

[2010] IPB 1

## Refugee status and religious conversion: The significance of *Refugee Appeal Number 76204*

*Doug Tennent from Waikato University considers the effect of adverse findings of credibility in a refugee claim involving religious conversion and cautions the need for support agencies to act with care when assisting people with refugee determinations*

One of the grounds upon which a person may be accorded refugee status is having a well-founded fear of being persecuted for reasons of religion. A number of claims for refugee status on the basis of religion have come before the Refugee Status Appeals Authority (RSAA) over the years. A large number of such claims have come from Iranians. People come to New Zealand, convert to Christianity and apply for refugee status on the basis that conversion (apostasy) will not be tolerated if they were to return to Iran. Apostasy is a crime in Iran. Indeed at the time of the handing down of *Refugee Appeal 76204*<sup>1</sup> it was noted that a revision had recently been made to the Iranian Penal Code whereby apostasy, specifically conversion from Islam, would be punishable by death.<sup>2</sup> It is also acknowledged that for certain apostate's intense pressure and human rights abuses occur regularly.<sup>3</sup>

Consequently it can be argued that a well-founded fear of persecution can be established should an Iranian upon leaving Iran, convert to Christianity and then be required to return to Iran after such a conversion. However, it is not as straightforward as this. People leaving Iran, arriving in New Zealand, enjoying the freedoms, lifestyle and opportunities, wish to remain here. Consequently, using conversion to Christianity as a means of being granted refugee status is a very attractive avenue for being able to remain in New Zealand. Such claims need to be considered with caution particularly when such conversion to Christianity takes place while a refugee application is pending.<sup>4</sup>

It is acknowledged that refugee determination procedures are very much balanced in favour of the refugee claimant.<sup>5</sup> This is necessary as decision makers are addressing potentially life and death situations for the claimant and decisions are made in the midst of considerable evidentiary voids because a claimant has often had to leave his or her country of nationality or habitual residence in haste.<sup>6</sup> Consequently, the standard of proof required to establish a refugee claim falls below the balance of probabilities and the rules of evidence are not applied.<sup>7</sup> The generous flexibility, which is necessarily applied to refugee determinations, also makes them vulnerable to abuse. People can obtain refugee status through fraud, forgery of documents, the provision of false or misleading information, or the concealment of important information.<sup>8</sup> The ability to

cancel refugee status where it is consequently discovered that fraud and other unacceptable means were applied to achieve refugee status is given statutory recognition in both the Immigration Act 1987<sup>9</sup> and the Immigration Act 2009.<sup>10</sup> Such provisions are crucial if the integrity of the immigration system is to be maintained. Refugee status is accorded to a person because he or she comes within the required legal parameters as set out in the Refugee Convention. The fact that a person has a well-founded fear of persecution means that they can be recognised as a refugee and be accorded the protections and rights arising out of this status. To be accorded refugee status as a result of fraudulent means has two negative outcomes. Firstly, it undermines the integrity of the refugee regime. Secondly, it erodes the commitment of states party to the Convention to ensure that appropriate protection is provided.<sup>11</sup> It has the effect of states adopting an unwarranted restrictionist regime.<sup>12</sup>

The need for flexibility when making refugee determinations while at the same time guarding against abuse of the scheme, reflects one of the tensions of refugee law.

### *Refugee Appeal Number 76204*

All of these issues have particular relevance when considering refugee claims made under the convention ground of religion from Iranian claimants who have converted to Christianity since leaving Iran. In this regard *Refugee Appeal Number 76204* by the RSAA is very significant. This case concerned an Iranian refugee. He came from a Muslim family being the eldest of four children. As he grew up he experienced or witnessed actions from state officials which made him aware of the limitations on freedom that were imposed in Iran.<sup>13</sup> This resulted in him leaving for Turkey but returning shortly afterwards upon the death of his father. When the family settled down following the bereavement, the appellant left for Korea where he attended a church which focused on giving practical assistance to migrants.<sup>14</sup> The concern shown by the church made him interested in Christianity and after some 13 months he maintained that he converted to Christianity. He informed his mother about this, who, while being initially shocked, became interested in understanding more about

Christianity. He proceeded to send her videos and photos. When he asked if she had received them he was informed that they had been intercepted by the authorities.

The appellant heard that his mother was unwell and returned to Iran. While in Iran he was informed that the

## [2010] IPB 1, 2

authorities were looking for him and making specific reference to his religion.<sup>15</sup> This worried the appellant causing him to find his way to Turkey, Korea and ultimately, New Zealand. Upon arrival in New Zealand he made a claim for refugee status. The claim was unsuccessful with both the Refugee Status Officer and the RSAA. The basis of the claim was the alleged discovery of the appellant's conversion to Christianity and a claimed risk of lengthy imprisonment, if not execution, in Iran for his abandonment of Islam.<sup>16</sup>

The reasons of the RSAA for declining the appeal were the inherent implausibility of central aspects of the appellant's evidence, significant changes to his evidence, inconsistencies and contradictions.<sup>17</sup> For example, one matter raised was the fact that no visit was made by officials to the appellant's family house after the tapes sent from Korea were seized. This was considered to be implausible.<sup>18</sup>

The second refugee claim repeated the appellant's first claim but added a new and important element. This was the claim that, in his absence, he had been summonsed to the revolutionary court, tried and convicted of apostasy and that the death penalty was imposed. This new issue was supported by four documents: a letter requesting the appellant to appear before the court, a summons, the verdict and sentence and a letter from the appellant's brother. The letter from the brother said that the brother, being mistaken for the appellant, had been interrogated. It further stated that cousins threatened to kill the appellant upon his return to Iran or at least report him to the authorities. The letter emphasised that he would encounter major trouble if he were to return. It also noted that he had caused significant trouble to the family.<sup>19</sup>

This was a significant development. After the declination of the first appeal, a removal order was served on the appellant which he unsuccessfully appealed.<sup>20</sup> The appeal against the normal order was followed by lodgment of a s 35A application. This appeal was declined on 12 October 2005, by which time the appellant had been aware of the death penalty for three to four months. The Minister of Immigration was not, however, advised of this particularly significant development.<sup>21</sup> When the appellant was challenged about this during the second appeal hearing, his response was that he had rung and informed his lawyer's secretary about the matter. However, he did not check to ensure that the secretary had conveyed this information to the lawyer. He gave two reasons why no check was made. Firstly, that he lost his mobile telephone. Secondly, that he was subsequently arrested. When he phoned his solicitor after his arrest he was informed that his s 35A application had been unsuccessful.<sup>22</sup> This account was completely different to that given to the Refugee Status Officer

(RSO). He informed the RSO that he had spoken directly to the lawyer. He claimed that his account to the RSAA was the correct account. A file note was presented to the RSAA which clearly indicated that he had phoned the then lawyer's office, had spoken to the secretary and requested an update.<sup>23</sup> He also indicated that he would call back later but he never did. From the file note no mention was made of the death sentence. As the RSAA noted, it would be expected that he would have stated that this needed to be conveyed as a matter of urgency.<sup>24</sup> It would also be expected that such a crucial matter would be followed up on.

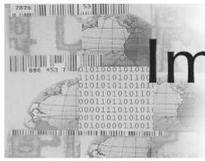
Also significant was that the appellant had not been informed immediately by his family about the court documents and summons. The appellant's reason provided for this was that the family did not take the request letter and summons seriously but they panicked when they received the court verdict.<sup>25</sup> The claim that a family would not take a summons from a Revolutionary Court seriously could not be accepted.<sup>26</sup> Also the authenticity of the court documents was not accepted — they lacked detail, had inconsistent wording, and had inconsistent dates. This led the RSAA to conclude that their overall appearance gave the impression that the documents were not genuine.<sup>27</sup> For these and other reasons the second refugee appeal was also unsuccessful.

The third refugee claim, while still maintaining the issues as advocated in the first and second grounds, added further grounds essentially related to the appellant's "fast" or "hunger strike", which it was submitted revealed a "genuine" conversion to Christianity, and to the wide publicity which had been given to his matter.<sup>28</sup> It was maintained that the publicity could not have helped but to have made the Iranian authorities aware of his conversion thereby making him liable to punishment for apostasy.<sup>29</sup>

The grounds advanced in the third appeal make it necessary to consider the matters of custody, the "hunger strike" and the publicity attached to this matter especially with regards to the death sentence.

As noted earlier, the appellant was served with a Removal Order on 7 December 2005, after which he was taken into custody. He was in custody when the second refugee claim was determined. The appellant refused to cooperate with the authorities in terms of signing the necessary documents to facilitate his removal back to Iran. As New Zealand had no agreement with Iran in terms of involuntary repatriation, the refusal to cooperate amounted, in effect, to an indefinite stay of the statutory removal process.<sup>30</sup> When the non-cooperation resulted in a refusal on the part of the Court to release him on specific conditions, the appellant commenced his "fast" or "hunger strike".

Before his arrest he had been worshipping at St James Anglican Parish Orakei. The vicar of St James, acting upon the request of the appellant, made public the documents related to the purported death sentence.<sup>31</sup> The issue was given extensive



# Immigration Practitioners BULLETIN

media attention. Further the appellant himself gave two emotionally charged television interviews about his matter. He maintained that the “hunger strike” would continue until he was allowed to remain in New Zealand.<sup>32</sup> Support for the appellant was provided by:

- Green MP Keith Locke;  
**[2010] IPB 1, 3**
- Global Peace and Justice Auckland which staged a protest outside Auckland Central Remand prison;
- The Anglican Archbishop and the Anglican Church’s Social Justice Commissioner. (Both of these people considered that his conversion to Christianity was genuine),<sup>33</sup> and
- The vicar and parishioners of St James Parish Orakei.

As the appellant’s “hunger strike” continued the then Minister of Immigration intervened, because the appellant’s state of health was precarious.<sup>34</sup> The appellant was released on certain conditions.

In brief the appellant received a significant amount of support which resulted in considerable media attention.

As with the first and second appeal bodies, the third appeal body made adverse findings about the appellant’s credibility, which will be explored in more detail shortly. Further, it was concluded that the appellant’s actions were self-serving, manipulative and in bad faith.<sup>35</sup> Good faith is an essential ingredient of a successful refugee claim. However, while the appellant had acted in bad faith, those supporting him had acted in good faith and this was sufficient to overcome the bad faith on the part of the appellant.<sup>36</sup> This point is discussed later. These people, acting in good faith, had ensured that a significant amount of publicity was accorded to the appellant’s matter. Also of significance was that the publicity given to the case enabled the Iranian authorities to become aware of the appellant’s claim that he had converted to Christianity and that he had been sentenced to death for apostasy.<sup>37</sup>

Country information with regards to those persons suspected of apostasy was seen to be fragmentary, contradictory and confused.<sup>38</sup> There were clearly accounts that apostates were regularly the subject of human rights abuses.<sup>39</sup> Serious human rights abuses were regularly experienced by those suspected of apostasy. Suspected apostates especially at risk were church leaders and proselytising Christians.<sup>40</sup> This did not apply to the appellant. His main issue was the publicity attached to his case that clearly identified him as an apostate.<sup>41</sup> In this regard the panel clearly emphasised that its focus must be the risk factors specific to individual claimants.<sup>42</sup> Applying this principle to the appellant’s case, it acknowledged that the publicity which his case attracted could lead to careful scrutiny of him at the border upon arrival in Iran, which might in turn lead to criminal charges, detention and ill treatment.<sup>43</sup>

The RSAA third panel noted that these were only possibilities. Given, however, the gravity of consequences which could flow from a mistaken finding of “not well founded”, the

authority in applying the principle of the benefit of doubt concluded by the narrowest of margins that the real chance of persecution was satisfied on the facts which had been placed before it.<sup>44</sup> He was therefore granted refugee status.

What has been reached is an extraordinary outcome whereby despite adverse credibility findings by three appellant bodies, refugee status was granted. This was the result of the RSAA third panel applying the principles of refugee determinations in a manner which acknowledges the complexities of refugee determinations and the grave consequences of wrong decisions being reached. Despite being accorded refugee status, the appellant’s attempt to stop the decision being published was unsuccessful.<sup>45</sup> Consequently the finding about his self-serving and manipulative actions was placed in the public domain. Again this is a matter requiring further elaboration.

This appeal also raises some significant points concerning refugee determinations and provides lessons and guidelines for people assisting refugee claimants. It is appropriate to consider these points.

## The issue of adverse credibility findings

Credibility issues lie at the heart of most refugee determinations. Often the evidentiary voids present in a refugee claim require that significant weight has to be attached to the testimony of the claimant or appellant. However, it also needs to be remembered that the purpose of the hearing of a refugee appeal is not to determine the truthfulness and genuineness of the claimant or appellant’s account. Rather it is to determine whether there is a well-founded fear of persecution. Consequently even though a claimant or appellant’s evidence is rejected in its entirety, it is possible that refugee status may be granted on the basis of other material evidence.<sup>46</sup>

In this matter the appellant produced significant documentation to support his case as well as a number of supporting witnesses — some being seen as expert witnesses. It is important to consider the RSAA’s approach and findings to these.

The questionable documents were:

- Certificates of identification from the church that the appellant attended in Seoul which supposedly verified the times that he had been a faithful attendant at the church;
- Baptism certificates from the same church; and
- The documents relating to the claimed death sentence.

The appellant claimed that his conversion to Christianity occurred while he was in Korea. Consequently the dates of his time of arrival and time spent in Korea were significant. There were two certificates produced with regards to his church attendance. The first set was produced by the appellant’s first legal counsel on 30 April 2004, after the first refugee appeal hearing. These included the verification of dates that the church was attended plus the translation of a baptism certificate dated 19 November 2002. The date was said to be a

mistake as it should have been 2000. The second set was produced by the appellant's third legal counsel Grant Illingworth QC some three years and five months later on 27 September 2007.

The two sets of documents regarding his church attendance gave conflicting dates. One document (the first to be produced) stated that attendance commenced in March 2000 and continued until April 2002. Yet the appellant said that he had

#### [2010] IPB 1, 4

travelled back to Iran in April or May of 2001 and did not return until February 2002.<sup>47</sup> The second set of documents submitted to the Minister stated that the appellant had attended the Seoul Migrant Mission church from August 1999–March 2001. These dates conflict with the appellant's claimed date of arrival in Korea on 29 February 2000.

The first two RSAA panels had only been aware of one set of verification certificates. The appellant, when pressed on the issue of the production of two sets of documents by the third RSAA panel, maintained that the documents filed by Illingworth in September 2007 were in fact the first documents that he received. When pressed to explain about the production of two sets of documents, the appellant gave two alternative accounts. The first was that his lawyer had noted the difficulty with the dates, leading the appellant to contact the church in Seoul — resulting in the second lot of documents to be provided. The second explanation was that he himself had noted the difficulty with the dates and therefore contacted the church in Seoul. Whichever documents were received first they both conflicted with the appellant's account of his arrival and stay in Korea. Therefore not only were there problems with the conflicting documents but both documents were inconsistent with the appellant's own version of the dates.<sup>48</sup> Another observation worth noting is whether the Migrant Church in Seoul kept an attendance register of any kind. If the church had a large attendance and no register was kept it would be hard to clearly state that a person was a regular worshipper. The conflicting dates would suggest that the church was guided by the appellant when preparing the certificates.

The key issue with the baptism certificates was that the appellant, when first presenting himself as a refugee claimant upon arriving in New Zealand, maintained that he had never been baptised in Korea. His explanation for this was because he considered that baptism required full water immersion. While on remand at Auckland Central prison he said that he learnt that baptism by sprinkling was also possible. This made him realise that on one particular occasion he had been baptised in Korea.<sup>49</sup> However, he sought no further clarification from the church in Seoul over the issue of his baptism. Further, given the significance of baptism to the Christian faith, it was very hard to believe that he was not aware of the fact that he had been baptised.<sup>50</sup> The conclusion of the third RSAA panel with regards to the baptism certificates and the appellant's account that he was not baptised in Korea followed by a subsequent realisation that he had been, was that this amounted to an opportunistic and unconvincing attempt to

reconcile a claim that he was not baptised when baptism certificates had been produced.<sup>51</sup>

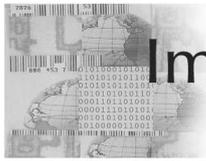
With regards to the death sentence document at the third appeal hearing the appellant's counsel conceded that the court documents relating to the death sentence were false. The issue here was whether the appellant was aware of the falsity of the documents and whether in his dealings with the death sentence documents he had been sincere, forthright and candid.<sup>52</sup> The conclusion of the third panel was that he had not been. Both the vicar of Orakei and his work supervisor had disseminated the documents. However, the appellant had never shown the vicar of Orakei a copy of the decision of the first and second RSAA panels and had not made him aware of the concession that the documents were false prior to the third hearing. The vicar was first made aware of this by the third panel during the hearing. The work supervisor had also not been made aware of the falsity of the documents. This, the third RSAA panel concluded, was strong evidence of a distinct lack of candor and openness on the part of the appellant.<sup>53</sup> Noting and in effect supporting the concerns of the second RSAA panel about the authenticity of the documents, the third RSAA panel concluded that the appellant had deliberately misled all of those supporters who had taken up his cause in the belief that he had been sentenced to death.<sup>54</sup>

Given all of the inconsistencies in the documents produced and the appellant's inability to provide convincing explanations on these matters, the third RSAA panel had no hesitation in making an adverse credibility finding. In their own words:<sup>55</sup>

He is a manipulative and opportunistic individual who is indifferent to his sworn obligation to tell the truth.

Attention then focused upon the weight which could be given to the evidence of a significant number of witnesses supporting the appellant either written or given under oath at the hearing. This included members of the parish he attended, the vicar and the Anglican Social Justice Commissioner (the Commissioner) who had visited the appellant with the Anglican Archbishop when he was on his hunger fast. The Commissioner considered the conversion to be genuine. However, the Commissioner had not been privy to the evidence produced at the first and second refugee hearings. Further, he had not sighted either decision from the first or second RSAA panels. His position was that he focused on internal spiritual matters rather than external matters such as the documentary evidence. His concern was the genuineness of the conversion. He noted the appellant's balanced use and understanding of the Bible which exhibited a considerable amount of depth of faith.<sup>56</sup>

The third panel held the view that it was not possible to separate the internal from the external. Truth which is a central tenant of the Christian faith was relevant to both the internal and external.<sup>57</sup> The conflicts and inconsistencies of the appellant's evidence which he was unable to explain challenged the appellant's integrity and credibility. The appellant had not been upfront about the previous adverse findings. As the third



# Immigration Practitioners BULLETIN

RSAA panel noted, the Authority had spent much more time testing the appellant's credibility than the other witnesses. This was evidenced in the two and a half day hearing and the Authority had been privy to the 1707 page Refugee Status Branch file.<sup>58</sup> The third RSAA panel in emphasising this and also noting the fact that the witnesses were not privy to prior adverse finding with regard to the appellant were therefore unable to place a great deal of weight on the testimony of the

## [2010] IPB 1, 5

witnesses. Certainly it was not sufficient to overturn or counter the adverse credibility findings. The panel was therefore left clear in its decision that the appellant's evidence was not credible and that he was not a genuine convert to Christianity.<sup>59</sup> For three panels to find such adverse finding against the appellant is significant. The third RSAA panel was able to base its conclusions on much more evidence than the other two. Such a detailed focus on credibility invites some observations. There were significant problems with the documentary evidence. Some were incomplete. Other documents, such as the first and second certificates of identification, were in conflict. The appellant could not give convincing responses to address the vagueness and conflicts. If the witnesses in a situation such as were to be compelling, they needed to address the concerns raised about the appellant's credibility. They did not. They were focused on the appellant's conversion and their belief of its genuineness. They had not been privy to adverse credibility findings.

They had not gained a full understanding of the appellant's situation before assisting him and giving testimony in his favour. This omission meant that they could not address the issues which concerned the panel regarding the appellant's credibility. As the third panel observed such a case cannot be compartmentalised.<sup>60</sup> A genuine conversion to Christianity requires a commitment to the truth. Such a commitment was not exhibited by the appellant. The evidence of witnesses upholding the genuineness of a conversion without addressing issues raised about the integrity of the appellant is rightly not going to be accorded a significant amount of weight. Also of significance is the granting of refugee status despite such an adverse credibility finding. Usually in such circumstances one looks to extrinsic evidence such as country information to determine whether there is a well-founded fear. In this case, while country information was clearly relevant, the significant issue in determining that the appellant should be recognised as a refugee was the publicity given to his situation especially the alleged death sentence. Had the supporters not acted in the manner that they did, the requirement to grant refugee status would not have arisen. The requirement to give protection despite dishonesty and manipulation says a great deal about the commitment of the refugee scheme to providing protection and leads directly into the other important issues of this appeal to be discussed.

## The generosity and flexibility of the refugee determination process

The conclusion of the third panel was that the appellant had not converted to Christianity but had played the role of a convert to further his goal, namely being able to remain permanently in New Zealand. The third panel further concluded that if he were to return to Iran he would abandon the role prior to arriving in the country.<sup>61</sup> However, the third appeal introduced a further ground which if established would stand despite the adverse findings about the appellant's conversion and credibility. This was that the wide publicity given to his hunger strike and the death sentence would place him at risk if he were to return to Iran.<sup>62</sup> The appellant had not acted in good faith and if the appeal was to be determined on his actions alone, refugee status would not have been granted. However, a number of people had assisted him and in doing so had acted in good faith. Through the publicity his supporters gave to his situation, the Iranian authorities could not have helped but notice the appellant's claimed conversion to Christianity and the allegations of the death sentence imposed against him. Refugee law acknowledges a situation where after a person has left his or her country of nationality or habitual residence, and at the time of leaving not having a well-founded fear of persecution, circumstances change to the extent that a well-founded fear could well be established. In other words the circumstances in the home country have changed. A person who comes within such a situation is referred to as a *sur place* refugee.<sup>63</sup> For example there might be a change of government which may not respect fundamental human rights. The person in question may criticize the new regime while outside the country, thereby making it unsafe for them to return. They therefore have a well-founded fear. However, it is important when considering such claims to check that a person has not undertaken actions for the sole purpose of creating a pretext for invoking fear or persecution thereby being accorded refugee status.<sup>64</sup> Such an action is made for wrong motives and in bad faith. Technically such a person should not be granted refugee status.

However, the RSAA has taken the position that the good faith requirement should be applied with caution and not zeal.<sup>65</sup> Where the issue of good faith becomes relevant the matter must be carefully considered. Issues of relevance are: the degree of bad faith; the nature of the harm feared; and the degree of risk.<sup>66</sup> As noted, while the appellant had acted in bad faith, the people assisting him acted in good faith. In so doing, while being unaware of a number of important truths, they inadvertently created the grounds for a refugee claim which was otherwise without foundation and fraudulent.<sup>67</sup> The publicity of the appellant's situation arising from their actions made in good faith may have given rise to a well-founded fear. They therefore contributed substantially to the risk of harm. The panel held this was sufficient to override the bad faith qualification.<sup>68</sup>

The manner in which the third panel has approached the fact scenario clearly illustrates the legal flexibility and generosity applied when determining refugee claims. The grave consequences of error in such determinations require this. But the cautionary manner with which the good faith requirement was approached in a sur place determination is only the first example of the flexibility and generosity applied in refugee situations. The other example in this case is the application of the benefit of doubt. This principle, central to refugee determinations, essentially requires that where an appellant authority determining refugee claims is unable to reach a decision

## [2010] IPB 1, 6

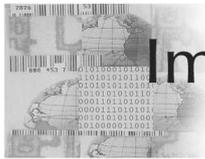
about refugee status, a decision should go in favour of the claimant or appellant.<sup>69</sup> This principle again acknowledges the unique situation in which a refugee claimant can find himself or herself placed when bringing a claim. The RSAA has consistently advocated that the benefit of doubt principle is to be applied liberally. The appeal under consideration is an excellent example of the liberal application of the principle. As noted earlier, the third panel considered the plight of an apostate in Iran carefully. While there were significant human rights abuses against apostates this is mainly directed at church leaders and converts who exhibited a strong commitment to proselytise. The appellant was neither a leader nor a proselytiser.<sup>70</sup> However, it was acknowledged that given the publicity surrounding his case, extra attention might be given to him upon his return. This could lead to the appellant being victim of human rights abuses. The third panel found itself in a difficult situation of being unable to determine whether the possible risks faced by the appellant were sufficient to cross the “real chance” threshold.<sup>71</sup> Bearing in mind the gravity of the consequences which would flow from the wrong decision that the appropriate threshold had not been reached, the third RSAA panel determined that it was appropriate to apply the benefit of doubt and grant refugee status. It was noted that this was done by the narrowest of margins.<sup>72</sup> Again it was the publicity given to the appellant’s case by supporters acting in good faith which created the circumstances which led the third RSAA panel to grant refugee status, being aware of the grave consequences of a wrongful decision to decline refugee status. A person acting in bad faith, manipulating circumstances to his own end, and withholding central truths from those people tirelessly advocating for him was granted refugee status. Yet this was necessitated by the publicity given to the appellant’s alleged conversion and death sentence and the effect that this might have on the Iranian authorities. This illustrates how determined the refugee regime is to provide effective protection even when people have acted in bad faith. If the generous and flexible approach to refugee determinations establishes that there is a well-founded fear and the exclusion clauses contained in the Refugee Convention do not apply, then protection is to be granted. This is because of the grave consequences of a wrong decision.

## The issue of confidentiality

The cynic reading such a decision might become very critical of the refugee determination process. Indeed, if the granting of refugee status were the end of the matter in this case, a certain amount of cynicism might be justified. However, the issue of the appellant’s right to ongoing confidentiality arose after the handing down of the decision. Clearly when people read *Refugee Appeal Number 76204*, given the publicity attached to the matter, they would easily be able to identify the appellant and the adverse findings of his genuineness and credibility. Consequently he did not want the decision published. The requirement to publish decisions arises in s 129Q(3) of the Immigration Act 1987, which requires that a refugee decision must be in writing and include reasons both for the decision and for any minority view.<sup>73</sup> Schedule 3C, cl 12 of the Immigration Act 1987 also notes the importance of publication for research purposes. However, it must be published in a manner which does not identify the person. The reason for publication of decisions goes to the heart of the rule of law.<sup>74</sup> It promotes accountability, equal treatment and fairness.<sup>75</sup> Precedents are set by way of appeal and such precedents need to be applied to other cases taking into account the individual features of the particular case.

The other important reason for publication is that it encourages the development of refugee jurisprudence. Consequently the Immigration Act 1987 provides for publication provided that the particulars are published in a manner that is unlikely to allow identification of the person concerned.<sup>76</sup> In this way a fair balance is established between the need to disseminate and the need to maintain confidentiality, which in the refugee context is to protect the safety of the person.

However, the legislation also acknowledges that the statutory obligation of confidentiality cannot be enforced where the claimant has either expressly or by implication waived his right to confidentiality.<sup>77</sup> The wide publicity in this matter which included two appearances by the appellant on national television amounted, in the view of the RSAA to an implied, if not an express waiver of the confidentiality provisions.<sup>78</sup> Indeed after the third RSAA panel released its decision the appellant and his counsel gave a media conference.<sup>79</sup> In the conference no secrecy was made of the appellant’s identity. This was seen to amount to a further waiver.<sup>80</sup> Acknowledging this, the appellant’s counsel argued that the appellant had not waived his right to confidentiality with regards to [12]–[14] of the decision. Contained in these paragraphs were the adverse credibility findings with regards to the appellant. The RSAA made a very firm response to this. This was that when an appellant makes public the basis of their claim including the provision of a document known to be false and makes much of the ultimate recognition of refugee status, this must amount to a waiver of confidentiality in relation to the findings of credibility and fact.<sup>81</sup> A reading of the waiver provisions contained in s 129T(4) of the Immigration Act did not provide



# Immigration Practitioners BULLETIN

for some form of selective waiver.<sup>82</sup> Further, to allow for a selective waiver would not enable the reader to understand the deceitful actions of the appellant which in the end justified the recognition of refugee status.<sup>83</sup> It would not provide the reader with a full appreciation of the decision and how the final determination was justified.

With no convincing evidence produced to show that there would be any risk of danger to the appellant through publication, the RSAA held that the decision should be published.<sup>84</sup> Consequently, while the appellant had gained refugee status as the result of careful manipulation and fraudulently exploiting the goodwill of supporters to advance his case, such facts were eventually made known to the public. It was refugee status

## [2010] IPB 1, 7

obtained through the exercise of bad faith but through publication the public became aware of this exercise of bad faith. This will in turn influence people's opinions of and approaches to the appellant. He cannot be said to be a refugee with "clean hands".

## The need to act with care when assisting people with refugee determinations

The people who assisted the appellant all acted in good faith. However, as the third panel noted, that in so acting without being aware of the facts, they inadvertently created the grounds for a refugee claim which would otherwise be without foundation and fraudulent.<sup>85</sup> They allowed a person who, in the view of all the panels, was fraudulent and manipulative to obtain refugee status. The importance of maintaining the integrity of the refugee system has already been emphasised earlier in the paper. Abuse of the refugee system resulting in people wrongly being accorded refugee status has the danger of leading states to impose "unwarranted restrictionist pressures" in terms of refugee applications.<sup>86</sup> Such restrictions will impact adversely on genuine claimants. Consequently, groups such as churches who habitually provide assistance to vulnerable people such as refugee claimants need to do so with appropriate caution. Assistance in such situations requires that a certain amount of research and clarification is undertaken to ensure that the information relating to a person seeking assistance prima facie suggests that the person and his or her alleged concerns are genuine. Enquiries must include all relevant information. For a senior member of the clergy to conclude that a person's conversion to Christianity is genuine after spending only two one-hour sessions with him while acknowledging at the same time that a person can walk away from his or her faith at a moment's notice is not reflective of careful scrutiny of the matter.<sup>87</sup> Further, to say that one is only concerned about spiritual matters and be indifferent to the previous adverse findings about the appellant is not reflective of the inherent practical aspect of the Christian faith which requires a balanced approach to be undertaken when assisting people. To provide assistance to people seeking protection is what Christians would refer to as a gospel mandate. However,

truth and integrity are central to the Christian faith as well. Consequently some discernment needs to be exhibited before undertaking to spend considerable time and energy to assist such people.

## Conclusion

*Refugee Appeal Number 76204* is a significant decision. It shows that in applying the necessarily generous and flexible provisions of refugee determination a person who manipulates the process can still be accorded refugee status. This is because the focus in a refugee claim is on the establishment of a well-founded fear. Therefore, even if the findings about a claimant's credibility are adverse, if evidence independent of the claimant's account shows that there is a well-founded fear, refugee status can be granted. The benefit of doubt principle affirms that if there is any doubt as to whether the well-founded fear has reached the required low threshold, then the decision should go in favour of the claimant. Such a principle is necessary given the grave consequences for the claimant of a wrongful decision.

The people who assisted the appellant in good faith created the circumstances giving rise to a successful refugee claim. The appellant had selectively withheld important information from them, such as the decisions from the first two determination panels and the fact that there was an acknowledgement that the death certificates were false. While the appellant was able to gain refugee status through exploitative, fraudulent and manipulative means, the fact that he had waived his right to confidentiality resulting in the decision being published meant that the adverse findings about the appellant were made known and his claim to victory in the refugee process was limited.

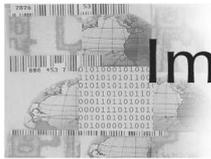
Refugee claims involving religious conversion must always be treated with caution. Conversion is a subjective process and its genuineness is very hard to establish. This is where the internal process of conversion needs to be compared with external and independent evidence. Some form of consistency needs to pervade all of the evidence. This will more often than not assist in determining the genuineness of a claim. People assisting such claimants need to do so in good faith but with caution. They need to gain as full a picture of the claimant's case as possible. It should be a requirement that people seeking help disclose all relevant information about their claim. This includes information which does not advance their claim. In this way the integrity of the refugee scheme is being encouraged.

---

## Footnotes

1. *Refugee Appeal Number 76204* 16 February 2009.
2. *Refugee Appeal Number 76204* 16 February 2009.
3. Christian Solidarity Worldwide, *Iran Religious Freedom Profile* (July 2008).
4. *Refugee Appeal Number 70283/96* at 1.

5. *MA v Attorney-General* HC Auckland CIV-2006-404-1371, 21 September 2007 at [107].
  6. *I Hathaway Rebuilding Trust — Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*. (December 1993) at 6 and 7.
  7. *Refugee Appeal Number 75574* 29 April 2009 at [50].
  8. *Refugee Appeal Number 75574* 29 April 2009 at [59].
  9. Immigration Act 1987, s 129R(b) and (c).
  10. Immigration Act 2009, ss 145 and 146.
  11. *Refugee Appeal Number 75574* 29 April 2009 at [59].
  12. James Hathaway. “What is in a Label?” (2003) 5 *European Journal of Migration Law* 1 at 20.
  13. *Refugee Appeal Number 74256* 16 June 2004 at [9].
  14. *Refugee Appeal Number 74256* 16 June 2004 at [12].
- [2010] IPB 1, 8**
15. *Refugee Appeal Number 74256* 16 June 2004 at [22].
  16. *Refugee Appeal Number 76204* 16 February 2009 at [15].
  17. *Refugee Appeal Number 76204* 16 February 2009 at [18].
  18. *Refugee Appeal Number 74256* 16 June 2004 at [38].
  19. *Refugee Appeal Number 76204* 16 February 2009 at [26].
  20. *Refugee Appeal Number 75889* 20 December 2006 at [15].
  21. *Refugee Appeal Number 75889* 20 December 2006 at [16].
  22. *Refugee Appeal Number 75889* 20 December 2006 at [19].
  23. *Refugee Appeal Number 75889* 20 December 2006 at [25].
  24. *Refugee Appeal Number 75889* 20 December 2006 at [27].
  25. *Refugee Appeal Number 75889* 20 December 2006 at [30].
  26. *Refugee Appeal Number 75889* 20 December 2006 at [31].
  27. *Refugee Appeal Number 75889* 20 December 2006 at [29].
  28. *Refugee Appeal Number 76204* 16 February 2009 at [32].
  29. *Refugee Appeal Number 76204* 16 February 2009 at [32].
  30. *Refugee Appeal Number 76204* 16 February 2009 at [36].
  31. *Refugee Appeal Number 76204* 16 February 2009 at [38].
  32. *Refugee Appeal Number 76204* 16 February 2009 at [39].
  33. *Refugee Appeal Number 76204* 16 February 2009 at [40].
  34. *Refugee Appeal Number 76204* 16 February 2009 at [41].
  35. *Refugee Appeal Number 76204* 16 February 2009 at [137].
  36. *Refugee Appeal Number 76204* 16 February 2009 at [138].
  37. *Refugee Appeal Number 76204* 16 February 2009 at [144].
  38. *Refugee Appeal Number 76204* 16 February 2009 at [156].
  39. *Refugee Appeal Number 76204* 16 February 2009 at [152].
  40. *Refugee Appeal Number 76204* 16 February 2009 at [151].
  41. *Refugee Appeal Number 76204* 16 February 2009 at [152].
  42. *Refugee Appeal Number 76204* 16 February 2009 at [156].
  43. *Refugee Appeal Number 76204* 16 February 2009 at [157].
  44. *Refugee Appeal Number 76204* 16 February 2009 at [164].
  45. *Refugee Appeal Number 76299 and 76297*.
  46. “Michigan Guidelines on Well-Founded Fear” (2005) 26 *Mich. J Int’L* 491 at [12].
  47. *Refugee Appeal Number 76204* 16 February 2009 at [65].
  48. *Refugee Appeal Number 76204* 16 February 2009 para [71].
  49. *Refugee Appeal Number 76204* 16 February 2009 para [79].
  50. *Refugee Appeal Number 76204* 16 February 2009 para [81].
  51. *Refugee Appeal Number 76204* 16 February 2009 para [81].
  52. *Refugee Appeal Number 76204* 16 February 2009 para [93].
  53. *Refugee Appeal Number 76204* 16 February 2009 para [97].
  54. *Refugee Appeal Number 76204* 16 February 2009 para [100].
  55. *Refugee Appeal Number 76204* 16 February 2009 para [105]. There had even been an acknowledgement by the Counsel for the appellant that “in many ways the appellant was not a good witness”.
  56. *Refugee Appeal Number 76204* 16 February 2009 at [46].
  57. *Refugee Appeal Number 76204* 16 February 2009 at [115].
  58. *Refugee Appeal Number 76204* 16 February 2009 at [115].
  59. *Refugee Appeal Number 76204* 16 February 2009 at [129].
  60. *Refugee Appeal Number 76204* 16 February 2009 at [117].
  61. *Refugee Appeal Number 76204* 16 February 2009 at [121]–[122].
  62. *Refugee Appeal Number 76204* 16 February 2009 at [32].
  63. *Refugee Appeal Number 2254/94* 21 September 1994.
  64. *Refugee Appeal Number 76204* 16 February 2009. Here the third panel was adopting the situations advocated by Ghahl-Madsen whereby a person may establish grounds for becoming a *sur place* refugee.
  65. *Refugee Appeal Number 2254/94* 21 September 1994 at [59].
  66. *Refugee Appeal Number 2254/94* 21 September 1994 at [59].
  67. *Refugee Appeal Number 76204* 16 February 2009 at [139].
  68. *Refugee Appeal Number 76204* 16 February 2009 at [139].
  69. This principle has been discussed in *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 at 655–656.
  70. *Refugee Appeal Number 76204* 16 February 2009 at [154].
  71. *Refugee Appeal Number 76204* 16 February 2009 at [159].
  72. *Refugee Appeal Number 76204* 16 February 2009 at [159].
  73. Immigration Act 1987, s 129Q(3).
  74. *Refugee Appeal Number 76297* 17 July 2009 at [25].
  75. *Refugee Appeal Number 76299 and 76297* 17 July 2009 at [23]–[30].
  76. Immigration Act 1987, s 129T(3)(e).
  77. Immigration Act 1987, s 129T(4). The equivalent provision is contained in s 151 of the Immigration Act 2009.
  78. *Refugee Appeal Number 76204* 16 February 2009 at [101].
  79. *Refugee Appeal Number 76299 and Refugee Appeal Number 76297* 17 July 2009 at [36].
  80. *Refugee Appeal Number 76299 and Refugee Appeal Number 76297* 17 July 2009 at [37].
  81. *Refugee Appeal Number 76299 and Refugee Appeal Number 76297* 17 July 2009 at [40].
  82. *Refugee Appeal Number 76299 and Refugee Appeal Number 76297* 17 July 2009 at [41].
  83. *Refugee Appeal Number 76299 and Refugee Appeal Number 76297* 17 July 2009 at [40].
  84. *Refugee Appeal Number 76299 and Refugee Appeal Number 76297* 17 July 2009 at [51].
  85. *Refugee Appeal Number 76204* 16 February 2009 at [139].
  86. James Hathaway “What’s in a Label” (2003) 5 *European Journal of Migration Law* 1 at 20.
  87. *Refugee Appeal Number 76204* 16 February 2009 at [114].



# Immigration Practitioners BULLETIN

We welcome letters to the Editor and new contributors.  
Please see our website [www.lexisnexis.co.nz](http://www.lexisnexis.co.nz) for contributing to our Bulletin.  
Address all correspondence to: The Legal Editor, Immigration Practitioners Bulletin, PO Box 472, Wellington 6140.

Published by LEXISNEXIS NZ LIMITED  
Mode of citation: [2010] IPB (page number).

ISSN 1748-1147

**Copyright © 2010 LexisNexis NZ Limited**

All rights reserved. This work is entitled to the full protection given by the Copyright Act 1994 to the holders of the copyright, and reproduction of any substantial passage from the publication except for the education purposes specified in that Act is a breach of the copyright of the author and/or publisher. This copyright extends to all forms of photocopying and any storing of material in any kind of information retrieval system. All applications for reproduction in any form should be made to the publishers.

**Disclaimer**

*Immigration Practitioners Bulletin* has been written, edited and published and is sold on the basis that all parties involved in the publication exclude any liability, including negligence or defamation, for all or any damages or liability in respect of or arising out of use, reliance or otherwise of this publication. The publication should not be resorted to as a substitute for professional research or advice for any purpose.