REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76077

AT AUCKLAND

Before:	A N Molloy (Member)
Counsel for the Appellant:	D Mansouri-Rad
Appearing for the Department of Labour:	No Appearance
Dates of Hearing:	11 & 13 September and 17 & 19 October 2007
Date of Decision:	19 May 2009

DECISION

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[1] The appellant (the wife) and her husband (the husband) appeal against decisions of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining their applications for refugee status.

[2] The wife is stateless. Her country of former habitual residence is Israel. She claims that she was a citizen of Israel; and that the state arbitrarily stripped her of her citizenship in the late 1990s. The wife claims that the ongoing consequences of that action will give rise to serious harm tantamount to being persecuted if she were to return to Israel. She claims that her predicament arises because she is a Christian.

[3] The husband is a citizen of the State of Israel. He claims that he is at risk of being persecuted in that country because of his conscientious objection to completing compulsory military service and because he is Christian. His appeal is related to that of the wife but their backgrounds and the basis of their claims are not identical. Accordingly his appeal is dealt with in a separate decision of the Authority, *Refugee Appeal No 76078* (18 May 2009). That decision should be read alongside this appeal. Both appeals were heard simultaneously and it was

agreed that all of the evidence heard would be taken into account in connection with both appeals. The Authority regrets the delay attendant upon publishing these decisions.

[4] The wife's appeal turns upon whether her account is well-founded. This will be assessed following the summary of her accounts which appears below.

THE APPELLANT'S CASE

THE WIFE'S ACCOUNT

[5] The wife was born during the late 1970s in what is now the independent state of Tajikistan, but which was then part of the USSR. Her parents separated during the early 1980s and the wife left the Soviet Union with her father, step-mother and siblings in around 1990. The wife was not told the specific reason why the family left, but recalls living in "constant fear" in Tajikistan because of her Jewish ancestry.

[6] The family travelled to Israel where the wife and her siblings were provided with Israeli passports. Before long, the wife's father took the family to South Africa, where they remained from 1991 until 1993, when the peripatetic father decided to come to New Zealand.

[7] He came alone, leaving his children in South Africa with their step-mother. However she followed the father to New Zealand the following year, leaving the wife and her siblings to fend for themselves in South Africa. The wife's father subsequently moved to Australia.

[8] The wife's older siblings sold what possessions they had to pay for tickets to return to Israel in about 1994. They were met on arrival by a relative of their father, AA. She had also moved to Israel from the USSR in the early 1990s.

[9] AA and her family lived in X, a small community of settlers, many of whom were Christians or "Messianic Jews". The wife and her siblings were given a small house within that community and the wife began to attend church services. She gradually came to regard herself as a Christian.

[10] The wife's problems began in 1997. One morning as she was getting ready for school, her older sister told her that the family's Israeli citizenship had been taken from them. The wife did not really understand what her sister meant,

however she recalls attending a community meeting that evening. The wife and her family members did not know what to do.

[11] During that period the wife and her family members were served with "expulsion orders" requiring them to leave Israel. The wife's older sister, BB and one of her brothers, made their way to the United States. BB was granted asylum in 1999. The wife is not sure whether her brother ever applied for asylum but she said that both are now US citizens.

[12] The wife's Israeli passport had expired in 1996, when she was still at school. It had not occurred to her to renew it at the time, and it had not been renewed on her behalf by her older siblings. Once she received the expulsion order she was unable to renew the passport. Her older siblings and other members of the community were taking whatever steps they could to salvage the situation. The wife does not know why she was not subsequently deported.

[13] In 1998, the wife tried to obtain an official identification document so that she could work legally. She took her expired Israeli passport to the Ministry of Internal Affairs. After referring to the wife's records the official asked the wife if she was Christian. When the wife confirmed that she was, the official shredded the expired passport.

[14] The wife was distraught. She had to support herself financially yet without identification documents she knew that she would find it difficult to work. She wrote to the Ministry of the Interior almost immediately but she received no response to that or any of her many subsequent letters.

[15] Despite the lack of documentation the wife did manage to obtain employment, sometimes for reasonably long periods of time. She obtained agricultural work and later completed a short secretarial course which helped her to secure work at a financial institution between 2000 and 2001. While working there she had to fend off enquiries about her identification documents. She was eventually dismissed at the beginning of 2001.

[16] Throughout this period the wife hoped to join BB in the United States. Although she was finally issued with a travel document (as distinct from a passport) through the Ministry of Internal Affairs in Jerusalem in 2002, the wife's hopes of joining her sister came to nothing.

[17] The wife subsequently applied for many other jobs. She found clerical work which lasted more than two years until mid to late 2003. However she eventually

encountered the same problem which led to her dismissal from the bank; her lack of documentation and the fact that she had no legal right to work.

[18] The wife met the husband in around 2002. He too had emigrated to Israel from the former USSR with his family. Like the wife, the husband had also been granted Israeli citizenship soon after arriving in Israel. Unlike her, he was not at that time religious and had not then experienced difficulties.

[19] The husband moved in with the wife in her flat in X and they decided to marry. They were not permitted to do so in a Christian ceremony in Israel, and had to travel to Cyprus for that purpose later in 2003. The nature of her travel document created complications for the wife and husband in Cyprus, where the wife was nearly denied entry.

[20] After marrying, the wife returned to the Ministry of the Interior to apply for citizenship again on the basis of her marriage to an Israeli citizen. She was dealt with by the same woman who had issued her with a travel document. That woman said that she had issued it so that the wife would leave Israel permanently, and expressed distaste that she had not done so. The woman refused to accept the wife's completed application for citizenship and sent the wife and the husband away under a torrent of verbal abuse. According to the husband, they were usually ejected from such offices under a stream of racist invective.

[21] The wife and the husband sent numerous letters and faxes to various government departments, hoping to restore her position as an Israeli national. They also tried to find a lawyer who would help, without success. The wife said that her aunts and siblings had also approached various organisations over a period of time, again without success. They were typically referred to the Ministry of the Interior, which refused to assist.

[22] The wife volunteered for alternative military service more than once in the hope that she would demonstrate sufficient loyalty to the state that she might recover her citizenship. Her overtures were always rejected. On the last occasion, the wife was shown her details on the computer screen. They appeared in red. She does not understand the significance of this, but claims that she is on a "black list" of some sort. In March 2004 she received a letter from her local army base acknowledging receipt of her application. It stated that "Due to your civil status, you are not obliged to and are exempt from doing military service".

[23] The wife eventually obtained another job which lasted about eight months.

She was then unemployed for almost two years from the end of 2004 until mid-2006, when she again obtained work for a company near Tel Aviv.

[24] In early 2004 the husband was summoned to perform his compulsory military service. The wife said that her husband was fundamentally opposed to serving in the military because of his personal beliefs. However he was not permitted to perform alternative service. He eventually reported for service. He was poorly treated because of his Christianity and because of his vocal opposition to the actions of the Israeli military and the Israeli occupied territories. Eventually the husband secured temporary release from the army after convincing a psychiatrist that he should be released. He signed a document agreeing to resume his service after two years.

Departure from Israel and applications for refugee status

[25] In early 2006 the wife and her husband decided to try to leave Israel, after visiting the Ministry of Internal Affairs in the hope of restoring the wife's status in Israel. Not only were they unsuccessful in their attempt to do so, the husband was told by the Ministry that his own citizenship could be taken from him because he is a Christian. They decided to leave Israel.

[26] The wife managed to have her travel document extended by a different office of the Ministry of the Interior in Afulah, rather than approach the office in Jerusalem where she had met with so many difficulties. It was originally issued for about 10 months, however the wife was subsequently able to have that period extended to two years. It has since expired, although it is renewable until 2011, when she will have to apply for a new document.

[27] The wife had abandoned any hope of joining her siblings in the US and has been unable to join her brother and her father in Australia. She and the husband obtained visas to enter New Zealand. They claimed refugee status shortly after their arrival in December 2006.

[28] After interviewing the wife and the husband in March 2007 a refugee status officer of the RSB issued decisions dated 12 June 2007 declining the applications for refugee status lodged by the wife and the husband. It is from those decisions that they appeal.

Summary of the wife's claims

[29] The wife claims that she has in the past, and will in the future, experienced discrimination on the grounds of her religion. Her citizenship was arbitrarily stripped from her, leading to a loss of significant rights attached to nationality.

[30] The wife has been discriminated against as a Christian. She has been unable to work legally, despite her ability to obtain work illegally from time to time; she has been unable to obtain state provided medical care; she had had no entitlement for social welfare and will have no right to it in the future. Her ability to leave and return to Israel has been at the whim of the Israeli state and while she has never been deported, nor does she have any entitlement to or guarantee of being able to obtain a further travel document when her existing document expires. All of her attempts to rationalise her status have been dismissed in perfunctory manner. The wife says that she has been deprived of a nationality because she has no meaningful prospect of acceptance by her country of birth or anywhere else. She is unable to plan for her future with her husband and she is unable to plan to start a family.

[31] She claims that the consequences of that act are ongoing and that she will continue to experience serious harm tantamount to being persecuted if she is to return to Israel.

WITNESSES

[32] Several witnesses gave evidence on behalf of the wife and her husband. Their evidence is summarised below.

The husband

[33] The husband's evidence is set out in more detail in *Refugee Appeal No 76078* (18 May 2009). In summary he stated that he met the wife in around 2003. He corroborated her claim with respect to her membership of the Christian community in X, her unsuccessful attempts to regain her Israeli citizenship and the difficulties she experienced with regard to employment and in general. His evidence was broadly consistent with the wife's account, at least from the time they met in around 2003.

Pastor DD

[34] Pastor DD has been the pastor of an Auckland Church since the early 1990s. He met the wife and the husband when they began attending his services in early 2007. They have visited Pastor DD at his home and have attended services at his Church. He does not doubt the sincerity of their claim to be Christians, although he said that the extent of their knowledge was rudimentary. He said that language barriers made an independent assessment of their knowledge difficult.

[35] Pastor DD made general observations about his impressions of Christians in Israel based upon two brief trips in the 1970s and 1980s.

Evidence of EE

[36] EE met the wife and the husband in New Zealand and subsequently learned that they were attending the same church that he attends. EE said that he discussed the question of faith with the wife and the husband. Those discussions had been limited because of language difficulties, but he did not doubt their sincerity.

[37] While EE recounted aspects of the accounts of the wife and the husband which had been relayed to him, he had no first hand knowledge of any aspects of their lives prior to their arrival in New Zealand.

Statement of FF

[38] The wife produced a statement dated 24 July 2007 from her brother, FF. He was granted refugee status in Australia by the Refugee Review Tribunal (RRT) some years earlier. A copy of the RRT decision is on the Immigration New Zealand (INZ) file.

[39] The account which FF related to the RRT is similar to the wife's account. FF claimed that he emigrated from Russia with his family in the late 1980s or early 1990s. He obtained Israeli citizenship and an Israeli passport when he arrived in Israel with his family in 1991. These were taken from him in 1997 after the Israeli authorities learned that he is Christian. He was granted temporary residence in Israel for periods of up to two years, however most of his official documents were confiscated. He was told to leave Israel, however he was not provided with a travel document which would enable him to do so until earlier this decade. He used it to travel to Australia the same year.

[40] FF's statement broadly corroborates the wife's account. He confirms that the family's problems began during the mid-1990s when a representative of the Israeli Ministry of the Interior questioned his aunt and some of his older siblings. When it became apparent that the family had converted to Christianity they received "expulsion orders".

[41] He confirmed that his older brother and sister left for the United States almost immediately. One sister remained with the younger siblings, including him and the wife. They endured several years of hardship due to the difficulty in obtaining work or accommodation, and in lack of access to medical care.

Letter from husband's mother

[42] The INZ file contained a letter from the husband's mother. Its contents related in the main to the husband's compulsory military service. It corroborates the claim that the husband and wife married and that they were Christian.

MATERIAL PROVIDED

[43] Mr Mansouri-Rad relies upon submissions which were made to the RSB on behalf of the wife and the husband. He also provided the Authority with a memorandum of submissions dated 10 September 2007, under cover of which he provided statements by the husband, wife and witnesses, together with items of

country information.

[44] At the end of the first day of the hearing, Mr Mansouri-Rad was asked to consider various matters, which he addressed in additional submissions provided under cover of a letter dated 17 October 2007, prior to the resumption of the appeal interview on 19 October. Mr Mansouri-Rad also forwarded various other documents. These include an extract from the Israeli military service law, a translation of the husband's Israeli driver's licence, translations of other documents which appear on the INZ file and items of country information.

[45] At the beginning of the third day of the appeal interview counsel provided the Authority with the original translation of the deportation order served upon the wife's sister BB in 1997, a copy of which had been forwarded under cover of the letter dated 17 October 2007. Towards the end of the hearing, counsel provided the Authority with a DVD containing various items of country information downloaded from the Internet and from other sources by the husband.

[46] On 15 November 2007 counsel forwarded additional documents, including copies of two internet articles with respect to the Israeli military, a copy of an extract from the expired Israeli passport of BB, and an article relating to an arson attack on a church in Jerusalem.

[47] On 12 December 2007 counsel forwarded the Israeli passport issued to FF, who had forwarded this from Australia, where he now lives.

[48] Counsel wrote to the Authority on 5 August 2008, enclosing copies of three articles relating to Messianic Jews in Israel.

[49] The Authority wrote to Mr Mansouri-Rad on 2 October 2008, enclosing a copy of *Refugee Appeal No 75995* (31 October 2007), and inviting counsel to comment upon that and to provide any additional country information which may have come to light since the appeal hearing.

[50] After obtaining an extension of time Mr Mansouri-Rad replied under cover of a letter dated 18 November 2008. Accompanying that letter was a memorandum of further submissions together with several items of country information and a supplementary statement by the husband.

[51] Mr Mansouri-Rad wrote to the Authority again on 15 January, 20 January, 26 March and 27 April 2009, enclosing further items of country information.

[52] All of this material has been considered by the Authority.

THE ISSUES

[53] 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."

[54] In terms of *Refugee Appeal No 70074/96* (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?

ASSESSMENT OF THE WIFE'S CASE

EVALUATION OF THE WIFE'S CREDIBILITY

[55] Before addressing the principal issues identified, it is necessary for the Authority to assess the credibility of the evidence produced in support of the wife's appeal.

[56] The wife's testimony was prone to hyperbole in parts. For example she claimed that the travel document issued to her in 2002 was provided on condition that she left the country and did not return. She claimed that immigration officers were astonished to find that she had used it to re-enter from Cyprus. However the document, which has since been renewed, contains an express right of re-entry to Israel. In addition, she claims that the Israeli authorities could kill her if she were to return to Israel. However that claim is without basis either in the country information available or indeed in the account of her life in Israel before she departed.

[57] Despite those reservations, the wife's testimony was in general spontaneous and reasonably consistent with past accounts she has given. Of

particular significance is the fact that key aspects of her account are supported either by documentary evidence emanating from a wide range of sources or by country information with which they are consistent. In all the circumstances the Authority finds that it is appropriate to afford the wife the benefit of any doubt, and accordingly her account is accepted as credible insofar as it relates to her own predicament.

Immigration from USSR and obtaining Israeli citizenship

[58] The wife's claim to have been an Israeli citizen of Soviet origin is supported by several different documents. She produced a translation of a birth certificate showing that she was born in Tajikistan, and there is a record on the INZ file that her father was "Russian and Israeli". She also provided a copy of the Israeli passport issued in the name of her sister BB. It was extended in South Africa and then again in Israel. Then, following the conclusion of the appeal hearing the wife's brother FF forwarded his (expired) Israeli passport to the Authority.

[59] Accordingly, while the wife is unable to produce an Israeli passport in her own name, there is no reason to doubt her claim that she too was issued with an Israeli passport when she arrived in Israel in around 1991, given that her father, sister and brother all possessed such passports at some point in the past.

Stripping of citizenship

[60] There is also evidence to support her claim that her family members were stripped of Israeli citizenship during the 1990s. A copy of the "Deportation Order" served upon BB also appears on the INZ file. The name and serial number in the Deportation Order match those in BB's passport and the surname which appears in the sister's passport and Deportation Order matches that of the wife. In addition, the INZ file contains a copy of a letter from the US Department of Justice verifying the grant of asylum in the United States to BB. It was issued in 1999 and is endorsed with a stamp which refers to BB's country of origin as "Israel".

[61] The wife's brother has also claimed that he was stripped of his citizenship. By way of verification the Authority has been provided with his expired Israeli passport. This can be read together with the RRT decision granting him refugee status, which records that FF entered Australia on a travel document which was issued by the Israeli authorities but which was not an Israeli passport.

[62] For her part, it is clear that the wife is no longer entitled to an Israeli

passport. In 2002 she was issued with an Israeli travel document which expressly states on its front jacket that it does "not constitute an attestation of citizenship". That can be juxtaposed against the husband's current Israeli passport which expressly states that it is an indication of citizenship. A similar statement appeared upon the expired passport issued to FF. To underline the point, the wife's travel document describes her as "stateless".

[63] With respect to her claim that her citizenship was stripped (and her right to a passport lost), the wife provided country information confirming that the Israeli authorities targeted a community of Christians in X during the mid-1990s.

[64] The problems experienced from time to time by the Messianic Jewish community in Israel are referred to generally within the United States Department of State *International Religious Freedom Report: Israel and the Occupied Territories* (2005). It refers to "media sources" that indicate that the number of Messianic Jews (described as considering themselves Jewish but believing that Jesus Christ is the Messiah) in Israel had grown rapidly over the previous decade, particularly among the Russian immigrant community.

[65] An article by Yossi Klein Halevi, "Rejected" *The Jerusalem Report* (21 August 1997), refers to the existence of a settlement in X which comprised mostly Russian emigrants who came to Israel in the early 1990s and confirms that the Ministry of the Interior arbitrarily labelled its inhabitants members of a Christian sect, before revoking their citizenship.

[66] Another more recent report from the Canadian Immigration and Refugee Board, Research Directorate ISR37890.E (2 October 2001) confirmed that "… the Israeli passports of some Messianic Jews have been confiscated or not renewed …".

[67] The wife has supported her claim that she lived in X by providing the Authority with a copy of a letter from the Israeli Interior Ministry which was addressed to the wife at an address in X. In addition, the husband's driver's licence indicates that he lived in X.

Conversion to Christianity

[68] The wife's claim to be a practising Christian is consistent with the evidence relating to her brother, FF. It is also supported by DD, whose church community the wife and the husband have joined in Auckland. He has supplied additional

correspondence to the Authority after the conclusion of the hearing.

[69] The wife claimed that she and the husband had to travel to Cyprus to marry because they could not marry as Christians in Israel. Their respective travel documents confirm that they went to Cyprus for two days and their marriage certificate was issued in Cyprus.

[70] Their claim is also consistent with country information confirming that many Israelis go abroad to marry, including to Cyprus; Immigration and Refugee Board of Canada, *Israel: Whether Russians, who immigrated to Israel under the Law of Return, are being prohibited from marrying under rabbinical law; treatment of their children*, 25 October 2000. ISR35453.E. . The reasons why they do so are referred to in a report of the Association for Civil Rights in Israel *Shadow Report to the United Nations Committee for the Elimination of all forms of Racial Discrimination (CERD)* January 2006, (the 2006 ACRI report). It states that "hundreds of thousands" of people cannot marry in Israel for a variety of reasons (p 33), including the fact that Israeli Law does not permit civil marriage, and that Orthodox rabbis, who have a monopoly on marrying Jews in Israel, will not perform mixed marriages.

<u>Attempts to recover citizenship</u>

[71] When asked what she had done to retrieve her Israeli citizenship since it was taken from her in 1997, the wife said she had done everything possible. She claimed that she and the husband had made several attempts to seek assistance from government departments and agencies both in person and in writing. She said that she received no response to her letters and claimed that any approach made in person was met with hostility and aggression.

[72] The wife provided country information which is consistent with her claim. For example a report prepared by the Association for Civil Rights in Israel *Discriminatory Treatment of Non-Jews by the Ministry of the Interior* (2004) (the 2004 ACRI report) refers to:

> "…a series of bureaucratic measures used by Ministry of the Interior clerks to break the spirit of the applicants requesting their services: citizenship and residency are routinely revoked without due process and with no right of appeal; applications submitted to the Ministry are not dealt with for many years; applicants are repeatedly asked to produce numerous and strange documents, some of which are impossible to find … and numerous other issues."

[73] In addition, the Authority has a copy of a letter from the Israeli military, together with an English translation, which confirms that the wife is exempt from military service "Due to your civil status". This is consistent with her claim that she attempted to enlist to perform alternative military service in order to curry favour with the state. The INZ file also contains a copy of a letter written by the wife's uncle in connection with applications for citizenship in connection with himself and his family. The letter bears a date in 2003 and refers to the family's ongoing attempts to obtain citizenship for some years.

SUMMARY OF FACTUAL FINDINGS

[74] In short, it is accepted that the wife was born in what is now Tajikistan and which was formerly part of the USSR. She moved to Israel with her family during the early 1990s. They were granted Israeli citizenship and they were issued with Israeli passports.

[75] It is also accepted that circumstances conspired against the wife in that she was left in a foreign country at a young age with her siblings but without the support of parents. Being young and inexperienced, it did not occur to her to renew her Israeli passport before it expired. The Authority accepts that the wife lived in X for some years (latterly with her husband) and accepts that she was a

member of the Christian community there. She was then among the subjects of an initiative which targeted her small Christian community, and her status as an Israeli citizen was unilaterally stripped from her in the late 1990s.

[76] The Authority finds that the wife has made several attempts to recover her Israeli citizenship, and accepts her testimony that she has been met at every turn with a lack of cooperation and overt obstruction by bureaucracy intent upon preventing her from doing so.

[77] The Authority accepts that the wife was stripped of her citizenship in part for reasons of her Christianity, and that she has been prevented from pursuing any meaningful remedy for the same reason. It finds that this has severely curtailed her ability to earn a living, it has qualified the nature of her ability to leave and return to Israel; it has deprived her of the ability to vote, has undermined her ability to take part in civic affairs and her ability to access the highest attainable standard of health or the benefit of social welfare available to citizens of Israel.

[78] The wife married the husband in Cyprus in the early part of this decade. She has been issued with an Israeli travel document (not a passport) which she was able to use to return to Israel. That travel document is capable of being renewed until 2011. In the absence of any submission to the contrary from counsel the Authority finds that the wife has a legal right to return to Israel now, and that she can return there as a matter of fact.

[79] It is against that factual background that the wife's claim is to be assessed.

THE WIFE'S "COUNTRY OF FORMER HABITUAL RESIDENCE"

[80] The wife's predicament arises as a result of the Israeli government's act of arbitrarily stripping her of her Israeli citizenship. She was unable to fall back upon the nationality which she had acquired by birth because by the time she lost her Israeli citizenship the Soviet Union no longer existed. She did not have (and has not laid claim to) the citizenship of the Russian Federation nor the Republic of Tajikistan, neither of which existed as independent states at the time the wife arrived in Israel in 1991. The wife was rendered stateless in around 1997. She remains stateless as at the date of this decision.

[81] The wife is therefore a person under Article 1A(2) of the Refugee Convention "… who, not having a nationality … is outside the country of [her] former habitual residence". The principal issues identified must therefore first be

addressed with respect to Israel, which the Authority finds to be her country of former habitual residence.

OBJECTIVELY, ON THE FACTS AS FOUND, IS THERE A REAL CHANCE OF THE WIFE BEING PERSECUTED IF RETURNED TO ISRAEL

[82] For the purposes of refugee determination, "being persecuted" has been described as the sustained or systemic violation of basic or core human rights, such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125]. Put another way, it has been expressed as comprising serious harm, plus the failure of state protection; *Refugee Appeal No 71427* (16 August 2000).

[83] The Authority has consistently adopted the decision in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted will be well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. This entails an objective assessment as to whether there is a real or substantial basis for the anticipation of being persecuted. Mere speculation will not suffice.

[84] Counsel submitted that deprivation of nationality is in itself an act of persecution. For reasons which are to be set out below, that is simply too broad a submission, and it is rejected.

[85] It would also be misleading to focus solely on the now historic act of the Israeli government in removing the wife's nationality. That took place more than a decade ago. The purpose of the Refugee Convention is not to acknowledge past difficulties, but to provide protection against prospective harm. Accordingly the Authority's focus is upon whether there is a real chance that, if the wife were to return to Israel today, she will face serious harm for a convention reason. Clearly the wife's past experience will be relevant in the Authority's assessment.

[86] This requires some examination of the nature of citizenship or nationality, (terms which are often used interchangeably), the manner in which nationality may be removed, and the consequences of losing one's nationality.

The nature of citizenship/nationality

[87] As a starting point, general assistance can be gleaned from two documents

published by UNHCR. The first is the UN High Commissioner for Refugees Information and Accession Package: *The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness* (First published in June 1996; Revised in January 1999) (the UNHCR Information Package). That paper referred to the finding of U.S. Supreme Court Chief Justice Earl Warren in *Trop v Dulles*, 356 U.S. 86 (1958) (USSC), when he effectively described the concept of citizenship as "the right to have rights" (at 102). Using that proposition as its starting point the UNHCR Information Package notes that citizenship:

> "… is a necessary precursor to access to other rights. Nationality provides the legal connection between an individual and a State which serves as a basis for certain rights, including the State's right to grant diplomatic protection and representation of the individual on the international level." [p 4]

[88] This issue is enlarged upon in the second UNHCR paper; *Statelessness in the Canadian Context. A Discussion Paper* (July 2003) (the UNHCR Canadian discussion paper), which states that:

> "Nationality is the prerequisite for the enjoyment of other rights, including such basic ones as the right to remain in one's country and to re-enter from abroad, and, in democratic countries, the right to vote and to participate fully in public affairs. As well, nationality is the basis on which a state extends protection to individuals in other states, through the mechanism of consular assistance. Importantly, nationality is also the main way for individuals to invoke their universal human rights, as the international human rights system is premised on state responsibility for the rights of nationals, with a more limited set of rights for "aliens." (p 4).

[89] The UNHCR Canadian discussion paper also recited the observations about the nature of nationality contained in Nottebohm (*Liechtenstein v Guatemala*); second phase, International Court of Justice (ICJ) 6 April 1955, to the effect that it is:

> "… a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties."

[90] The ICJ also held in that case that:

> "Naturalization is not a matter to be taken lightly … It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him."

<u>There is no "right" to nationality</u>

[91] At first sight Article 15 of the 1948 *Universal Declaration of Human Rights*

(UDHR) may seem to lend support to counsel's submission that deprivation of nationality amounts in itself to "being persecuted". It provides that:

> "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality."

[92] However the "right" referred to in Article 15 has been described as "aspirational" rather than binding on states**.** The Authority acknowledged this in *Refugee Appeal No 72635* (6 September 2002) (at para [85]) in which it undertook a comprehensive examination of the concept of nationality and examined why under international law states are largely to determine for themselves upon whom to confer nationality. The Authority observed that Article 15 is not replicated in the International Covenant on Civil and Political Rights 1966 (ICCPR) and described questions of nationality or citizenship as being "principally within the jurisdiction of a state" (at [70]). It continued:

> "Being without an effective nationality does not necessarily signify persecution under the terms of the Refugee Convention. The definition of a stateless person was, in fact, chosen with the intent of excluding the question whether the person has faced persecution, as there are conflicts of laws issues which might result in statelessness without any wilful act of neglect, discrimination or violation on the part of the State." (at para [81]) [emphasis added].

[93] In short, under international law it is for each state to determine by operation of domestic law who its citizens are; the UNHCR Information Package (p1).

[94] Thus the fact that an individual is stateless does not in itself mean that he or she is entitled to recognition as a refugee under the Refugee Convention. This is specifically alluded to in the Preamble to the 1954 Convention relating to the Status of Stateless Persons, which provides that "there are many stateless persons who are not covered by [the Refugee] Convention."

Withdrawal of nationality *may* give rise to being persecuted

[95] Conversely, while it is apparent that statelessness does not in itself equate with being persecuted, it is also clear that "… stripping a person of nationality and of the right to return may constitute persecution"; *Refugee Appeal No 72635* (6 September 2002) [134].

[96] That appeal concerned a man born in Kuwait who claimed (and was found) to be stateless. He was unable to obtain citizenship by virtue of the operation of the Kuwaiti Citizenship law, which bestowed citizenship according to bloodline rather than according to place of birth. The Authority found that the relevant law was of universal application in Kuwait and was not applied in a discriminatory fashion.

[97] However, the predicament of the wife in the current appeal is entirely different. In this appeal the Authority has found that, after granting the wife citizenship in around 1991, the Israeli state arbitrarily stripped it from her some years later because of her religious affiliation. It is necessary to determine whether the ongoing consequences of that act amount to serious harm tantamount to being persecuted in the particular circumstances of the wife's appeal.

Whether withdrawal of the wife's nationality gives rise to being persecuted

[98] In *Refugee Appeal No 72635*, the Authority noted that a stateless person will suffer "considerable hardship" arising out of that fact (at [189]) and is at "serious disadvantage and difficulty on every front" at domestic and international law, "from international movement, sojourn and settlement to inferior status in domestic law" (at [111]).

[99] The Canadian discussion paper, which describes the impact of statelessness as "dramatic and debilitating" (p2), cites an extract from *Trop v Dulles* (see[87] above) in which he characterised the situation of the stateless person this way:

> "His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless." (at 101-102)

[100] The wife has identified various consequences which she has already experienced. These include impediments to her freedom of religion, to her ability to earn a living; to her ability to leave and return to Israel; to her ability to vote and

to take part in civic affairs and to her ability to access the highest attainable standard of health. Many of these rights are afforded by international conventions, such as Articles 12, 18, 23, 25, 26 and 27 of the ICCPR or Articles 6 and 9 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

[101] Initially the wife lived in Israel by virtue of choices made for her by others. However, by the time her Israeli citizenship was taken from her, the wife had a real social attachment to that state. It was her only home, to the exclusion of all others. She wanted to live there; she wanted to work there, to pay taxes there and to call upon the benefits of social welfare there should she need to do so. She wished to have the freedom to leave in the knowledge that she would be free to return. She offered to perform military service there, she wanted to marry there and she wished to found her family there.

[102] All of these aspirations are within the scope of any citizen's desire. The consequence of making her a non-citizen was to withdraw her ability to do these things, or to make their realisation subject to the whim of the state. That, presumably, was the point of doing so.

[103] As already alluded to, there is no absolute right to nationality. However, while it is one thing for a state to withhold nationality, it is a quite different matter when a state, having conferred nationality upon a person, then withdraws it by what in the case of the wife might be characterised, (adopting the Authority's terminology in *Refugee Appeal No 72635* (6 September 2002) at [81]) as a "wilful act of neglect, discrimination or violation".

[104] The act of stripping the wife of her citizenship was contrary to the spirit and purpose of the Statelessness Convention (to which Israel is a signatory). Far from arbitrarily rendering individuals stateless, the Statelessness Convention provides that contracting states shall:

> "… as far as possible facilitate the assimilation and naturalisation of stateless persons. The State shall in particular make every effort to expedite naturalisation proceedings including reduction of charges and costs wherever possible." (Paragraph g).

[105] Even if the "right" to a nationality referred to in the UDHR is aspirational rather than absolute, the reasons why this is to be aspired to are bound up in the fundamental importance of the rights and protection which attach to it. Nationality (or citizenship) is a matter of "profound significance" as characterised in the Nottebohm case (see [90] above), and the consequences of being stripped of citizenship amounts, in this case, to serious harm.

[106] If the rights attendant upon nationality were inconsequential, it is unlikely that the state would have taken the trouble to remove them arbitrarily and without recourse to natural justice. Conversely, if removing those rights is of sufficient importance that the State sees a fundamental benefit in doing so, then the removal of those rights and the specific consequences of doing so, can be so significantly discriminatory as to amount to serious harm tantamount to being persecuted. The Authority finds this to be the case in respect of the wife.

[107] As articulated in the UNHCR Information Package:

> "While the extension of certain rights generally associated with nationality, such as voting, employment, or ownership of property, may be one means of normalising the status of non-citizens on a State's territory, there is no replacement for nationality itself." (p4).

<u>The harm is prospective</u>

[108] The Authority has found, for the purposes of this appeal, that the wife and her husband have made several attempts to recover her citizenship, and that these have invariably been met with obstruction. This is in keeping with country information, which confirms that such practices are not uncommon. For example the 2004 ACRI report refers to the practice of the Interior Ministry's population authority, which prevents non-Jews, particularly spouses of Israeli citizens, from obtaining resident status by subjecting them to unfair and arbitrary requirements. Such practices were also referred to in the United States Department of State *Country Reports for Human Rights Practices for 2006: Israel* (March 6 2007) (the 2006 DOS report).

[109] The 2006 DOS report also refers to partly successful action taken by ACRI in the Supreme Court, which ordered the Interior Ministry to process residency applications for common-law spouses of citizens, without requiring them to leave the country. However occasional victories in the Israeli Courts do not appear to be reflected in a fundamental change of policy or practice across the administration. One comparatively recent article provided by counsel suggests that Israeli citizens including evangelical Christians and Messianic Jews have been summoned to the offices of the Ministry of the Interior to review their civil status, and that citizenship has in some cases been revoked: Michael Decker "Messianic legal analysis" (January 1 2008). While the article is general and non-specific it is at least consistent with the wife's assertion that any further attempts to recover her citizenship would not be dealt with sympathetically.

[110] The impact upon the wife of the loss of her citizenship is exacerbated by the fact that, having been awarded Israeli citizenship in 1991 she was effectively led to forgo the citizenship of the USSR, her nation of birth. It also became difficult, if not practically impossible, for her to acquire the citizenship of either Russia or Tajikistan, to which she may have been entitled had the state of Israel never given her citizenship in the first place. This will be explored further below.

[111] In conclusion, the Authority is satisfied that there is no clear process by which the wife can recover her Israeli citizenship if she were to return to Israel. There is a real chance that she would be deprived of any meaningful access to a domestic remedy to address the wrong done to her. The serious harm experienced by the wife is not confined to the moment when her citizenship was lost. The impact of that action endures. The prospective consequences of being rendered stateless amount to serious harm in the case of the wife.

The harm is "for reason of" a Convention ground

[112] The Authority has already observed that statelessness can arise because citizenship is withdrawn or withheld on the basis of discriminatory practices: *Refugee Appeal No 72635* (6 September 2002) [80]. The Authority is satisfied that the arbitrary revocation of the wife's citizenship was for reason of her Christianity and specifically because she is a Messianic Jew. The Authority is equally satisfied on all of the evidence that the serious harm to which she would continue to be exposed if she were to return to Israel is for the same reason and is accordingly for a convention ground, namely religion.

CONCLUSION ON THE PRINCIPAL ISSUES

[113] The Authority finds that objectively, on the facts found, there is a real chance of the wife being persecuted if she were to return to Israel. Such persecution would be for reason of her religion.

WHETHER THE WIFE IS OWED A DUTY OF PROTECTION BY ANY OTHER STATE

[114] Consideration of New Zealand's obligation to offer protection under the Refugee Convention does not end there. Article 1A(2) of the Refugee Convention has been interpreted such that if the wife is able to obtain the nationality of more than one country, she must demonstrate a well-founded fear of being persecuted

for a Convention reason in respect of each country of nationality in order to be recognised as a Convention refugee. This is because the object and purpose of the Refugee Convention is to provide a form of surrogate protection where home state or states of the putative refugee is or are unable or unwilling to do so; *Canada (Attorney General) v Ward* [1990] 2 S.C.R 667, 709; per La Forest J:

> "International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see The Law of Refugee Status (1991), at p135."

[115] This principle of surrogacy was recognised by the New Zealand Court of Appeal in *Butler* v *Attorney General* [1999] NZAR 205, 216-217.

> "Central to the definition of "refugee" is the basic concept of protection – the protection accorded (or not) by the country of nationality or, for those who are stateless, the country of habitual residence. If there is a real chance that those countries will not provide protection, the world community is to provide surrogate protection either through other countries or through international bodies."

[116] However, the principle of surrogacy is not applied in order to place gratuitous impediments in the way of a putative refugee. Acquisition of nationality is not necessarily straightforward, and accordingly the Authority must be satisfied that the wife is able to obtain the nationality of another country as a matter of "mere formality" before attributing to that country an obligation to provide the protection which must otherwise be obtained under the Refugee Convention: see *Refugee Appeal No 74321* (19 December 2005) [91].

[117] The wife was born in the USSR, which no longer exists as a nation. The Authority's enquiry is therefore directed to whether the wife can acquire the nationality of either Tajikistan or Russia. For the following reasons the Authority finds that she can not do so as a matter of mere formality.

Tajikistan

[118] The Authority accepts Mr Mansouri-Rad's submission that the wife is unable to obtain Tajik citizenship as a matter of mere formality. The various means by which nationality of the Republic of Tajikistan is acquired are set out in Chapter II of the Constitutional Law of the Republic of Tajikistan. The wife does not come within the ambit of any of those provisions:

a) She is not entitled to citizenship by birth under Article 16 because neither of her parents were "nationals of the Republic of Tajikistan at the time of [her] birth", (the Republic of Tajikistan not being in existence at that time).

b) Further, while the wife was previously a national of the former USSR, she did not apply for nationality of the Republic of Tajikistan "within three years after November 1995", [Article 21 (d)], when the relevant constitutional law came into force. Nor can she now comply with other time constraints imposed.

c) While the wife could theoretically apply for naturalization under Article 22, this entails the exercise of Presidential discretion. Acquisition of nationality by such means cannot be said to be a "mere formality".

d) Likewise, while Article 23 allows an application "On other grounds provided for by this Law", the wife would have to have been domiciled in the territory of the Republic of Tajikistan for an uninterrupted period ranging from three to five years directly before submitting such an application. Clearly she does not meet these requirements.

Russia

[119] Chapter 2 of Federal Law No 62-FZ of 31 May 2002 provides for the means by which citizenship of the Russian Federation is acquired. In short, the wife does not qualify as she has not resided in the territory of the Russian Federation for five uninterrupted years since being granted a resident's permit as required by Article 13; she does not have a parent with Russian citizenship and she does not appear to qualify under other grounds set out within the relevant legislation.

CONCLUSION

[120] Turning to the issues framed for consideration, the Authority finds that objectively, on the facts as found, there is a real chance of the wife being persecuted if returned to Israel. The persecution she faces is on account of a Convention reason, namely, her religion.

[121] For these reasons the Authority finds that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

“<u>A N Molloy</u>”
A N Molloy
Member