IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2011] NZIPT 800014**

AT AUCKLAND

Appellant:	**AB (Iraq)**
Before:	A R Mackey (Chair) C M Treadwell (Member)
Counsel for the Appellant:	C Curtis
Counsel for the Respondent:	No Appearance
Date of Hearing:	18 April 2011
Date of Decision:	4 May 2011

DECISION BY C M TREADWELL

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the Department of Labour, declining to grant refugee status to the appellant, a citizen of Iraq. It is accompanied by a claim for recognition as a protected person.

[2] As against Iraq, the appellant's claim to refugee status must succeed. The question, however, is whether he is also a French national by descent. If so, he must also establish his claim against France in order to be recognised as a refugee or a protected person. The central issue is thus whether his mother's French nationality means that France, today, recognises the appellant as a French national or, alternatively, whether the steps necessary for him to acquire French nationality would be no more than a mere formality.

[3] For the reasons which follow, the Tribunal finds that the appellant is neither a French citizen as of right, nor could he acquire it by steps that would be no more than a mere formality.

[4] In recording the grounds of the appellant's claim, it is appropriate to explain that he has a history of impaired cognitive functioning and confusion (see in this regard the 16 June 2010 report of Dr Joseph Sakdalian, consultant clinical psychologist). For this reason, his evidence was supplemented by assistance from his son AA.

THE APPELLANT'S CASE

[5] The appellant is an Assyrian Christian, from Baghdad, aged in his mid-60s. He and his wife arrived here in January 2010. Their two children are permanent residents here and his wife has recently been recognised by the Refugee Status Branch as a refugee, in an application contemporaneous with that of the appellant.

The claim as against Iraq

[6] The appellant was born in the mid-1940s to an Iraqi man of Arab ethnicity, BB, and an Iraqi woman of French and Arab ethnicity, CC. The appellant's complexion and appearance are notably European, not Arab. He has markedly fair skin and fair hair. Because of its Christian origin, his family name passes for a European name. Save for his speech, the lay observer would assume him to be European.

[7] Prior to 2003, the appellant's appearance caused him little difficulty. He suffered mild teasing as a student but, particularly under the more secular regime of Saddam Hussein, neither his religion nor his apparent ethnicity led to any particular discrimination.

[8] The appellant and his family ran a small shop in Baghdad. In 1991, they suffered the only incident of note in that decade, when the appellant's mother was murdered by thieves who had broken into the house. The appellant suffered significant mental trauma as a result of this incident and became progressively withdrawn and distressed. Today, he continues to be forgetful and confused and his cognitive ability remains impaired.

[9] As the security situation in Baghdad deteriorated after 2003, the appellant and his family became the victims of numerous incidents. Goods were taken from their shop without payment, they were too afraid to attend church regularly (their church was bombed in 2004), the children could no longer walk safely in the

streets because of kidnappings and, in 2005, they began to receive written threats, warning them to leave the area.

[10] In early 2006, armed members of the Badr organisation, a Shi'a militant movement, came to the house and told the family that they would be bombed if the appellant's wife and daughter did not adopt *hijab*. They were also told to move to another area.

[11] In August 2006, the appellant's brother-in-law was in a car which was shot at, killing the other occupant. Some days later, a member of the Badr organisation came to the appellant's shop and told him that his brother-in-law had been the intended target.

[12] In October 2006, the appellant, his wife and their daughter were accosted by four men as they walked home from church. The appellant's wife had a cross torn from around her neck and an attempt was made to do the same to the daughter. When the appellant intervened, he was roughly treated and was spat upon.

[13] Shortly thereafter, the family left Iraq, in fear for their safety. They travelled to Syria, where they registered with the United Nations High Commissioner for Refugees in early 2007.

[14] During 2007, both the appellant's son and his daughter became engaged to New Zealand citizens who were also Assyrian Christians. In late 2007, the daughter travelled to New Zealand, followed by the son in early 2008. Both children were married to their respective spouses in mid 2008.

[15] In January 2010, both the appellant and his wife arrived in New Zealand. They each lodged a claim to refugee status on 18 January 2010. The Refugee Status Branch granted the wife's claim. It accepted that the appellant had a well founded fear of being persecuted in Iraq, but found that he is also a French citizen (or could acquire French citizenship as a mere formality). He did not have a well founded fear of being persecuted in France and his claim was declined.

The claim as against France

[16] The appellant says he is not French. To the best of his knowledge, his maternal lineage includes one or more French citizens who emigrated to Iraq approximately 250 years ago. He believes that French citizenship by descent may

have been maintained until his maternal grandparents' era. He points to his mother's Iraqi Certificate of Citizenship, obtained in 1976 (when she was aged 79) at the time that she renounced her own French citizenship. It records her parents' "original nationality" as French, though the appellant does not know the premise upon which this was asserted.

[17] The appellant does not have a certificate created at the time of his own birth, in 1944. His primary form of identification is his Iraqi identity card, issued in 1999, which is silent as to his nationality or nationalities. His birth in Baghdad was registered with the Iraqi authorities but, to the best of his knowledge, there was never any communication by his parents (or anyone else) to the French authorities about his birth. He believes that his birth has never been notified to the French authorities, nor any record of him created in any register save that of the Iraqi government.

[18] The appellant has never been to France. He knows nothing of the country, cannot speak the language and does not regard himself as French in any way.

Submissions

[19] Counsel has filed submissions dated 16 December 2010, 24 March 2010 and 15 April 2010.

CREDIBILITY

[20] The appellant's account is accepted as truthful.

JURISDICTION

[21] By section 198(1)(b) of the Act, the jurisdiction of the Tribunal is to determine (in this order) whether, on the facts as found, to recognise the appellant:

(a) as a refugee under the Refugee Convention (section 129); and/or

(b) as a protected person under the Convention Against Torture (section 130); and/or

(c) as a protected person under the International Covenant on Civil and

Political Rights (“the ICCPR”) (section 131).

THE REFUGEE CONVENTION

[22] The inclusion clause in Article 1A(2) of the Refugee Convention 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

[23] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

[24] The particular circumstances of this case give rise to two further issues, deriving from the second paragraph of Article 1A(2), namely:

(c) Has the appellant a second country of nationality?

(d) If so, has he, without any valid reason based on well-founded fear, not availed himself of its protection?

Assessment of the Claim to Refugee Status

[25] Given the question of dual nationality, it is appropriate to consider the claim in respect of each country separately.

Assessment of the Claim as Against Iraq

[26] This issue can be disposed of shortly. For the reasons which follow (and consistent with the findings of the Refugee Status Branch on the claims of both the appellant and his wife), the appellant has a well-founded fear of being persecuted, for reasons of religion, if he returns to Iraq.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Iraq?

[27] "Being persecuted" comprises two elements – serious harm plus the failure of state protection. See *Refugee Appeal No 71427* (16 August 2000) at [67]. Put another way, it is the sustained or systemic violation of basic or core human rights such to be demonstrative of a failure of state protection. See J C Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at para 15.

[28] It is necessary to record, briefly, the present circumstances for Assyrian Christians in Iraq.

[29] According to the United States Department of State's *Country Reports on Religious Freedom: Iraq* (17 November 2010), the Iraqi state generally recognises religious freedom and does not, itself, harass or discriminate against religious minorities, including Christians.

[30] The state, however, is often unable to protect religious minorities against harm at the hands of non-state agents, notably Islamic extremists. As the report notes:

> "[R]eligious minorities in both Sunni- and Shi'a-dominated neighborhoods reported receiving death threat letters demanding that they leave their homes, and in many cases individuals either complied or were killed....
>
> Very few of the perpetrators of violence committed against Christians and other religious minorities in the country were punished; arrests following a murder or other crimes were rare....
>
> [T]errorist attacks rendered many mosques, churches, and other holy sites unusable. During most of the reporting period, many worshippers reportedly did not attend religious services or participate in religious events because of the threat of violence. Christian leaders inside and outside the country reported that members of their communities received threatening letters demanding that Christians leave or be killed.
>
> Regardless of religious affiliation, women and girls were often threatened for refusing to wear the hijab (head covering), for dressing in western-style clothing,

> or for failing to adhere sufficiently to strict interpretations of conservative Islamic norms governing public behavior. Numerous women, including Christians, reported opting to wear the hijab for security purposes after being harassed for not doing so."

[31] The International Organization for Migration *Press Briefing notes – Iraqi Christians Continue to Face Threats and Economic Insecurity*, posted 1 February 2011, succinctly records:

> "Christians in Iraq are still living under the threat of violence three months after the attack on the Saidat al-Najat church in Baghdad. In its latest update on Christian displacement in the country, IOM monitors in Baghdad report that Christians are facing grave threats to their lives despite the increased presence of security checkpoints near their homes."

[32] Against this background, the particular characteristics of the appellant must be measured. Not only is he a practising Christian, he is European in appearance, with fair skin and fair hair. In a predominantly Arab environment, he would be conspicuous. For those who continue to try to destabilise society by attacking minorities (particularly religious minorities), he would be a visible target.

[33] Coupled with the threats already received by the family before they left Iraq, the appearance and religious practises of the appellant lead to a real chance of him suffering serious harm at the hands of Islamic extremists if he returns to Iraq. His fear of being persecuted there is well-founded.

Whether there is a Convention reason for that persecution

[34] The predominant reason for such harm would be religion.

Assessment of the Claim as Against France

[35] Notwithstanding those findings, it is necessary to address the third question raised by the Convention. This is because the underlying assumption in refugee law is that, where available, national protection takes precedence over international protection – see JC Hathaway, *The Law of Refugee Status* at p 57 and the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, at para 106. If a refugee claimant possesses more than one nationality he or she must establish a well-founded fear of being persecuted in respect of each before the surrogate protection of the international community comes into play. Put simply, if the appellant is a French national and can thus avail himself of the protection of that country, New Zealand's surrogate protection obligation is not engaged.

[36] By logical extension, the same outcome is reached if the acquisition of French nationality is a mere formality. See, for example, *Refugee Appeal No 72635* (6 September 2002) at [138]-[141] and *Refugee Appeal Nos 72558 & 72559* (19 November 2002) at [83], both citing *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ No 576; (1993) 67 FTR 74 (FC:TD). Those decisions considered the question of the attainment of nationality by persons who are otherwise stateless but the principle is the same.

[37] The protection must not be illusory, however. Neither notional, nor merely asserted, nationality will suffice. What must be established is *effective* protection, because protection in name only is, of course, no protection at all. The starting point for establishing effective protection must thus be the recognition of nationality by the state in question. This was the view reached in *Lay Kon Tji v Minister for Immigration and Ethnic Affairs* (1998) 158 ALR 681, at pp 693-696, where it was held by Finkelstein J that an essential element in the concept of an "effective nationality" is the recognition of the existence of that nationality by the state in question.

Has the appellant an effective second nationality?

[38] It will be recalled that the appellant believes that his mother held French nationality by descent, at the time of his birth in 1944. Her parents had been, he understands, French nationals by descent themselves – a characteristic passed down through two and a half centuries of family residence in Iraq. His mother only lost her French nationality when she renounced it in 1979.

[39] The evidence of the appellant is that his birth was never registered with the French authorities at any time during his minority. It was registered with the Iraqi authorities, predictably, but the French embassy was not informed, nor was any other step taken to inform the French authorities of the appellant's existence.

[40] The Refugee Status Branch found that the appellant is a French national. In reaching that view, it took into account the fact that Article 18 of France's *Code Civil* provides that:

> "*Est français l'enfant dont l'un des parents au moins est français*."
>
> [The child is French, of whom at least one parent is French.]

[41] The appellant does not dispute that his mother was French at the time of his birth. On its face, this might seem determinative.

[42] The matter does not rest there however. For two reasons, any petition by the appellant for recognition as a French national would require steps well beyond 'a mere formality'. The first is that the 'one French parent' rule in Article 18 is subject to the the Article 20-1 requirement that such parental relationship have been established during the child's age of minority. The second is that, in certain circumstances, there is a 50-year limitation on claims. Each requires greater explanation.

A relationship established during the claimant's minority

[43] Article 20-1 of the *Code Civil* provides:

> "*La filiation de l'enfant n'a d'effet sur la nationalité de celui-ci que si elle est établie durant sa minorité."*
>
> [The parentage of a child has effect on his nationality only where it is established during his minority.]

[44] Before the appellant could establish that he has any right to French nationality, he would need to establish that his mother was French, that she was his mother *and* that the relationship between them had been established at some point during the appellant's minority. More than just lip service is paid to this last requirement, as was reinforced on 3 January 2008 by Rachida Dati, the then French Minister of Justice in response to an enquiry in the Senate (recorded in the *Journal Officiel du Sénat* on that date, at p46), when she expressly reiterated:

> "*... quand une personne revendique la nationalité française de ses père ou mère, elle doit justifier, d'une part, de la nationalité de son parent et, d'autre part, d'une filiation à l'égard de ce parent établie pendant sa minorité.*"
>
> [When a person claims the French nationality of his/her father or mother, s/he must prove, on one hand, the nationality of the parent and, on the other hand, a relationship with regard to that parent established during his/her minority.]

[45] These requirements may be amenable to simple proof in some cases, but they do not appear to be so in the case of the appellant, for the reasons which follow.

[46] The sole record of his mother's nationality in the possession of the appellant is a photocopy of her Iraqi certificate of identity, issued in 1979. He cannot point to any other document or record establishing her nationality.

[47] For the appellant to satisfy the French authorities of his entitlement to nationality, he would have to satisfy them that the photocopy of the Iraqi document

is authentic, that the original was authentic *and* that the original was accurate. How he might do this is difficult to determine. Even if authenticity is accepted (which it may not be), the document, created by a foreign state, makes the bare assertion that the appellant's mother's previous nationality was French. Beyond also recording that her parents were French, it does not refer to any source of the information, nor does it justify or explain the (asserted) French nationality of the appellant's maternal grandparents. In probative terms, the certificate of identity is likely to be of limited weight.

[48] It is possible, of course, that the French authorities might accept the document. But it is far from certain.

[49] The difficulty in establishing a right to French nationality through *jus sanguinis* (descent) is noted by Professor Patrick Weil, senior research fellow at the French National Research Centre at the University of Paris, in *How to be French* (originally *Qu'est-ce que qu'un français?*) (Durham and London, 2008). Having noted that nationality by birth on French soil (*jus soli*) requires two generations to be born there, he observes, at p 245:

> "In practice, being French by the double *jus soli* or by marriage or naturalization is immensely advantageous whenever one needs to supply proof of French nationality or to obtain a certificate of nationality. The birth of two generations on French soil can be proved by two birth certificates. Declarations by marriage and naturalizations are officially registered, and even published in the *Journal official*. In contrast, for someone who is a descendant of a French person but was not born in France to a parent born in France, it is not easy to obtain a certificate of nationality; such a person may have to seek a court decision to have his or her status as a French national confirmed."

[50] Consistent with Professor Weil's observation, the *Première Chambre Civile* of the *Cour de Cassation* regularly hears appeals against the refusal to register the recognition of French nationality, including claims in which issues relating to the application of Article 20-1 arise. Recent Article 20-1 examples include *Arrêt no 1199 du 17 Décembre 2010 (10-10.906)*, *Arrêt no 1200 du 17 Décembre 2010 (09-17.242)* and *Arrêt no 1198 du 17 Décembre 2010 (09-13.957)*. Such appeals make it clear that evidence is not simply accepted at face value and, also, that real regard is had to Article 30 of the *Code Civil*, which provides that the burden of proof in matters of French nationality lies on the person whose nationality is in dispute.

[51] The difficulties suffered by *jus sanguinis* claimants born abroad in proving their claims to nationality are widespread. That is evident in the following passage

by Professor Weil, at p 252:

> "French people are thus equal in terms of nationality, in all but one respect: some can provide proof of nationality more easily than others. As Philippe Bernard notes [in '*Le renouvellement de la carte d'identité est devenu une course d'obstacles*', *Le Monde*, 6 February 1996], 'the profound trauma caused to hundreds of thousands of persons suspected of fraud because they were born abroad' when difficulties arise over the attribution of a nationality certificate 'cannot be measured'."

[52] Given the fragility of the evidence, the fixing of the burden of proof on the claimant and the difficulties for persons attempting to establish claims to French nationality by descent when born abroad which are documented by professor Weil, it cannot be said that the acquisition of French nationality by the appellant would be a mere formality.

[53] Because it lends further weight to the degree of difficulty the appellant would encounter, we also address the second issue – that of the loss, in some circumstances, of the right to claim nationality by descent after fifty years.

Loss of right to prove French nationality after fifty years

[54] The *Code Civil* excludes the ability to claim French nationality where the person's ancestors have lived in a foreign country for more than fifty years and either the person or the ancestor through whom nationality is claimed, has not "enjoyed the apparent status of French". See in this regard Article 30-3 of the *Code Civil*, which states:

> "*Lorsqu'un individu réside ou a résidé habituellement à l'étranger, où les ascendants dont il tient par filiation la nationalité sont demeurés fixés pendant plus d'un demi-siècle, cet individu ne sera pas admis à faire la preuve qu'il a, par filiation, la nationalité française si lui-même et celui de ses père et mère qui a été susceptible de la lui transmettre n'ont pas eu la possession d'état de Français.*
>
> *Le tribunal devra dans ce cas constater la perte de la nationalité française, dans les termes de l'article 23-6*."
>
> [Where a person usually resides or resided in a foreign country, in which the ancestors from whom he holds nationality by parentage have settled for more than half a century, that person shall not be allowed to prove that he has French nationality by parentage if he, or the parent who was likely to transmit it to him, have not enjoyed the apparent status of French.
>
> In that event, the court shall have to record the loss of French nationality under Article 23-6.]

[55] Article 30-3 is relevant for two reasons. First, the appellant says that his mother's French ancestors first settled in Iraq some two hundred and fifty years

ago. Second, he cannot sensibly be said to have ever “enjoyed the apparent status of French”, given that he does not speak the French language, has never lived in France or any French territory, does not know the French culture and has never regarded himself as French. Those facts are likely to be significant obstacles to the success of any petition by him for recognition as a French national.

[56] If more need be said on this point, depending on the interpretation of “the apparent status of French” by the *Cour de Cassation*, the appellant may even struggle to establish that his mother had such status. She, too, was born in Iraq and appears never to have lived in France, or to have had any real connection with French culture, language or society.

Conclusion on French nationality

[57] These prerequisites to the ability to establish a claim to French nationality are uncertain of outcome. It cannot be said that he has the effective protection of the French state as a national, or that recognition as such is a mere formality.

[58] It follows that the appellant is not, today, to be regarded as a national of France and the question of any protection obligation which would arise from having the citizenship of that country does not arise.

[59] It remains only to record that, because of the foregoing findings, the fourth issue raised by the Convention, namely whether, without any valid reason based on well-founded fear, the appellant has not availed himself of the protection of a second country of nationality, does not arise.

Conclusion on Claim to Refugee Status

[60] For the foregoing reasons, the appellant has a well-founded fear of being persecuted if returned to Iraq. His claim does not arise against France.

THE CONVENTION AGAINST TORTURE

[61] Section 130(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New

Zealand."

Assessment of the Convention Against Torture Claim

[62] The appellant being recognised as a refugee, it follows that he cannot be deported from New Zealand. This country's *non-refoulement* obligation arises at international law pursuant to Articles 32 and 33 of the Refugee Convention, and is expressly brought within domestic law by section 129(2) of the Act. There are limited exceptions (see section 164 (3)) but they have no application here.

[63] In short, New Zealand has the obligation not to expel the appellant (save on grounds of national security or public order) and, in particular, not to return him to the frontier of any territory where his life or freedom would be threatened for any Convention reason. As a matter of law, the appellant cannot be deported from New Zealand and returned to Iraq. It follows that there are no substantial grounds for believing that he would be in danger of being subjected to torture in Iraq.

[64] The possibility that the appellant's recognition as a refugee might be cancelled or that the exception provisions of section 164(3) may apply at some indeterminate point in the future, leading to a possible re-engagement of the deportation provisions of the Act, is so speculative that it is unnecessary to address it at this time. The Tribunal must determine the appellant's claim on the basis of his present circumstances. He is not presently at risk of being deported from New Zealand and does not require recognition as a protected person under section 130(1) of the Act.

[65] This finding is consistent with the terms of section 137(4) of the Act, which provides:

> "For each claim accepted for consideration, a refugee and protection officer must also determine whether the claimant has the protection of another country or has been recognised as a refugee by another country and can be received back and protected there without risk of being returned to a country where he or she would be at risk of circumstances that would give rise to grounds for his or her recognition as a refugee or a protected person in New Zealand."

[66] The reality is that the appellant has the protection of another country (New Zealand) and does not require recognition as a protected person.

Conclusion on Claim under Convention Against Torture

[67] Because the appellant is safe from being returned to Iraq, there are no substantial grounds for believing that he is in danger of being subjected to torture there. He is not a person to whom New Zealand owes protection obligations under the Convention Against Torture and section 130 of the Act.

[68] For the foregoing reasons, the appellant is not a protected person within the meaning of the Convention Against Torture and section 130 of the Act.

THE ICCPR

[69] Section 131(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

Assessment of the ICCPR Claim

[70] The same analysis applies to this limb of the claim. The appellant being recognised as a refugee, he cannot be deported from New Zealand. The *non-refoulement* obligation arises at international law pursuant to Articles 32 and 33 of the Refugee Convention, and is brought within this country's domestic law by section 164 of the Act. The limited exceptions in section 164 (3) and (4) have no application.

[71] Because the appellant is safe from being returned to Iraq, there are no substantial grounds for believing that he is in danger of being subjected to cruel treatment. He is not a person to whom New Zealand owes protection obligations under the ICCPR and section 131 of the Act.

Conclusion on Claim under ICCPR

[72] For the foregoing reasons, the appellant is not a protected person within the meaning of the ICCPR and section 131 of the Act.

CONCLUSION

[73] For the foregoing reasons, the Tribunal finds that the appellant:

(a) is a refugee within the meaning of the Refugee Convention;

(b) is not a protected person within the meaning of the Convention Against Torture; and

(c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[74] The appellant is recognised as a refugee. The appeal is allowed.

C M Treadwell
C M Treadwell
Member

Certified to be the Research Copy released for publication.

C M Treadwell
Member