AT AUCKLAND

Before: B.O. Nicholson (Chairman), R.P.G. Haines (Member), H.M. Domzalski (Non-voting Member)

Counsel for the Appellant: D.A. Crompton

Appearing for the NZIS: No appearance

Date of Hearing: 15 February 1993

Date of Decision: 18 June 1993

DECISION OF THE AUTHORITY DELIVERED BY R.P.G. HAINES

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, an Indian national of the Sikh faith born in the Punjab.

THE APPELLANT'S CASE

The appellant is a twenty-six year old single man who has lived most of his life in the village of C situated in the Jalandhar District of the Punjab. He is the eldest of three brothers. For convenience, we shall refer to his brothers as "Brother A" and "Brother B". The appellant's father serves in the Indian Army and is presently stationed in Kashmir.

The appellant arrived in New Zealand on 15 May 1989 and subsequently applied for refugee status on 8 January 1991.

His account is that on 25 September 1988 he was returning home from college on his bicycle. Some two kilometres distance from the college he was stopped by police at a checkpoint. There he was seized, forced into a jeep and taken to a local police station for questioning. He was told that he was wanted for questioning and that he would be shot if he tried to escape. The appellant was held at the police station for seven days.

At the police station the appellant was accused of being a member of the All India Sikh Student Federation (an allegation which was true) but he was also accused of being a terrorist or a terrorist sympathizer (an allegation which was untrue). He was accused of associating with terrorists and of giving them shelter and food. He was told to sign a confession admitting the false allegations.

When the appellant refused to sign the confession his hands were tied in front of him and he was severely beaten by three men for approximately thirty minutes. He was beaten all over his body with a sharp pointed baton or stick, particularly on his feet and the soles of his feet. He was kicked and his hair was pulled. He received blows to his head, fell down and lost consciousness.

The appellant was beaten several times on the first day, but because he lost consciousness on several occasions, he cannot recall on how many occasions he was beaten.

The next morning the appellant was again taken for interrogation. The accusations were repeated and the beatings were resumed. This process was repeated on each of the seven days the appellant was held at the police station. On these further occasions, in addition to the treatment already described, the appellant was slapped and punched in the face; held on the floor while a roller was placed over his lower legs (the weight was increased by police officers standing on the roller); he was also threatened with a pistol and told that he would be shot.

Following the intervention of the village sarpanch the appellant was released upon the Panchayat giving a guarantee that the appellant was not an associate of terrorists. At the time of

his release the appellant was in pain and could walk only with difficulty. He received treatment from the village doctor. Because of injuries to his feet and legs he was unable to return to college for at least two weeks.

Although the appellant returned to his studies both he and his family were concerned at the possibility of further action by the police. The appellant considered leaving India and accordingly applied for a passport. It was issued promptly on 29 November 1988 and received by the appellant in December 1988. Before anything further could be done the appellant was detained by the police once more.

In mid-January 1989 the police arrived at the appellant's home at 6.00 a.m. in the morning and arrested the appellant. He was handcuffed and taken once again to the same police station. Again he was accused of giving shelter to terrorists. The appellant denied the allegations. He was thereupon set upon and beaten severely all over his body. The appellant related beatings to his hands and legs, a police officer standing on both of the appellant's feet, being jumped on, being kicked with steel-capped boots, having his arms twisted, punches to the face, beatings with sticks and having his right arm broken. The appellant was also threatened with being shot. The appellant stated that the beatings continued at intervals of thirty minutes all through the first day and into the second day. He was in great pain and asked to see a doctor. His request was refused.

On the third day the appellant was released following a further intervention on his behalf by the village sarpanch. Again, the appellant required medical treatment. In particular, his arm was set in plaster and a certificate from a medical practitioner in the Punjab has been produced corroborating the appellant's account in this respect.

The appellant was away from college for some three months. He endeavoured to complete his examinations but gave up as he was unable to write properly. He also found that because of head injuries received during the interrogations he was unable to sleep at night. During this period he lived either at home or stayed with his grandparents who live in a village approximately ten kilometres from the appellant's home.

The appellant's efforts to leave India continued and on 21 April 1989 he was successful in obtaining a visa from the New Zealand High Commission in New Delhi. He left India a few weeks later and arrived in New Zealand on 15 May 1989.

In August 1991 the police visited the family home and arrested the appellant's two brothers and took them to the same police station as the appellant had been taken to. There they were questioned as to the appellant's whereabouts. When the police were told that the appellant was in New Zealand, they wanted to know who had helped the appellant to escape. The appellant accepts that the police may have had further reason for arresting his brothers. Brother A had in January 1991 been elected Vice President of the Student Federation Village Committee which is apparently an important position. The holder of that office takes part in village functions and comes into contact with a large number of people. Brothers A and B had worked together in order to recruit people and the police suspected them of recruiting terrorists. This had led to their arrest but the appellant is nevertheless of the belief that when the Punjab police are trying to find someone, they commonly arrest a member or members of that person's family. Many of the cases heard by the Authority support the appellant's belief.

At the police station the appellant's brothers were badly beaten and then taken to another police station near to Jalandhar city. As a result of intervention by the Panchayat Brother A was released, but not Brother B. Soon after his release, Brother A wrote to the appellant on 7 September 1991 reporting the arrests and further advising the appellant that the family had come to learn that "the CID people have been looking for you. All we can say is that you should not return to India."

This letter has been produced in evidence and the Authority has no reason to doubt its authenticity or the truthfulness of its contents.

The appellant was interviewed by the Refugee Status Section of the Immigration Service on 24 September 1991. His application for refugee status was declined by letter dated 27 November 1991.

In the meantime, the situation in the Punjab continued to develop. In October 1991 Brother A was re-arrested and has been held since then in jail under the National Security Act. He has not appeared in Court.

Brother B, on the other hand, was released (on a date unknown to the appellant). He returned home for a few days only and then disappeared. In recent telephone discussions with his family the appellant has been told that Brother B is still missing and is now believed to have been killed by the police or other parties.

Because of the misfortunes which have befallen his family, the appellant's father applied to leave the Army so that he could return home and help his sons. His application was declined on the grounds, it is believed, that the father is a trained soldier and is at risk of joining the terrorist movement in the Punjab.

In conclusion, the appellant emphasized that because of the treatment meted out to him personally by the police, he has no trust in the police either in the Punjab or elsewhere. His attitude has been reinforced by events subsequent to his departure from India, particularly the maltreatment of both his brothers at the hands of the police. He says that there is no justice in India that he could rely on.

Documentary evidence produced at the appeal hearing included a certificate from the village sarpanch in which it is confirmed that the appellant while attending college, was harassed and interrogated by the police who mistook him for a militant. The certificate details that to escape "undue harassment and the high-handedness of the police" the appellant left India "with a view to save his life and lead a peaceful life". This document was also provided to the Refugee Status Section.

For the purpose of the appeal hearing, the appellant obtained a forensic medical report, dated 24 October 1992, from an Auckland doctor. The report states:

(a) The appellant has an obvious deformity in the right forearm. An x-ray examination shows "moderate bowing" of one bone and "abnormal curvature" of another. In the opinion of the consultant radiologist, both features "could be the result of incomplete fractures in young malleable bones". In the opinion of the medical practitioner who prepared the forensic report, the x-ray appearances are consistent with the appellant's account of a fracture to his right forearm. The appellant has told the doctor that because of this injury he cannot lift anything for a long time, nor can he lift anything really heavy because of pain in the arm.

(b) The appellant has a scar towards the back of his head.

(c) The appellant has a good head of hair which would have cushioned any blow. Therefore, for a blow to have both knocked him out, and to have caused the laceration, it would have had to have been delivered with "considerable force".

(d) Being knocked out would almost certainly have produced a period of amnesia in relation to events immediately preceding the blow.

(e) The appellant continues to suffer from frequent headaches. In the opinion of the doctor, "This is not infrequently found after a head injury of this type."

(f) The appellant has a number of scars on his feet and lower legs. It is to be inferred from the report that these scars are consistent with the appellant's account of the various beatings described above.

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 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.

The Authority finds that the appellant is a credible witness and his account of events is accepted. It is consistent with what is known of conditions in the Punjab, especially torture at the hands of the authorities. See, for example, Amnesty International, *India - Human Rights Violations in Punjab: Use and Abuse of the Law* (May 1981) and Asia Watch, *Human Rights in India: Punjab in Crisis* (1991). The arbitrary detention and torture of family members in order to extract information about their relatives' whereabouts or activities is confirmed in the recent Amnesty International publication *India: Torture, Rape & Deaths in Custody* (1992) 7, 29.

We further find that the imprisonment and torture feared by the appellant clearly constitute persecution.

The Authority is therefore satisfied that an affirmative answer must be given in relation to issues (1) and (2).

In relation to issue (4) the appellant advances his case on two grounds. First he argues that the relevant Convention ground is that of "political opinion". In this respect it is clear from the evidence that the appellant is suspected by the police of being a supporter of terrorists, if not a terrorist himself. In the context of the Punjab this is an imputed political opinion and sufficient to bring the appellant within the Convention.

The second Convention ground advanced by the appellant is that of "social group". He argues that were he to return to the Punjab, substantial pressure would be put on him as the only available male member of the family to assist in obtaining the release of Brother A from prison. In this respect, if it is suspected that his father would end up helping the terrorists, then, so it is argued, it is probable that the appellant would be viewed in the same light if he attempted to try and help his brother. It is submitted that there would be a real chance of re-arrest on the basis of his past record together with the suspicion that he is involved in similar activities to his brother or brothers, whatever he or they may be suspected of. In essence, there is a high likelihood of the family being regarded altogether as "a bad lot" by the police.

In our view the appellant's submission succeeds on both grounds though the evidence to support the "social group" category is not as strong as that in relation to the "political opinion" ground. Nevertheless, we have recognized that immediate family members do constitute a particular social group: *Refugee Appeal No. 17/92 Re SSS* (9 July 1992). That decision made reference to the United States decision of *Sanchez-Trujillo v Immigration and Naturalization Service* 801 F.2d 1571, 1576 (9th Cir. 1986), a decision which must now be read subject to the

qualifications added by the Authority in *Refugee Appeal No. 3/91 Re ZWD* (20 October 1992) at 67-70.

We turn now to the remaining issue, namely whether the appellant's fear is well-founded.

The view taken by the Refugee Status Section in their letter of 27 November 1991 declining refugee status was that the appellant's fear was not well-founded for the following reasons:

1. The appellant "has no political affiliations in India and has never had any problems with terrorists".

Inexplicably, this statement takes no account of the appellant's membership of the All India Sikh Students Federation, nor of the repeated accusations by the police that the appellant was either a terrorist, or a person who was sympathetic to terrorists and who provided them with shelter.

2. The appellant was detained for short periods only.

This ground fails to mention, or to give weight to, the severe beatings and ill- treatment to which the appellant was subjected, including the damage to his right arm. It also fails to recognize that the two periods of detention were separated by a period of less than three months. The appellant had little time to recover.

3. In the period from the second detention in January 1989 up to the appellant's departure for India in May 1989 the appellant had not been visited by the police.

This ground ignores the fact that it is common in such cases for police activity to be unpredictable and spasmodic, though their interest remains constant. It is a common feature of cases heard by the Authority that police will visit at irregular intervals. On occasion those intervals are closely spaced, on other occasions they are more widely spaced. For that reason care must be taken to ensure that inferences are drawn not only from the regularity of the visits, but also from the equally fundamental factor, namely the suspicions held by the police.

4. According to the Refugee Status Section, as at the date of their decision, there was no evidence of further threats from the police and no letters from the family in India were produced to support the claim that the brothers had been arrested.

This ground does not deal with the fundamental issue of the appellant's credibility. If his evidence is credible, that is as far as he need go as it is not always possible for independent evidence of police activity to be obtained.

There is irony in the fact that when letters from family members are produced, they are all too often dismissed as being self-serving or contrived. This is virtually what happened in relation to a letter obtained by the appellant from his college confirming his absence for three months on medical grounds. The Immigration Service reasons for decision dismiss the letter on the grounds that it was "poorly printed and misspelt". In the Authority's view these are hardly persuasive grounds for dismissing the document in question. Experience shows that virtually all documents from the Indian Sub-continent written in English contain similar faults. It could also be said that many documents written in New Zealand (including those written within Government Departments) have similar shortcomings. Indeed, the letter of decline in the present case is in parts unintelligible. See, for example, the following quote:

"With regard to his two arrests, that is, September 1988 and, and in fact was treated in high regard by the January 1989 it is noted that he was detained for short periods of time only. The first for seven days and the second two days."

5. The next reason given by the Refugee Status Section for concluding that the appellant's fear of persecution was not well-founded was that "in regard to state protection there is no evidence of an arrest warrant or formal charges".

While the existence of an arrest warrant or formal charges is relevant to the issue of state protection, it is always necessary for the overall circumstances to be examined. Here, the arrest

of the appellant's two brothers ought to have been regarded as a factor of considerable weight. There was also the evidence that the CID were looking for the appellant. These factors are sufficient to negative the absence of an arrest warrant or formal charges.

6. Finally, the Refugee Status Section was of the view that the medical certificate from the Punjab "does not confirm that the injuries were related to police torture".

While this is literally true, this ground fails to take account of the fact that if the appellant is accepted as a credible witness, the certificate does support and strengthen his case. As we stated in *Refugee Appeal No. 19/91 Re SA* (17 February 1992) 12:

"A medical practitioner cannot say more than that the injuries observed by him are consistent or inconsistent with the account given to him as to their cause or origin. The medical practitioner cannot say that the injuries **were** in fact suffered in precisely the way claimed, unless, of course, the practitioner witnessed the incident or incidents personally. This, however, does not mean to say that the opinion of a suitably qualified medical expert is not entitled to considerable respect and weight. In most cases, such opinion would provide important and perhaps determinative independent corroboration or confirmation of the applicant's factual account, particularly where the account is prima facie credible. But where the account given by an applicant is not credible, the weight to be given to the medical opinion is limited. While each case must be determined upon its own facts, the opinion might in the particular circumstances add nothing to the case."

See also *Refugee Appeal No. 168/92 Re MS* (18 December 1992). Here, there is nothing to suggest that the Refugee Status Section formed an adverse view of the appellant's credibility. There was therefore no logical ground for dismissing the medical certificate obtained from the Punjab.

For these reasons the Authority is of the view that the Refugee Status Section assessment of the facts is not valid. In addition, the Authority has had the advantage of having received further significant evidence:

(a) The forensic medical report and x-ray examination.

(b) Credible oral testimony from the appellant (without supporting documentation) that his Brother A has been re-arrested and is presently held in custody; and further, that his Brother B is missing, presumed dead.

It is our *de novo* assessment of the facts as now known, particularly the evidence relating to the fate of the appellant's two brothers, that upon the appellant returning to his home village there is a real chance that he will, as in the past, be detained and brutally ill-treated.

We are further of the opinion that it matters not whether the authorities are justified in believing that the appellant's two brothers are terrorists. Their possible involvement in subversion or other unlawful activities cannot justify the detention, ill-treatment and torture of an innocent family member, such as the appellant. We stress that there is no suggestion whatsoever on the evidence before us that the appellant has been anything but an innocent victim of circumstances.

In the light of the evidence now presented to us we have no hesitation in finding that were the appellant to return to his home village in the Punjab there is a real chance of persecution and it therefore follows that his fear in that respect is well-founded.

The remaining issue for consideration is that of relocation.

Where an individual has suffered torture at the hands of a state agent of persecution, special considerations come into play when considering the issue of relocation. These issues we will examine in greater depth shortly.

Our findings in the present case are as follows:

(a) The appellant has been the victim of severe ill-treatment on two separate occasions and we find, that that treatment amounts to torture.

(b) The appellant suffers permanent disabilities as a result of those experiences, in particular frequent headaches and a continuing inability to lift heavy objects with his right arm.

In *Refugee Appeal No. 167/92 Re RS* (18 December 1992) 14 we said that where torture has produced long-term effects on an individual, a very conservative approach must be adopted in relation to the relocation issue, particularly where there is already a positive finding that the appellant is a person who has a well- founded fear of persecution for a Convention reason.

(c) The appellant's two brothers were first arrested in August 1991, questioned (inter alia) about the appellant and badly beaten. Although initially released, Brother A was re-arrested and has been in custody since October 1991. In the meantime, Brother B disappeared after his release and has not been heard of since that time. This demonstrates that the authorities have a high level of interest in the appellant's family generally.

(d) According to the letter dated 7 September 1991 from Brother A, the police were still at that stage actively looking for the appellant. This factor together with the misfortunes which have befallen the appellant's two brothers, make it unsafe to conclude that police interest in the appellant has diminished since that time.

We conclude that the cumulative effect of the foregoing is that it would be unreasonable to expect the appellant to avail himself of the protection of the Government of India. As we remarked in the not dissimilar case of *Refugee Appeal No. 17/92 Re SSS* (9 July 1992) there has been a pattern of failure by the Government of India to afford effective protection to the appellant and his family. If anything, the pattern establishes a systematic abuse of the fundamental human rights of members of this family.

CONCLUSION

Our conclusions are therefore as follows:

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

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

3. His fear is well-founded as there is a real chance that the harm feared will occur.

4. The harm feared by the appellant is connected with or related to two of the five Convention reasons, namely his (imputed) political opinion and his membership of a particular social group (his family).

5. It would be unreasonable to expect the appellant to avail himself of the protection of the Government of India by settling elsewhere in India outside of the Punjab.

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.

We have mentioned that where an individual has suffered torture at the hands of a state agent of persecution, special considerations come into play when considering the issue of relocation. It is to those issues that we now turn.

RELOCATION: INTRODUCTION

Over the past two years the Authority has heard a large number of appeals by Indian nationals from the Punjab. While most of the individuals have been Sikhs, there have been a number of Hindus and Ad Dharmi. Some have been in fear of persecution by a state agency (for example the police, the para-military police or the military) while others have been in fear of persecution

at the hands of non-state agents (extremist or terrorist organizations). Often the Authority finds that the fear of persecution is well-founded as regards return to a particular village, city or locality, but further finds that the fear is not well-founded outside that area. The question which arises is whether an individual should be called upon to relocate elsewhere within the Punjab, or within one of the several Indian states and thereby avoid the real chance of persecution at the hands of the agent of persecution which would otherwise exist.

The cases addressing this issue in the context of non-state agents of persecution were drawn together and summarized in *Refugee Appeal No. 18/92 Re JS* (5 August 1992). That decision contains an extensive discussion of the factors the Authority has taken into account in assessing the relocation issue in the context of non-state agents of persecution.

We have not to date undertaken a similar exercise in relation to those cases involving state agents of persecution. More particularly, we have not yet had occasion to review the developing jurisprudence concerning the relocation issue as it affects victims of state violence or torture. We believe that because of the special considerations which come into play when such victims apply for refugee status it is appropriate that we now review the case law as it has developed in relation to them.

We will refer first to the significance of the basic human right to be free from torture or cruel, inhuman or degrading treatment or punishment.

TORTURE AND OTHER FORMS OF STATE VIOLENCE

As will be shown, the Authority, in considering the issue of breakdown of national protection has been particularly concerned to safeguard victims of torture and other forms of state violence. This flows from our desire to give meaningful recognition to the cardinal importance of the universal right to be free from torture.

THE RIGHT TO BE FREE FROM TORTURE: THE INTERNATIONAL CONVENTIONS

Both Article 5 of the Universal Declaration of Human Rights 1948 and Article 7 of the International Covenant on Civil and Political Rights 1966 stipulate that no-one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

The primacy of this right is underlined by the fact that under the International Covenant on Civil and Political Rights no derogation from Article 7 is permitted at all, not even in times of public emergency threatening the life of the nation. See Article 4(1) and (2). Furthermore, the right not to be subjected to torture conferred by Article 7 of the Convention is a right which State parties to the Convention undertake to respect and to afford to all individuals within their territory. State parties further undertake to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant.

Similar obligations are to be found in Article 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. New Zealand signed the Convention on 14 January 1986 and ratified it on 10 December 1989. It came into effect for New Zealand on 9 January 1990. Under this Convention too, State parties are obliged to "take effective legislative, administrative, judicial and other measures to prevent acts of torture" (Article 2). Torture may not be justified by invoking exceptional circumstance such as "war or a threat of war, internal political instability or any other public emergency", nor by invoking an "order from a superior officer or a public authority" (Article 2). The latter point, rejecting the defence of *respondeat superior*, borrows from the Nuremberg Principles. Torture is also to be made punishable as a crime of a "grave nature" (Article 4). Also under the Convention State parties are required to consider torture among those crimes to be treated as extraditable (Article

8). Unless a state extradites an alleged torturer to another country to stand trial, it is obliged to institute criminal proceedings against any such person within its jurisdiction, regardless of the latter's nationality, or of where the crime was committed (Articles 5 to 7). The Convention therefore enshrines the principle of universality of jurisdiction.

The Convention has been implemented in New Zealand by the Crimes of Torture Act 1989, the long title of which emphasizes that it is an Act to make better provision for the punishment of the crimes of torture, and to implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The enactment of the statute emphasizes at domestic law level the importance of the freedoms enshrined in the conventions referred to.

No discussion of convention law would be complete without reference to the Geneva Conventions (see at New Zealand domestic law level the Geneva Conventions Act 1958) which prohibit torture both in time of non-international armed conflict and in time of international armed conflict. Violation of these prohibitions is considered a "grave breach" of the Conventions.

Torture is also prohibited by a number of regional human rights conventions, including the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Declaration of the Rights and Duties of Man (Articles 25 and 26), the American Convention on Human Rights (Article 5(2)) and the African Charter on Human Rights and Peoples Rights (Article 5).

THE RIGHT TO BE FREE FROM TORTURE: CUSTOMARY

INTERNATIONAL LAW

In addition to the Conventions mentioned, it is also relevant to note that the United States Federal Court of Appeals in *Filártiga v Peña-Irala* 630 F.2d 876 (2nd Cir. 1980) held that State-sponsored torture is prohibited by a rule of customary international law. The Court found that deliberate torture perpetrated under colour of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. At p.890 the Court stated:

"Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become - like the pirate and slave trader before him - *hostis humani generis*, an enemy of all mankind."

As pointed out in Rodley, *The Treatment of Prisoners Under International Law* (1987) at p.105 this judgment is important in three respects. First, the Court, relying on the human rights and humanitarian law instruments described earlier, found that torture is prohibited by modern customary international law. Second, although the Court did not deal with the question of when a prohibition under customary international law imposes liability on the individual violator, it did find that an individual could be responsible. Third, the Court exercised jurisdiction (in a civil case) despite the fact that the torture occurred outside the United States and was inflicted on a foreign national by a foreign national.

A recent review of the significance of the *Filártiga* decision is to be found in Holt, "*Filartiga v Pena-Irala* After Ten Years: Major Breakthrough or Legal Oddity?" (1990) 20 Georgia Journal of International and Comparative Law, 543 and reference should also be made to Oraá, *Human Rights in States of Emergency in International Law* (1992) 96.

Against this background, we believe that we are justified in emphasizing the cardinal importance of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment and the commensurate need to recognize the special position of those who have been victims of torture, and of those who face a real chance of torture in the future.

THE MEANING OF TORTURE

Frequently the word "torture" is used as an all-embracing term. We are of the view that some observations need to be made concerning the employment of this terminology.

Before turning to a consideration of the meaning of torture and other cruel, inhuman or degrading treatment or punishment, the principle point to make is that the Refugee Convention requires only that an applicant establish "persecution", not torture. Whether on a particular set of facts persecution is established is very much a question of degree and proportion. However, where torture or other cruel, inhuman or degrading treatment or punishment is established, it would only be in exceptional circumstances that a finding of persecution would not follow.

As to the meaning of torture, we note that there have been several attempts to define this expression. See Burgers & Danelius, The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988). We do not intend in this decision to arrive at a definitive definition. However, several points can be made:

1. For the purpose of refugee determination it will often be unnecessary to draw distinctions between torture, cruel, inhuman and degrading treatment or punishment given that each of these forms of treatment are equally prohibited by the international instruments referred to and further given that in refugee cases the primary issue is the broader question of persecution.

2. In *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25 the European Court of Human Rights held that the distinction between torture on the one hand and inhuman or degrading treatment on the other is one of degree. For ill-treatment to violate the prohibition on torture or other inhuman or degrading treatment or punishment it must attain a minimum level of severity. That minimum level, being relative, "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and in some cases, the sex, age and state of health of the victim, etc ...." [p.79, para 162]. On the facts of that particular case it was held that the intensity of the suffering caused, although sufficient to be "inhuman", fell short of that needed for "torture". In the words of the judgment, the techniques "did not occasion suffering of the particular intensity and cruelty implied by the word torture". It was the intention of the European Convention, with its distinction between "torture" and "inhuman or degrading treatment" to attach "a special stigma" to torture which is "deliberate inhuman treatment causing very serious and cruel suffering". [p.80 para 167.] In so categorizing torture the Court referred to the 1975 United Nations Declaration on Torture in which torture is said to be "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment" (Article 1(2)). For the text of the declaration see Burgers & Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 191.

3. There is now the definition contained in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, and which (with minor modifications) is also the definition adopted by the Crimes of Torture Act 1989, section 2(1). Article 1 defines torture as (inter alia):

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions."

If further research is required as to the meaning of torture, the two most detailed texts available to the Authority are Rodley, *The Treatment of Prisoners Under International Law* (1987) and Burgers & Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988). Reference could also be made to Sieghart, *The International Law of Human Rights* (1990) 159-174; McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) 362-382; and van Dijk & van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed 1990) 226-241.

4. Rodley in *The Treatment of Prisoners Under International Law* (1987) 7 suggests that for working purposes, torture may be understood to be the officially sanctioned infliction of intense suffering, aimed at forcing someone to do or say something against his or her will. We are of the opinion that this suggestion has merit so long as it is remembered that the United Nations Convention Against Torture has a more extensive definition and also, so long as it is further remembered that useful though a definition of torture may be, the Refugee Convention focuses not on torture but on persecution. Torture is only one of the many methods of persecution. While definitions of "torture" and of "other cruel, inhuman or degrading treatment or punishment" will obviously provide guidance and assistance, we emphasize that they are not to be applied literally in the context of the Refugee Convention where the enquiry is of a far broader nature.

CONCLUSIONS

The conclusions that we believe should be drawn from this review of jurisprudence relating to torture and other cruel, inhuman or degrading treatment or punishment (which hereinafter we will for the sake of convenience refer to as "torture") are:

(a) The right to be free of torture is universally proclaimed.

(b) This right, along with the right to life itself, is at the highest level of the hierarchy of rights.

(c) Torture is appropriately considered to be persecution.

(d) Actual and potential victims of torture who have a well-founded fear of persecution **in some part** of their country of origin deserve special consideration when the issue of relocation is examined.

We turn now to the specific issue of relocation.

RELOCATION: PRINCIPLES

As is apparent from Article 1A(2) of the Refugee Convention, a fundamental premise on which the Convention is based is that of national protection:

"... is unable or ... is unwilling to avail himself of the protection of that country."

The intention was that **international** protection under the Convention only comes into play where the maltreatment anticipated is demonstrative of a breakdown of national protection: Hathaway, *The Law of Refugee Status* (1991) 104. Hence the proposition that persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection: Hathaway *op cit* 104-105.

Where the failure of protection is regionalized, and effective protection is accessible elsewhere in the State, it can be said that refugee status is not warranted. The principle is succinctly expressed by Hathaway *op cit* 133:

"A person cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only

those who have no alternative to seeking international protection, primary recourse should always be to one's own state."

This statement of principle we adopted in *Refugee Appeal No. 11/91 Re S* (5 September 1991) and in *Refugee Appeal No. 18/92 Re JS* (5 August 1992).

The quote from Hathaway in *The Law of Refugee Status* at 133 continues:

"The surrogate nature of international protection is clear from the text of the Convention definition itself, which limits refugee status to a person who can demonstrate inability or legitimate unwillingness "to avail himself of the protection of [the home] *state*. **That is, the focus of analysis is the relationship between the claimant and her national government**. Where there is no *de facto* freedom from infringement of core human rights in a particular region (for example, due to the actions of an errant regional government or forces which make the exercise of national protection unviable), but the national government provides a secure alternative home to those at risk, the state's duty is met and refugee status is not warranted."

[emphasis added]

In New Zealand jurisprudence, this issue has become known as the relocation principle. In other jurisdictions it is known as the internal flight alternative, a description which we rejected as inappropriate in *Refugee Appeal No. 11/91 Re S* (5 September 1991). For the reasons given at p.19 of that decision, to pose any question postulated on an "internal flight alternative" is to ask the wrong question. Rather, the question is one of protection and is to be approached fairly and squarely in terms of the refugee definition, namely whether the applicant:

"... is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

In other words, the proper questions to address are the questions of protection, inability, unwillingness and the presence of a well-founded fear for one of the recognized Convention reasons.

RELOCATION: THE TEST

The decisions delivered by this Authority over the past two years on the question of relocation show that relocation turns on two issues. In this respect there is no distinction between state agent and non-state agent of persecution cases:

1. Can the individual ***genuinely access*** domestic protection which is ***meaningful***. This is the point made in Hathaway in *The Law of Refugee Status* 134:

"The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can *genuinely access* domestic protection, and for whom the reality of protection is *meaningful*. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized."

[emphasis in text]

2. Is it reasonable, in all the circumstances, to expect the individual to relocate. This is the point made in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* para 91:

"The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he

could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

[emphasis in text]

In other words, before an individual possessing a well-founded fear of persecution can be expected to relocate within the country of origin, it must be possible to say **both** that meaningful domestic protection can be genuinely accessed by that person **and also** that in all the circumstances, it is reasonable for that individual to relocate.

In carrying out this assessment considerable caution must be exercised as the tribunal is making what are, in effect, speculative judgments. Close attention must be paid to ethnic, religious, cultural and even political differences which, among others, often make the domestic relocation alternative unrealistic: Goodwin-Gill, "*Non-refoulement* and the New Asylum Seekers" in Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (1988) 103, 108 footnote 25.

RELOCATION AND TORTURE

Returning specifically to state agents of persecution, the approach adopted by the Authority on relocation issues has been to give clear recognition to the torture factor. Torture or other cruel, inhuman or degrading treatment or punishment is clearly relevant to both limbs of the above analysis. See for example *Refugee Appeal No. 17/92 Re SSS* (9 July 1992) and *Refugee Appeal No. 40/91 Re AS* (12 August 1992).

We turn now to some of the factors we have taken into account in assessing the relocation issue in the context of state agents of persecution where the individual has been subjected to torture or other cruel, inhuman or degrading treatment or punishment, or could be so subjected in the future. What follows is by way of a **general** summary only.

1. The nature and significance of torture as an acute violation of human rights norms and international law principles.

In *Refugee Appeal No. 14/91 Re JS* (5 September 1992) at 7 the Authority adopted the following quotes concerning torture from Amnesty International's publication *Torture in the Eighties* (1984):

(a) "Torture does not occur simply because individual torturers are sadistic, even if testimonies verify that they often are. Torture is usually part of the state-controlled machinery to suppress dissent. Concentrated in the torturer's electrode or syringe is the power and responsibility of the state." (p.4)

b) "... it rends the fabric of society, tearing at any threads of trust or sympathy between the citizens and their rulers." (p.8)

From the point of view of the victim, torture, for whatever purpose, is a calculated assault on that person's human dignity and for that reason alone is to be condemned absolutely: *Torture in the Eighties* 7. See further Bamber, Movschenson and Horvath-Lindberg "Torture and the Infliction of Other Forms of Organized Violence" in *Refugees - The Trauma of Exile* (1988) League of Red Cross and Red Crescent Societies.

2. Whether torture is prevalent in the country of origin.

In *Refugee Appeal No. 14/91 Re JS* (5 September 1992) at 8 we said this of India:

"Regrettably, there is nothing new about police torture in India. In 1854 a Commission was established by a British Governor to investigate allegations of torture in Madras. Within a brief period, nearly 2,000 complaints of torture were lodged with the Commission. That body found torture was prevalent. In the 136 years since that report was issued many commissions - some national, some at the state level - have examined police torture and come up with similar

findings. The judiciary has similarly denounced torture: *Prison Conditions in India* (1991) (An Asia Watch Report) at p.13.

In the opinion of the authors (p.15), the twin factors that account for most police brutality to detainees are corruption and the widespread view that it is the role of the police to dispense summary punishment. Corruption is a crucial element because the police have a low status in India and are poorly paid; bribery is a means for many to supplement their earnings.

In the case of detainees, bribes - by the detainee himself or by his family - are reportedly paid to avoid torture. The system can only work, however, if those who do not pay, or cannot pay, are tortured (p.15).

It is true that in India torture and cruel treatment or punishment are prohibited by law, and confessions or information extracted by force may not be admitted in Court. In the context of the Punjab, however, it is significant that under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act (TADA), such confessions made to a police officer are admissible in evidence, provided the police have "reason to believe that it is being made voluntarily": *Country Reports on Human Rights Practices for 1990* (1991) United States Department of State at 1428."

To this we should add that the Department of State *Country Reports on Human Rights Practices for 1992* (1993) at 1136 reports that there is credible evidence that torture of detainees remains common throughout India. Sometimes this abuse is part of interrogation procedures, sometimes it is to extort money from the victim or his relatives, and sometimes it is summary punishment doled out by individual police officers. Reference is made to the fact that numerous Indian human right groups have detailed cases of torture during interrogation by police and para-military forces in Kashmir, Punjab and Assam, including beatings, burning with cigarettes, suspension by the feet, crushing of limbs with heavy rollers and electric shocks. While in theory citizens may lodge a complaint regarding such treatment, there is no effective remedy for these chronic abuses.

3. The degree or severity of the torture or other cruel, inhuman or degrading treatment or punishment, and the number of occasions on which the treatment was inflicted.

In *Refugee Appeal No. 14/91 Re JS* (5 September 1991) 9 the appellant was tortured during ten days in custody and upon the appellant's release medical treatment was required. We held, on the facts:

"This calculated assault on the appellant's human dignity represents a significant interruption to the relationship of trust that ought to exist between the citizen and the state and is a factor of some importance when assessing the unwillingness of the appellant to avail himself of the protection of his country of origin."

Similarly, in *Refugee Appeal No. 12/91 Re SJ* (5 November 1991) it was found that the torture to which the appellant was subjected was severe and repeated on four separate occasions and that:

"Torture on this scale can properly be said to sever the relationship between the State and the citizen, or at least it is a very severe interruption of that relationship. It would be neither practicable nor reasonable to expect the appellant to seek out the protection of the very government responsible for the infliction of such harm upon him."

These statements have been applied on several occasions. See, for example, *Refugee Appeal No. 36/92 Re JB* (21 September 1992) and *Refugee Appeal No. 97/92 Re SS* (12 October 1992).

4. Where a person has experienced torture, particularly on more than one occasion, one should be reluctant to rule out the possibility of future torture or persecution, so long as the same conditions or regime prevails in the person's country of origin: *Refugee Appeal No. 55/91 Re RS* (10 August 1992). In relation to this principle we there stated at 13:

"We believe that this is not an unreasonable application or extension of the principles discussed by Grahl-Madsen in *The Status of Refugees in International Law* Vol. 1 (1966) 176-177 particularly given that the standard of caution was adopted by the High Court of Australia in *Chan v Minister of Immigration and Ethnic Affairs* (1989) 160 CLR 379 when examining the relevance of past persecution in the context of changed circumstances in the country of origin. See particularly the judgment of Mason CJ at 391 and Gaudron J. at 414-415. The following quote is from Gaudron J. at 415:

"The definition of 'refugee' looks to the mental and emotional state of the applicant as well as to the objective facts. It is a commonplace, encapsulated in the expression 'once bitten, twice shy', that circumstances which are insufficient to engender fear **may also be insufficient to allay a fear grounded in past experience**. Although the definition requires that there be 'well-founded fear' at the time of determination it would be to ignore the nature of fear and to ignore ordinary human experience to evaluate a fear as well-founded or otherwise **without due regard being had to the applicant's own past experiences**.

If an applicant relies on his past experiences it is, in my view, incumbent on a decision-maker to evaluate whether those experiences produced a well-founded fear of being persecuted. If they did, then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person **in the position of the claimant**would be allayed by knowledge of subsequent changes in the country of nationality. To require more of an applicant for refugee status would, I think, be at odds with the humanitarian purpose of the Convention and at odds with generally accepted views as to its application to persons who have suffered persecution ...."

[emphasis added]"

5. Torture victims suffering from a mental affliction deserve special consideration.

In *Refugee Appeal No. 55/91 Re RS* (10 August 1992) it emerged that the appellant suffered from a long-standing mental illness. Because of the brutality to which he was subjected by the police in the Punjab, his illness deteriorated. The Authority took particular note of the considerations which apply to mentally disturbed or ill persons who apply for refugee status and which are set out in paragraphs 206 to 212 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*.

In considering the issue of relocation, the Authority stated:

"As a person suffering from a mental affliction the appellant deserves special consideration:

"However perverse the actions of individual torturers, torture itself has a rationale: isolation, humiliation, psychological pressure, and physical pain are means to obtain information, to break down the prisoner, and to intimidate those close to him or her."

Bamber, Movschenson & Horvath-Lindberg, "Torture and the Infliction of Other Forms of Organized Violence" in *Refugees, The Trauma of Exile* (1988) 45, 47.

In his somewhat fragile mental state, the appellant has few resources with which to survive his experiences or to undertake the arduous task of resettling elsewhere in India. In these circumstances a very conservative approach must be adopted in relation to the relocation issue, particularly as we have found positively that the appellant is a person who has a well-founded fear of persecution for a Convention reason."

On the facts, the Authority concluded that the cumulative effect of the various factors relevant to that case made it unreasonable to expect the appellant to avail himself of the protection of the Government of India. It was established that there had been a consistent pattern of failure by that Government to afford effective protection to the appellant. If anything, the pattern established a systematic abuse of the fundamental human rights of members of his family.

6. The subjective consequences of torture upon its victim are also a relevant factor.

In this regard reference should be made to *Refugee Appeal No. 40/91 Re AS* (12 August 1992) 10. There the appellant suffered torture of a severe nature on two separate occasions in the course of which he suffered serious physical injuries and the trauma of witnessing the torture and murder of his friend. The Authority answered in the affirmative the question whether an individual's past experiences of persecution within a particular region of his country permitted the rejection of the internal relocation alternative even if, objectively, a safe refuge elsewhere within the country is available.

7. Incidents of torture and other cruel, inhuman or degrading treatment or punishment clearly remote in time generally carry little weight in the relocation context, particularly where there has been a single, isolated instance of torture.

This was the conclusion reached in *Refugee Appeal No. 127/92 Re DSM* (12 March 1993) where there had been severe torture at the hands of the police in 1985 but since that time there had been no further ill-treatment. The Authority's primary conclusion was that the appellant did not in 1993 have a genuine fear of persecution at the hands of the police, and that in any event the 1985 incident was too remote in time to form a basis for a finding that there was a real chance that the appellant would suffer persecution at the hands of the police in the future. As an alternative, the Authority concluded that as the 1985 incident was remote, and as there was no evidence suggesting a warrant for the appellant's arrest, it would not be unreasonable for the appellant to relocate elsewhere in India. He was a well- educated man and the member of a relatively well-to-do family who could be expected to assist him in resettlement.

8. However, the foregoing factor is subject to qualification and is of limited application only.

In *Refugee Appeal No. 167/92 Re RS* (18 December 1992) the appellant had been detained and tortured on two separate occasions. The first in June 1984 and the second in late-1986. The appellant left India in November 1989. It was held that the fact that the two periods of detention and torture were separated by two years was evidence that an appreciable period of time can elapse between episodes of persecution. For this reason, in the circumstances of that particular case, not much weight could be given to the fact that for the three years following the appellant's last release there were no further periods of detention or torture. In addition, the Authority was of the view that for the same reasons not much weight could be given to the fact that as at the date of determination, some six years had elapsed since the appellant's last episode of brutality. The Authority stressed that for three years following the last incident of torture in 1986 the appellant had been in hiding for most of the time before managing to leave for New Zealand. The Authority stated at p.10:

"Due to a combination of his luck and diligence he was able to avoid the police. It would be illogical to use these facts to argue that as nothing further has happened since 1986 there is no longer a well-founded fear of persecution. The focus should rather be on the intentions of the police."

To similar effect see *Sabaratnam v Canada (Minister of Employment and Immigration)* (FCA No. A-536-90, October 2, 1992) 2:

"A person successfully hiding from his persecutor can scarcely be said to be experiencing no problems."

In addition there is the decision in *Refugee Appeal No. 132/92 Re HS* (2 April 1993) where, after two incidents of torture the appellant did not leave India until a year after the second torture incident. During that time he completed his school examinations while avoiding the attentions of the police by staying with various friends and relatives. The delay did not count against the appellant as it was held that the nature of the torture suffered by him was such as to sever the relationship between citizen and state. In these circumstances it was held that it would be unreasonable to expect the appellant to avail himself of the protection of India.

9. Whether the appellant continues to suffer physical and related disabilities as a result of the torture, cruel, inhuman or degrading treatment or punishment.

In *Refugee Appeal No. 167/92 Re RS* (18 December 1992) the Authority expressed the principle in the following terms:

"The appellant suffers permanent disabilities as a result of those experiences including giddy spells, memory lapses and an increased level of anxiety. It seems unlikely that he will ever recover his sense of smell.

Given these long-term effects on the appellant a very conservative approach must be adopted in relation to the relocation issue, particularly as we have found positively that the appellant is a person who has a well-founded fear of persecution for a Convention reason."

10. It is unreasonable to expect an individual to return to his or her country of origin and there survive only by going underground.

This point was made in *Refugee Appeal No. 167/92 Re RS* (18 December 1992) where the appellant for a period of three years prior to his departure for New Zealand lived underground, changed his address frequently and had no contact with his wife and two children. In considering the relocation aspect of his case, the Authority stated:

"It would be unfair to suggest to the appellant that he could return to India and avoid arrest by once again going underground and keeping his family split up on an indefinite basis."

11. Whether a warrant has been issued for the arrest of the appellant.

In *Refugee Appeal No. 70/91 Re PS* (16 December 1991) the appellant was a member of the All India Sikh Students Federation. Five of the young men who worked with him were detained by the police and three were shot. The appellant believed that two were tortured and had revealed his identity. A warrant for his arrest was issued. On these facts the Authority made the following comments on the issue of relocation:

"In this case the persecution complained of emanates from the police force. It is suggested in the Refugee Status Section decision that the appellant could avoid persecution and obtain the protection of the state by moving away from the area of influence of the local police force. With respect we think this is not realistic. A warrant of arrest has been issued, presumably for charges relating to suspected terrorist activities. We do not think it likely that state protection against arrest will be available when it is a state agency which is pursuing this appellant. We think it more likely that if he is found by the police to be living in another part of India he will be returned to the Punjab where he faces a real chance of suffering persecution."

In *Refugee Appeal No. 180/92 Re SS* (2 April 1993) it was found that relocation was unreasonable as the evidence showed that police interest in the appellant extended beyond his home area and beyond the Punjab. In addition the appellant was found to have been the victim of torture on repeated occasions over a period of two and a half years and medical evidence established that he continued to suffer from post-traumatic stress disorder.

These decisions are to be contrasted with *Refugee Appeal No. 23/92 Re MS* (12 November 1992) where the appellant had been briefly detained twice but not ill- treated. The Authority accepted evidence that the police from time to time continued to make enquiries for the appellant at his home. The appellant feared that were he to return home he could become the victim of police brutality. However, there was no suggestion in the evidence that there was a warrant for the appellant's arrest. Nor was there any evidence to suggest that there was any widespread police interest in the appellant. It was concluded that in these circumstances it would be reasonable to expect the appellant to relocate elsewhere in India, particularly given that he had a relatively high standard of education and work skills which included not only farming but truck-driving. In addition, he came from a relatively wealthy family which could be expected to assist him financially in resettling.

12. The detention and torture of family members must also be taken into account.

In *Refugee Appeal No. 17/92 Re SSS* (9 July 1992) the appellant himself had been arrested and detained on three occasions and on one of those occasions tortured. Also, the appellant's brother, M, had been tortured in the appellant's presence. The Authority further accepted that a second brother, S, had been tortured by the police on a different occasion and had subsequently been killed by the police. Evidence also showed that the appellant's father had been detained by the police and that M, subsequent to his release had been sought once again by the police. The Authority stated at p.11:

"It is our conclusion that the cumulative effect of the foregoing is that it would be unreasonable to expect the appellant to avail himself of the protection of the Government of India. There has been a consistent pattern of failure by that government to afford effective protection. If anything, the pattern establishes a systematic abuse of the fundamental human rights of members of this family. "

In this respect see also *Refugee Appeal No. 55/91 Re RS* (10 August 1992) and *Refugee Appeal No. 167/92 Re RS* (18 December 1992).

13. If the decision-maker is unsure as to whether relocation is reasonable, the appellant must receive the benefit of the doubt.

In *Refugee Appeal No. 14/91 Re JS* (5 September 1991) there was torture on one occasion only when the appellant was held for a period of ten days. The Authority was in doubt as to whether there was a real chance that persecution would occur upon the appellant's return to some other part of India rather than to his family home. In those circumstances the Authority held that the benefit of the doubt must be given to the appellant with the result that he was entitled to a finding that he was a refugee.

From this review of the cases it can be seen that a wide range of factors will influence a decision on relocation, and in that sense, most cases will turn on their own particular facts.

We emphasize the high degree of caution that must be exercised in making what are, in effect, speculative judgments. Beyond referring to issues of domestic protection and reasonableness, it is not possible to adopt a fixed formula for making the difficult judgments demanded by the relocation issue.

Hence it is not necessary for an individual to demonstrate that there has been a severance of relationship between the state and the citizen. Certainly, in cases of extreme torture, it would not be difficult to find that such a severance had taken place. But this is only one route a decision-maker can take to find that genuine domestic protection is absent and that relocation is unreasonable.

Put another way, the more severe the torture, and the more severe and visible the long-term *sequelae* are, the more readily a decision-maker may find that relocation is unreasonable. But it does not follow that relocation is unreasonable only where the torture is severe and the *sequelae* immediately apparent. It is wrong to assume that a severance between citizen and state is a prerequisite to a finding that relocation is unreasonable. There will be many cases where there has been no severance, but where relocation is nonetheless still unreasonable. The very fact that the issue is one of "reasonableness" means that an infinite variety of circumstances will affect the particular decision under consideration. It is impossible to formulate a universally applicable test, such as severance.

Finally, we must emphasize again that if there is doubt either as to the issue of protection or as to the issue of reasonableness, the appellant must receive the benefit of the doubt with a finding that relocation is not available.

We believe that the jurisprudence developed is consistent with refugee law and doctrine. The ultimate purpose of the Refugee Convention is humanitarian and a purposive interpretation should be adopted whenever appropriate. As the Authority previously held in *Refugee Appeal No. 59/91 Re R* (19 May 1992) at p.19 the Convention should be applied in a generous and

humanitarian spirit. We there adopted the following statement by Grahl-Madsen in *The Status of Refugees in International Law* (Volume 1 1966) 145:

"There is quite some justification for the view that a convention, which States have agreed upon in order to regularize the position of human beings whose status would otherwise be precarious, should be applied generously, in a sympathetic and humanitarian spirit. Moreover, in Recommendation E of its Final Act the Conference of Plenipotentiaries has called for just such a generous application of the provisions of the Refugee Convention."

Giving recognition to the special position of victims of torture and other cruel, inhuman or degrading treatment or punishment is entirely consistent with the humanitarian premise of the Convention and the primacy accorded by the international community to the right to be free from torture, and importantly, with the need for the international community to protect those who could be tortured in their country of origin.

RELOCATION AND ARTICLE 1C(5) AND (6)

As this decision is our first opportunity to comprehensively survey our jurisprudence on relocation as it affects torture victims, it is appropriate that we examine whether the development of the law in this area is consistent with other parts of the Refugee Convention. The nearest analogous situation is found in the cessation provisions of Article 1C of the Convention and in particular paragraphs (5) and (6). We stress that these provisions are analogous only. We recognize that relocation cannot be treated as though it were a cessation of, or exclusion from Convention refugee status: *Rasaratnam v Canada* [1992] 1 FC 706, 709 (Fed C of A).

The analogy is nevertheless clear. The relocation principle as it applies to victims of torture clearly envisages the grant of refugee status under Article 1A(2) notwithstanding that the fear of persecution may not be well-founded **in relation to the whole of the country of origin**. In the context of cessation, Article 1C(5) and (6) provides that persons who are able "to invoke compelling reasons arising out of previous persecution" are exempt from the cessation of refugee status in those situations where the conditions in the country of origin have changed to such an extent that the well-founded fear once held has ceased to be well-founded.

In other words, Article 1C(5) and (6) provides for the continuation of refugee status in certain circumstances even though objectively, there is no well-founded fear of persecution. There is therefore a clear parallel with the Authority's relocation jurisprudence as it affects victims of torture.

We recognize that the "compelling reasons" exception applies only to refugees defined in Article 1A(1) of the Convention and *prima facie* the exception does not apply to those persons granted refugee status by the Authority as such persons are all refugees under Article 1A(2). But in this regard two points need to be made:

(a) Whether the "compelling reasons" exception is restricted to refugees under Article 1A(1) or not, the point remains the same, namely that the Convention provides for the continuation of refugee status in certain circumstances even though objectively, there is no well-founded fear of persecution. The analogy drawn earlier is therefore a proper one.

(b) In any event, it can no longer be confidently said that the "compelling reasons" exception is confined only to refugees under Article 1A(1).

It is to these issues which we now turn.

THE REFUGEE CONVENTION AND THE UNHCR STATUTE

The exemption provided by Article 1C paras (5) and (6) applies only to so-called "statutory" refugees defined in Article 1A(1) of the Convention. As noted in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* para 136, these refugees formed the majority of refugees at the time when the 1951 Convention was drafted. That, of course, is no longer the case.

One of the differences between the Convention and the Statute of the Office of the United Nations High Commissioner for Refugees (the text of which is reprinted in Plender, *Basic Documents on International Migration Law* (1988) 81) is that the Statute contains no such limitation. Paragraphs 6(e) and (f) of the Statute refer not to "compelling reasons arising out of previous persecution", but to "grounds other than those of personal convenience" as justifying a refusal to have recourse to the protection of the country of origin.

Addressing the differences between the Convention and the Statute, Goodwin-Gill in *The Refugee in International Law* (1983) 52 suggests that the "compelling reasons" exception should no longer be restricted to statutory refugees:

"The object of the exception to the effects of a change of circumstances is clearly the continuation of protection for those who have suffered most seriously in their country of origin ... the continuing nature of the injuries often suffered by the persecuted is a reason for the exception to be liberally applied."

The need to continue protection for those "who have suffered most seriously in their country of origin" has been more recently recognized in the recommendations of the Executive Committee of the High Commissioner's Programme urging State parties to the Convention to apply the Convention exception to **all** refugees, not only to statutory refugees who come within Article 1A(1). More particularly, at the 1991 session of the Executive Committee of the High Commissioner's Programme, the Committee, in *Conclusion No. 65: General* para (q), while underlining the possibility of using the Cessation Clause in Article 1C(5) and (6) of the Convention, at the same time specifically added the following important proviso:

"... that it is recognized that compelling reasons may, for certain individuals, support the continuation of refugee status ...."

In 1992 in *Conclusion No. 69: Cessation of Status* para (e), the Committee recommended that State parties recognize that the exception of "compelling reasons arising out of previous persecution" can be applied also to Article 1A(2) refugees. Significantly, however, the Executive Committee went even further and recommended that the exception apply also to persons who could not be expected to leave the country of asylum due to a long stay in that country resulting in strong family, social and economic links there. Paragraph (e) reads as follows:

"*Recommends*, so as to avoid hardship cases, that States seriously consider an appropriate status, preserving previously acquired rights, for persons who have compelling reasons arising out of previous persecution for refusing to reavail themselves of the protection of their country and recommends also that appropriate arrangements, which would not put into jeopardy their established situation, be similarly considered by relevant authorities for those persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links there."

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* para 136, while recognizing that the exception to the cessation provision in Article 1C(5) and (6) is restricted to statutory refugees, nevertheless also argues in favour of extending the exception to all categories of refugees:

"The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who - or whose family - has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of régime in his country, this may not

always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee."

Canada has accepted the argument in favour of extending the exception to all categories of refugees. The Canadian Immigration Act 1976-77 specifically incorporates the cessation exception but does not limit the application of the exception to statutory refugees. The provision applies to all refugees. Section 2 of the Immigration Act provides:

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

(a) ...

(b) ...

(c) ...

(d) ...

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

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

In *Canada (Minister of Employment and Immigration) v Obstoj* [1992] 2 FC 739, 748 (Fed C of A) it was held by Hugessen JA that Section 2(3) should be read as requiring Canadian authorities:

"... to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution."

Desjardins JA at 752 stated:

"The Act accordingly recognizes that if there are special circumstances a claim is valid even though there is no longer an objective basis for the fear of persecution itself."

More recently, at first instance the Refugee Division of the Canadian Immigration and Refugee Board held in *CRDD M 92-00768, June 19, 1992*; *Reflex* Issue 14, December 1992 p 8 that when applying Section 2(3) consideration will be given to the length of time the claimant suffered and the severity of the harm he endured. On the facts, the panel found that in light of the individual's long history of systematic harassment and his psychological make-up, he fell within Section 2(3). However, the panel pointed out that the "compelling reasons" provision was only to be used where circumstances warranted:

"The panel recognizes that the compelling reasons provision is not intended to be applied in every instance where a claimant has suffered past persecution and psychological hardship. This must be considered on a case-by-case analysis which must carefully consider criteria such as that referred to in the excerpts from Hathaway, Goodwin-Gill and Grahl-Madsen."

The excerpt from Goodwin-Gill, *The Refugee in International Law* (1983) 52 referred to is quoted above at page 44.

The relevant passages from Hathaway, *The Law of Refugee Status* are at pages 203-205. There Professor Hathaway emphasizes, inter alia, that the intention of the drafters in inserting the "compelling reasons" exception was two-fold: first, to recognize the legitimacy of the psychological hardship that would be faced by victims of persecution were they to be returned to the country responsible for their maltreatment; and second, to protect the victims of past atrocities from harm at the hands of private citizens, whose attitudes may not have reformed in tandem with the political structure. In his opinion, the effect of Section 2(3), in addition to

extending the protection of the exception clause to modern day refugees, requires consideration to be given (inter alia) to whether the particular refugee continues to suffer the effects of past persecution.

Grahl-Madsen in *The Status of Refugees in International Law* Volume 1 (1966) at p.410 states that what the drafters of the Convention had in mind when inserting the exception was the situation of refugees from Germany and Austria, "who were unwilling to return to the scene of the atrocities which they and their kin had experienced, or to avail themselves of the protection of a country which had treated them so badly. The fact was appreciated that the persons in question might have developed a certain distrust of the country itself and a disinclination to be associated with it as its national."

A similar point is made in Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation: A Commentary (1953) 61:

"... he ... may feel compelled to abstain from requesting protection by his former state if persecution and a long interval conditioned him psychologically so that he is unable to regard himself as a member of the community of that State."

Other relevant factors suggested by Grahl-Madsen, *The Status of Refugees in International Law* Volume 1 (1966) at 408 include:

"... such grounds as the creation of new family ties in the country of refuge, and the rooting of one's family in the new environment, along with the severance of all ties with the country of origin as a result of persecution, war, or simply lapse of time (prolonged residence abroad)."

And later at p.409:

"It was stated at the eleventh session of the Social Committee of the Economic and Social Council of the United Nations that those who had originally fled from persecution and did not wish to return for emotional and psychological reasons' were covered by the phrase reasons other than those of purely personal convenience' [UN Doc. E/AC.7/SR.160, 9], and it seems to be generally agreed that such is the case."

In conclusion, while the UNHCR Statute and the 1951 Refugee Convention deal somewhat differently with those who, having fled, may still be considered as having valid reasons for continuing to enjoy the status of refugee, any change in the circumstances of their country of origin notwithstanding, we believe that the passage quoted from Goodwin-Gill, *The Refugee in International Law* (1983) at 52 is correct in principle:

"The object of the exception to the effects of a change of circumstances is clearly the continuation of protection for those who have suffered most seriously in their country of origin."

This category would include, at the very least, those who have continuing injuries inflicted by persecution, those unwilling to return to the scene of atrocities which they or their families have experienced, and those who would suffer psychological hardship if returned to the country responsible for their maltreatment.

CONCLUSIONS ON ARTICLE 1C

The conclusions we draw from the analogy with Article 1C(5) and (6) are as follows:

(a) The Refugee Convention recognizes that there will be circumstances in which a person will continue to be recognized as a refugee even though that person, due to change of circumstances in the country of origin, ceases to have a well-founded fear of persecution.

(b) This exception is based on the same humanitarian principles which underpin the Refugee Convention.

(c) Although the exception is restricted by the Convention to statutory refugees falling under Article 1A(1) of the Convention, the validity of the underlying humanitarian principles do not depend upon their inclusion in any particular one Article. The underlying principles are reflected also in the Statute of the UNHCR, in the very recent Excom Conclusions to which we have referred, the Canadian Immigration Act 1976-77 and in the opinions of the leading jurists cited earlier.

(d) While relocation and cessation are separate issues, the humanitarian principles behind the exception to the application of the cessation clauses are the same as, or analogous to, the humanitarian principles underpinning the "reasonableness" limb of the relocation test.

(e) It is therefore entirely consistent both with the Convention and with refugee doctrine for refugee status to be recognized under Article 1A(2) even though the individual in question could access meaningful protection in some part of the country of origin, if in the circumstances, it would be unreasonable to expect the individual to seek out that protection.

(f) Victims of torture in one area only of their country of origin are deserving of special consideration when decisions are being taken as to the reasonableness of expecting them to relocate within that country.

"R P G Haines" [Member]