given by his wife. In this there is some irony. When the hearing began, the appellant's wife was not present and the Authority was told that it was not intended that she be called as a witness. When the Authority asked for the appellant's passport, we were told that he had inadvertently left it at home. Following a telephone call from the appellant, his wife came in to deliver the passport. The Authority took advantage of her presence to suggest that she give evidence and, through his counsel, the appellant readily agreed to this proposal. It is largely through these fortuitous events that the Authority has been able to arrive at a different conclusion to that reached by the Refugee Status Section. The appellant's wife did not give evidence at that hearing.

6. The appellant stated that, to his knowledge, there were a total of four Vedic groups in Tehran until events took an ominous turn in August and September 1990. In August, a group of persons interested in telepathy, hypnotism, yoga and spiritual activities led by a person called [name withheld] were arrested and imprisoned with their leader. In the same month, another group of persons who studied Indian religions under a guru called [name withheld] were also arrested and the appellant subsequently heard that [name withheld] had been killed. In September 1990, followers of the Guru Maharishi Mahesh Yogi were arrested and imprisoned. Their teacher, a man called [name withheld], was imprisoned and the appellant explained that it is not known whether he is dead or alive.

In these circumstances the appellant resolved to leave Iran and, having obtained a New Zealand visa in Tehran on 3 September 1990, arrived in New Zealand on 11 October 1990. His application for refugee status was filed on 27 June 1991.

THE DECLINE OF REFUGEE STATUS AT FIRST INSTANCE

The appellant's interview by the Refugee Status Section of the New Zealand Immigration Service took place on 14 December 1991. By letter dated 29 May 1992, the Refugee Status Section advised the appellant that his application had been declined. While the appellant was accepted as a truthful witness, the following grounds were given for the decision:

1. The appellant's religion had not disadvantaged him in the employment field. He had been able to earn a living as a self-employed person.

2. The appellant's inability to proselytize his religion was not regarded as a significant infringement of his human rights.

3. While accepting as credible the appellant's account of the arrests of persons associated with the three groups referred to, the Refugee Status Section pointed out that despite the appellant's association with some of those persons, he himself had never been arrested.

4. The Refugee Status Section was not satisfied that the appellant practised his beliefs with any conviction, and in this respect relied upon the fact that when the appellant married on 7 December 1989 he gave his religion as Moslem.

5. The appellant had no history of past persecution. This ground appears to be a restatement of the third ground.

In these circumstances, the Immigration Service was not satisfied that there was a real chance of persecution were the appellant to return to Iran.

MISDIRECTIONS BY THE REFUGEE STATUS SECTION

Regrettably, the decision is replete with misdirections:

1. Total prohibition on the practice of appellant's religion

There has been a failure to view the facts as a whole and in particular, a failure to appreciate that the appellant has faced a total prohibition on the practice of his religion. Furthermore, no weight has been given to the fact that membership of the Hare Krishna movement ***of itself*** is not tolerated by the authorities in Iran and there is every chance of the appellant facing severe punishment for his beliefs. In these circumstances, it is hardly surprising that the appellant's survival on a day-to-day basis in Iran would depend upon a series of accommodations and compromises dictated by the practical necessity to maintain the facade of a conventional member of a Moslem society. Put another way, he had to practise a non-conformist religion in such a way as would least lead to confrontation with the authorities and punishment. In a Christo-centric setting, these compromises are partly encapsulated by the well-known statement from the Bible, St Matthew, Ch.22 v.21:

"Render therefore unto Ceasar the things which are Ceasar's; and unto God the things that are God's."

Thus, for the appellant to marry in accordance with the laws of Iran, it is hardly surprising that his religion would be given as Moslem, given the implicit acceptance by the Refugee Status Section that had his religion been given as Hare Krishna, the marriage ceremony would not only have been cancelled, the appellant would have been at real risk of being taken to prison.

It is the appellant's total inability to ***practise*** his religion which distinguishes this case from those where the practice of a religion is possible, but subject to the qualification that proselytizing is forbidden. See, for example, *Refugee Appeal No. 37/91 Re MAU* (13 May 1992) 7-9; *Refugee Appeal No. 10/92 Re MI* (22 July 1992) 18-21; *Refugee Appeal No. 84/92 Re MI* (12 November 1992) 5-7 and *Refugee Appeal No. 72/92 Re MB* (12 August 1992) 7-8.

2. Failure to give weight to position of persons similarly situated

While the Refugee Status Section properly referred to the arrests which had taken place in relation to the three other groups mentioned by the appellant, that evidence was inexplicably given no weight. This was a regrettable oversight as evidence of harm to persons similarly situated to an asylum seeker is of central importance. That is, in pointing to the absence of past persecution of the appellant himself, the Refugee Status Section overlooked the fact that a claim to refugee status may be established by circumstantial evidence. For example, that persons

similarly situated to the claimant have been persecuted in the country of origin, or alternatively, are at risk in that country. Professor Hathaway in *The Law of Refugee Status* (1991) at 90 emphasizes that it is important to take into account what he describes as "contextualized surrogate indicators of risk". The question to be asked is what is ***in fact*** happening to persons like the claimant. It is not acceptable to rely on "generic or intuitive reasoning about the likelihood of harm", that is, whether persons who played minor roles in the past are in danger:

"The best circumstantial indicator of risk is the experience of those persons perceived by authorities in the state of origin to be most closely connected to the claimant, generally including persons who share the racial, religious, national, social, or political affiliation upon which the claimant bases her case."

op cit 89

3. Appellant not required to establish past persecution

But perhaps the most serious misdirection of the Refugee Status Section was to rely on the fact that the appellant has not been arrested in the past and does not have a history of persecution.

It is trite law that an asylum-seeker must demonstrate only a well-founded fear of persecution, not that persecution **will**occur: *Re Naredo and Minister of Employment and Immigration* (1981) 130 DLR (3d) 752, 753 (FCA) applied in *Benipal v Minister of Foreign Affairs* (High Court Auckland, A.No. 878/83, 29 November 1985) at 220, 224. Therefore, past persecution is not an essential element of the definition, although where evidence of past persecution exists, it is unquestionably an excellent indicator of the fate that may await the individual upon return to the country of origin: Hathaway, *The Law of Refugee Status* (1991) 88. Looking as it does to the future, the Convention is concerned with protection from prospective risk of persecution, and does not require that an individual should already have been victimized. It follows that past persecution is in no sense a condition precedent to recognition as a refugee: Hathaway, *op cit* 87. Thus, in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), it was held that the relevant time at which the status of refugee is required to be held is the time the determination is made. To similar effect see *Refugee Appeal No. 87/92 Re SG* (3 August 1992) 5; *Refugee Appeal No. 30/92 Re SM* (26 November 1992) 13; *R v Secretary of State for the Home Department, Ex parte Halil Direk* [1992] Imm AR 330, 334 (QBD).

4. Views of agent of persecution determinative

Finally, we turn to the statement that the Refugee Status Section was not satisfied that the appellant practised his beliefs with any conviction. This is a misdirection. The issue is not whether the appellant's new faith is practised with conviction, but rather, whether his conversion and professed adherence to his new faith could jeopardize his safety in Iran.

This principle is illustrated by *Bastanipour v Immigration and Naturalization Service* 980 F.2d 1129 (1992) (7th Cir. December, 7, 1992). Mr Bastanipour, an Iranian national of the Moslem faith, claimed to have converted to Christianity while serving a sentence of imprisonment in the United States for a drug trafficking offence. He applied for refugee status on the grounds (inter alia) that if deported to Iran he could be summarily executed for having converted from Islam to Christianity, a capital offence under Islamic religious law. His application was initially unsuccessful, the Board of Immigration Appeals doubting that Bastanipour's conversion was a genuine one, and that though a capital offence under Moslem religious law, apostasy was not the subject of a specific prohibition in the Iranian penal code. 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." p.1132

In the Authority's view these statements of principle are unquestionably correct.

The Court of Appeals was also of the view that the Board's statement that the Iranian penal code fails to mention apostasy, while based on advice of the United States Department of State, could well be erroneous:

"Nader Entessar, "Criminal Law and the Legal System in Revolutionary Iran", 8 *Bost. Coll. Third World L.J.* 91, at 97 (1988), states that the Iranian penal code codifies the prohibitions of Islamic religious law, expressly including the prohibition against apostasy. But more important, the State Department went on to say that "were [Bastanipour] to be charged before a Sharia [religious] court in Iran of the crime of apostasy, we believe that he could face very serious punishment if convicted, quite possibly death". The important thing is not what is written in the penal code but the fact that in Iran people receive temporal punishment, including death, for violating the tenets of Islamic law; and apostasy from Islam is indeed a capital offense under that law. Hughes, *supra*, at 16 ...

We do not know what Iran does to ordinary apostates. Bastanipour is not quite an ordinary apostate. Apart from his drug conviction, which will not endear him to the Iranian authorities but is not a relevant factor in deciding whether he has a well-founded fear of *persecution*, his brother has been active in the US in opposition to the Iranian regime. Nor is the death penalty the only sanction grave enough to be deemed persecution within the meaning of the asylum statute, as distinct from mere discrimination or harassment - on the distinction see [Osaghae v INS, 942 F.2d 1160] at 1163; Zalega v INS 916 F.2d 1257, 1260 (7th Cir. 1990); Desir v Ilchert, 840 F.2d 723, 726-27 (9th Cir. 1988). Nor must the applicant for asylum prove that he will be persecuted - only that a reasonable person in his shoes would fear persecution. At argument we asked the government's lawyer whether *he* would fear persecution by Iran if he were in Bastanipour's religious and political shoes and he conceded that he would - and even conceded that he was a reasonable man! We accept both concessions. If Bastanipour has converted to Christianity he is guilty of a capital offense under Iranian law. No doubt there are people walking around today in Iran, as in every other country, who have committed a capital offence but have managed to avoid any punishment for it at all. Bastanipour might be one of these lucky ones. But his fear that he will not be is well-founded."

[emphasis in text] p.1133

These comments apply with equal force to the facts of the present case.

As the Authority differs from the Refugee Status Section in its assessment of the sincerity of the appellant's beliefs, there is no reason for us to explore further the issues that would have been raised by a finding of absence of good faith on the part of the appellant. These issues are briefly adverted to in *Refugee Appeal No. 10/92 Re MI* (22 July 1992) 21.

In fairness to the Refugee Status Section we wish to emphasize again the fact that the case on appeal was presented more cogently and in greater detail than it was at first instance.

THE 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."

In the context of this case the four principal issues are:

1. Is the appellant genuinely in fear?
2. If so, is it a fear of persecution?
3. If so, is that fear well-founded?
4. If so, is the persecution he fears persecution for 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

As mentioned, the Authority accepts the appellant's credibility and we find that he has a bona fide subjective fear of persecution. We further accept that his fear is a fear of persecution given what we have previously described as the gross and persistent violations of human rights that occur in the Islamic Republic of Iran: *Refugee Appeal No. 58/91 Re ZAR* (27 March 1992) 10.

On the issue whether the appellant's fear is well-founded, only an affirmative answer can be given. We have already referred to the fate of the persons involved in the three other underground groups mentioned in the appellant's evidence. This evidence provides a concrete foundation for the appellant's claim.

There is the additional factor of the attitude of the Iranian authorities to non-Moslem religions. The only such religions recognized in the Iranian Constitution are the Christian, Jewish and Zoroastrian (the pre-Islamic religion of Iran) religions. While the communities practising these religions are small, under the Constitution they do elect representatives to seats reserved for them in the Parliament and they are permitted to practise their religions, to instruct their children and - although with a great deal of disruptive interference - to maintain schools: United States Department of State *Country Reports on Human Rights Practices for 1992 - Iran* (February 1993) 999, 1002. As the Report records, even these communities are subjected to administrative and other official harassment:

"In the case of Chaldean Catholics (numbering about 14,000), the government has reportedly refused to renew the church's registration and has, as a result, denied requests to print bibles, construct chapels, or engage in registered charitable activities. The Presbyterian Church has allegedly suffered similar interference from the authorities. A Christian convert from Islam, Mehdi Debadj, arrested in 1983, reportedly is still being held in prison."

The Lawyers Committee for Human Rights *Critique: Review of the US Department of States Country Reports on Human Rights Practices for 1992 - Iran* (July 1993) 184 describes the report on Iran as "a generally unexceptionable account of the widespread abuse which continues to characterize the country's human rights situation". However, the report is criticized for this very fact:

"Indeed, the report is so unexceptionable and lacking in hard information as to be bland and platitudinous. The reader is left with the strong sense that in producing this report the State Department has merely gone through the motions, with little effort to investigate sources of information other than the UN Special Representative's reports on the human rights situation."

The point being made is that if the officially-recognized religions in Iran are subjected to official harassment, the nature of which is understated in the DOS Report, the more readily one can accept the well-foundedness of the appellant's fear as an apostate practising a forbidden religion. The fact that the severity of the penalties anticipated by the appellant cannot be precisely quantified does not provide a basis for refraining from stigmatizing them as of a persecutory nature, or for holding that the lack of information precludes a finding that there is a real chance of persecution taking place. As pointed out in the publication by the Lawyers Committee for Human Rights, *Little Discernable Progress in Respect for Human Rights in Iran Despite Eight Years of International Scrutiny* (November 1992) at 6:

"The international community will continue to know little of the specifics of individual cases of abuse, and Iran will remain in the category of chronically abusive governments that are unresponsive to international monitoring."

The situation is compounded by the fact that the rule of law, as we know it, is absent in Iran: Lawyers Committee for Human Rights, *The Justice System of the Islamic Republic of Iran* (May 1993) and reference should also be made in this regard to the Human Rights Watch publication, *Guardians of Thought: Limits on Freedom of Expression in Iran* (August 1993).

We address now the final issue, namely whether the persecution feared by the appellant is persecution for a Convention reason. The appellant's conversion has both religious and political consequences. This is because the Islamic Republic of Iran is a theocratic state. We adopt what we said in *Refugee Appeal No. 58/91 Re ZAR* (27 March 1992) at 12:

"Islam does not differentiate between spiritual and temporal authority; there is no separation between Church and State. See generally, P.J. Vatikiotis, *Islam and the State* (1987) 9, 27, 30-31.

In the Islamic Republic of Iran Shi'ite Islam has become the overwhelming ideological force for social control. The point has been expressed in various ways:

(a) Tabari, "Islam and the Struggle for Emancipation of Iranian Women" in Tabari & Yeganeh, *In the Shadow of Islam - The Women's Movement in Iran* (1982) 20:

"Islam is not simply a religion in the limited sense of a set of concepts and practices related to man and god, but pre-eminently an overall political system, with a whole set of social, economic and moral policies according to which the Islamic community is to be governed ... [this] unity of religion and politics is specific to Islam ...."

(b) Ramy Nima, *Wrath of Allah* (1983) 24:

"Religion has been a crucial factor in the consciousness of the population of Iran. It is the most important ideological force for social control; one of the fundamental bases of religion, and in particular Shi'ite Islam, is the submission to authority and the acceptance of a governing elite. Shi'ism came into being as an ideology of protest, and from its birth it acted as a political force. Shi'ism, therefore, proclaims the inseparability of politics and religion."

To these quotes one might add the following passage from P.J. Vatikiotis, *Islam and the State* (1987) 22-23:

"In looking at the central political notions in the Islamic scripture, the Koran, or the structure of political ideas that one can extrapolate from it, my colleague Michael Cook suggests that one can form a general view of their import. For the believers, these ideas basically suggest that there are those who rule and those who are ruled: the weak, the oppressed. The meek shall not inherit the earth, unless they get up and go, or emigrate (*muhajirun*), in order to constitute a political community, with a designated authority - the Prophet or Caliph - membership of which is sharply defined in religious terms: believers versus unbelievers (*kuffar*), with an intermediate category of hypocrites (*munafiqun*). There is one clear political activity for the members of the community: *jihad*, or holy war against unbelievers who are outside it.

The Koranic conception of politics is not irenic. It is confrontationist, or rather Manichean, emphasizing rectitude versus error, and an armed confrontation between them. It is also radically monotheistic, synthesizing a monotheist policy *ex nihilo*. Moreover, the political idiom of the Koran is itself ideological. Thus the unbelievers are enemies of God (see Khomeini), who are pitted against the believers, who are friends of God (and the Ayatollah)."

An accusation against the appellant that he has committed the offence of apostasy from Islam is therefore an allegation that he has violated the prescribed norms of both politics and religion. His fear of persecution is therefore related to at least two of the five Convention reasons.

Even if there were **no** political ingredient to his situation, his case would in any event succeed on the ground of religion alone, and the *Bastanipour* decision is instructive in this regard.

CONCLUSIONS

By way of summary our conclusions are as follows:

1. The appellant holds a *bona fide* subjective fear of returning to Iran.

2. The harm feared by him is of sufficient gravity to constitute persecution.

3. The appellant's fear is well-founded.

4. The persecution feared by the appellant is persecution for a Convention reason, namely his religious beliefs which in the Iranian context also connotes an imputed political opinion.

For these reasons we find that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. The appeal is allowed. Refugee status is granted.

"R P G Haines" [Chairman]