

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75186

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AT CHRISTCHURCH

<u>Before:</u>	D J Plunkett (Member)
<u>Counsel for the Appellant:</u>	J Williamson
<u>Appearing for the NZIS:</u>	No Appearance
<u>Dates of Hearing:</u>	19 & 20 July 2004
<u>Date of Decision:</u>	30 November 2005

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellants, nationals of Malaysia.

INTRODUCTION

[2] The appellants are a married couple, henceforth known as the wife and husband respectively. Their stories are essentially identical and revolve principally around the wife. They came to New Zealand in July 2003 and made their applications for refugee status on 21 August 2003. Following interviews with a refugee status officer on 28 October 2003, they were notified of the decline of their applications. This prompted appeals to this Authority.

[3] As their cases are substantially the same and there are no privacy issues

between them, the appeals were heard together and a joint decision will be issued.

[4] The wife was born a Muslim, but has since converted to Christianity in New Zealand. The husband has always been Christian. Essentially, their claims concern the treatment in Malaysia of inter-faith marriages, where one party was born into Islam, and whether this amounts to persecution. They also fear the wife's brother who insisted that the husband convert to Islam prior to marriage.

THE APPELLANTS' CASE

[5] The wife and later the husband gave evidence. Their stories are set out hereunder. An assessment will follow in a later section.

THE WIFE

[6] The wife was born in the state of Negeri Sembilan. Both her parents were Muslim and she and her four siblings were brought up as Muslims. She said her parents were "not so strict" as Muslims but nonetheless adhered to the faith.

[7] The wife's brother, older than herself, is more stridently Islamic particularly after he returned from living in the Middle East in 2001. He is a supporter of the *Parti Islam se-Malaysia* (PAS), the Islamic fundamentalist political party, though is not active in the party. He continues to live in AA, where he operates a small business.

[8] The wife's upbringing and education were uneventful. She spent two years living in another Asian country when her father worked there. In the early 1990s, she spent a year as an exchange student at a Christian school in New Zealand.

[9] On returning to Malaysia, the wife went to live with her sister, X, in Kuala Lumpur. Shortly afterwards, in 1994, their parents, brother, older sister and that sister's husband came to the apartment shared by the wife and X to berate the latter about her boyfriend, whom they did not consider of sufficient status, given his insecure employment and family background. The wife and her sister refused to divulge the whereabouts of the boyfriend. Both X and the wife were assaulted by family members, who went "crazy". The wife suffered bruising. The wife's brother had his hands around the throat of X but fortuitously, a visiting family friend with her policeman husband separated the warring factions. The wife and X left

the apartment with the visitors and stayed the night with them.

[10] The next day the police came to the friend's house and asked the wife and X to accompany them back to the police station, as their family had reported that they had run away from home. The family wanted the two sisters to return with them to the family home in Negeri Sembilan. The wife and X described the incident to the police inspector and their version was confirmed by the policeman intervener. They were asked if they wished to press charges against their family, but declined to do so.

[11] Neither of the sisters returned to live in the apartment. The wife rented an apartment in Selangor (which is only 10 to 15 minutes by car from Kuala Lumpur). She has been largely estranged from the family since that incident but has always maintained contact with X. She would only return home at festival time. X has reconciled with the family.

[12] The wife started working in another company, where she met her prospective husband in 1996. Whenever they went out, they only ever met in the city and did not visit each other's apartment. Due to the difficulty in synchronising their respective work schedules and in order to spend more time together, she resigned from the company and obtained other employment.

[13] In late 1996, the two of them moved into a bedroom in his parents' house and lived together as a *de facto* couple from this time.

[14] They were not able to live on their own due to fear she would be prosecuted for *khalwat* (close proximity between an unmarried male and female) or *bersekedudukan* (living in a *de facto* relationship with a person not of Islam). Prosecutions for *khalwat* were common – she would read about them in the newspapers three or four times every week, in Kuala Lumpur and throughout Malaysia. More recently (in New Zealand), she read on the internet of three people being prosecuted in Selangor. They had briefly discussed living together on their own but decided it was impossible.

[15] At no time did the wife tell her parents or any family member, including X, that she was living with her boyfriend.

[16] The wife described living together as “in hiding”. They were scared, so took precautions. The couple travelled separately to work and shopping centres, meeting up only at their destination. They always remained in populated places.

If they went to the cinema or a restaurant, it would only be in the company of a group of friends or the husband's family. They were never in public on their own. Even in private at the house, she would not be alone with him but ensured that a female member of the husband's family was present at all times.

[17] None of the neighbours of the husband's family would have known they were living together. They would merely have thought she was renting a room with his family. While her friends were aware that he was her boyfriend (as he was then), only her best friend (who was not a Muslim) knew they were living together.

[18] At the time of a festival in 1997, the husband went with a group of friends to the house of the wife's family in Negeri Sembilan to meet them. Her family knew that she was going out with him and that he was a Christian, but were not aware of the strength of the relationship, let alone that they were living together. Her family did not say anything to him.

[19] The only other contact the husband had with her family was when the two of them had dinner with her sister, X.

[20] In about 1997, the wife became interested in Christianity as she was living with the husband's Christian family and attending their church. This caused no problems, given that she did not look overtly Malay and was merely one of many parishioners. She did not take part in Holy Communion or confession.

[21] In 1998, the wife decided to convert. The husband's mother asked the family priest if he would baptise her but he would not take the risk. Neither she nor the husband nor his family approached any other Catholic priest, since they thought that if the family priest would not take the risk then nobody else would.

[22] Sometime in 1998, when she was visiting her parents, her father produced a sheaf of newspaper clippings concerning the notorious case of Nur'aishah Bokhari. This Muslim woman, who converted to Catholicism to marry a Christian, had been kidnapped in 1997 by her family (with the assistance of the police) and detained by the family to prevent the marriage. The case attracted considerable publicity in Malaysia and overseas. Her father, knowing the husband to be a Christian (but still not knowing that they lived together), warned her that he would "go to this extreme" if she converted out of Islam.

[23] The couple decided to marry in 1999. They sought legal advice as to how

they could do so, initially approaching a couple of lawyers informally and socially. The lawyers shunned them, advising them to leave Malaysia instead. They went to see a lawyer in his office in Kuala Lumpur but he said that he did not want to be involved because it was a sensitive topic in Malaysia. The husband's mother asked the family priest for the name of a lawyer who could assist them and he referred them to one with experience of advising people in their situation (and who had acted for Nur'aishah), Leonard Teoh.

[24] The couple went to see Mr Teoh in 2000 to obtain advice as to how they could marry in accordance with Christian rites. He advised the wife that it was unlawful for a Muslim to attend a Christian church, so she promptly stopped doing so. He advised her to make a statutory declaration renouncing Islam but that they would have to await the outcome of a number of cases before the Federal Court before he would know whether they could marry. He also informed her that no priest would take the risk of converting her.

[25] The wife duly made a statutory declaration in February 2001 (which was submitted to the refugee status officer) stating that she did not believe in Islam and "officially" renounced it, that she was a practising Catholic Christian who wished to convert to Catholicism and take a Christian name. It bears the stamp of a Commissioner of Oaths and the seal of the Federal Court. The lawyer did not progress her renunciation or their desire to marry any further because the outcome of the court cases was not favourable (essentially, the Federal Court decided that the question of successful conversion out of Islam and therefore apostasy was a matter for the Shariah courts and not the civil federal courts). The lawyer advised that the declaration would not be effective in the Shariah courts.

[26] The wife did not approach a Shariah lawyer nor did she seek the consent of the Shariah court to convert as she was afraid of being identified as a Christian and therefore prosecuted. This followed advice from Mr Teoh not to see a Shariah lawyer because of penalties for apostasy imposed in Malaysia, especially in the state where she was born (which would have jurisdiction over her as would the Shariah courts in Kuala Lumpur where she resided). They were concerned that once her intention to convert was known to the religious authorities, she would be at risk of prosecution.

[27] The incident precipitating the flight of the couple to New Zealand occurred in December 2002. The husband received a call from his sister to say that the wife's brother had turned up at her house demanding the immediate presence of

the wife and the husband. He threatened to go to the husband's office and create a scene if they did not comply.

[28] Fearing a kidnapping or physical violence, the husband and wife travelled to the house, accompanied by the husband's parents, his other sister and her husband. The wife's mother was also present (her father having already died). A heated argument took place. Her brother demanded that they marry (since they had been going out for a long time) but that, prior to doing so, he convert to Islam. There was no physical violence, due to the presence of the husband's family, but each side "screamed" at each other. Her brother warned that if they did not do so he would report them to the Islamic authorities. He also threatened to go to the husband's office and beat him. The husband eventually calmed the wife's brother by promising to discuss the matter further with the wife and to ring him a few days later, with their decision.

[29] The husband duly rang the wife's brother and informed him that he would convert prior to marriage but that they could not marry then as they had insufficient savings with which to buy a house. The brother demanded that he immediately convert but the husband convinced him that could be done later. The husband eventually persuaded the brother to agree to allow them one year before they would have to marry.

[30] The couple returned to their lawyer who advised them that there seemed to be no positive outcome and that if they feared for their safety, it would be best to leave Malaysia. He suggested they sought protection in another country on humanitarian and refugee grounds. The wife conducted some research on the internet and identified New Zealand.

[31] The wife and her husband left Malaysia for New Zealand in July 2003.

[32] The wife has not had any contact with her family since coming to New Zealand, as she is afraid they will harass her husband's family in order to discover her whereabouts. So far as she knows, they do not know of her marriage or conversion to Christianity.

[33] In August 2003, the wife was baptised a Catholic.

[34] The husband and wife married in New Zealand in October 2003. They had a child in May 2005.

[35] The wife regularly attends church in New Zealand, is active with the church (assisting with cleaning and being present at the church while it is open to the public), says daily prayers at home and, together with her husband, attends one of the Catholic orders to be tutored in the scriptures by a nun and also to receive pastoral advice.

[36] Recently, the Muslim husband of one of the husband's sisters learned of their marriage and reacted angrily. She and her husband are concerned that, if they return to Malaysia, he would report them to the religious authorities or, at the very least, would disclose their presence back in Malaysia to the wife's family.

[37] The wife fears that if she returns to Malaysia, her marriage will not be legally recognised and she will not be able to live with her husband. She is no longer able to live safely with her parents-in-law as they did previously, given that her parents-in-law have moved out of Kuala Lumpur and now live in Selangor, surrounded by Muslim neighbours. Even if they initially stayed with his parents, they cannot remain with them forever and wish to raise a family of their own. She fears prosecution in the religious courts for *khalwat* (close proximity), *zinah* (unlawful sexual intercourse) and apostasy (conversion without the consent of the Shariah courts).

[38] If they did live together, she believes that they would have to live essentially in hiding and would not be able to live openly as a husband and wife. They could not go out in public together. They have one child who would not be considered legitimate in Malaysia, given that the marriage would not be recognised. Furthermore, her husband would have no right to her property, which would be taken by her family.

[39] As the marriage is not legitimate, she fears her family would have the right to take her back to the family home and force her to marry a Muslim. The wife also has grave fears of physical violence from her brother as occurred in the past when her sister had a boyfriend who did not meet the family's approval. She does not believe she would receive protection from the (predominantly Muslim) police.

[40] The wife is also concerned that she would not be able to practice her Christian faith, without being at risk of prosecution in the religious courts. Even if she was able to attend church, she could not take communion or confession. As a Malay, she would still be considered a Muslim.

THE HUSBAND

[41] The husband was born in the same city as the wife in Negeri Sembilan state. His parents (both still alive) are Catholic and the husband and his siblings were raised in this faith.

[42] His upbringing and education were normal and without incident. His Catholicism caused no difficulties until he met the wife.

[43] In about 1992 or 1993, the husband's oldest sister married a Muslim man. She was required to convert to Islam in order to marry. It was intended to be a "paper conversion" but her husband became stricter over time insisting, for instance, that she wear a head scarf. He has also forbidden her from working or attending church.

[44] The couple met in 1995 or 1996. At the end of 1996, they began living together as a *de facto* couple sharing a bedroom in his family's house.

[45] The Authority asked him to describe life as a couple. He replied they found it "difficult". They had to be very cautious and could only meet at their destination (such as shops) rather than going there together. They went to work separately. When they went to cinemas or restaurants, they would be part of a group as it was "dangerous" to go out together.

[46] His colleagues at work, who were largely Malay, teased him about the relationship. They said that since he was going out with a Malay girl, he was therefore "one of them" and should attend prayers and fast at Ramadan. He received emails condemning Christians.

[47] The husband described himself as "quite religious". He was active in his church, attending every week and participating in church fundraising and charitable events. He prayed at home regularly (and continues to do so).

[48] As to his wife's statutory declaration, he recalled that one of its purposes (as advised by the lawyer) was as a defence to any prosecution by the religious authorities due to the two of them cohabiting.

[49] The husband related to the Authority the incident in December 2002, in the same terms as his wife. He believes that her brother was serious in his threats of violence against him. He did not believe the police would protect them, as it was a

religious conflict. He did not tell her brother the truth about their relationship and intentions as they feared for their lives, if he knew they were living together.

[50] Following this incident, they realised that they would not be able to marry as Christians in Malaysia and decided to leave the country. The lawyer informed them that there was nothing he could do for them in Malaysia and suggested they sought refugee status elsewhere. Following research done by his wife, they decided to come to New Zealand.

[51] The husband confirmed in greater detail the incident in May 2004 when his Muslim brother-in-law discovered that they had married in a Christian ceremony in New Zealand. His brother-in-law reacted angrily though has not made any threats against the husband or his family. They are concerned he will inform his wife's family and the religious authorities of their presence in Malaysia, should they return.

[52] The husband is not prepared to convert to Islam in order to legally marry in Malaysia, as he would have to deny his faith. He is proud to be a Catholic and believes in the Holy Trinity. It would also subject him to the jurisdiction of the Shariah courts and put him at risk of prosecution for religious offences should he maintain any involvement in Christianity. He would not be prepared to convert 'on paper' for the same reasons. His sister's conversion (in order to marry) was supposed to be on paper only but it had not turned out that way for her, as her husband had insisted that she conduct herself in accordance with certain Islamic precepts.

[53] Should he return to Malaysia, he fears that his wife would be spirited away from him by her family and married off, as their marriage would not be recognised. They would have to live in hiding, as they could not live with his family any more, given that they now live in Selangor (which is more Muslim than Kuala Lumpur where the two of them had previously lived with his family) and particularly since his brother-in-law has found out about their marriage. The religious authorities might also prosecute her because she would not be considered legally married. They would not be able to build a family together. Their children would be considered Muslim and they would not be able to raise them as Christians.

[54] He also fears the possibility that the government would force him to convert to Islam or might prosecute him for proselytising, given his wife's conversion (he accepts that the Shariah courts would not have jurisdiction over him as he is not a

Muslim). He particularly fears not being able to profess his Christian faith.

[55] He also fears physical violence from his wife's brother.

[56] The husband further fears a violent reaction to their marriage from the Malaysian community. In the notorious case of Nur'aishah, approximately 100,000 wanted posters concerning that woman and her boyfriend were distributed throughout Malaysia. If the same happened to them, any Muslim Malay who saw them might "do something about it".

SUBMISSIONS AND DOCUMENTARY EVIDENCE

[57] The Authority acknowledges counsel's submissions filed on 13 July 2004, together with country information and previous decisions of the Authority and the Refugee Review Tribunal of Australia. At the hearing, the wife produced a (New Zealand) Change Of Name by Statutory Declaration showing that she now bears a Christian name, including the surname of her husband. The appellants have also produced a letter from the husband's mother (7 July 2004) and numerous testimonials as to the genuineness of the wife's conversion to Christianity. The Authority has also sighted a marriage certificate for the couple and the wife's baptism certificate. The couple submitted to the refugee status officer a legal opinion from their Malaysian lawyer concerning their situation (dated 27 January 2004).

[58] During the hearing, the Authority handed over two items of country information:

- (i) *AFP Malaysia may drop bill on apostasy* (25 October 2000); and
- (ii) *International Christian Concern Malaysia – Christian Persecution in Malaysia* (8 May 2003).

[59] Following the hearing, comprehensive further submissions and country materials were received on 16 August 2004, including a further legal opinion from the appellant's Malaysian lawyer (dated 13 August 2004). The Authority is indebted to counsel for his comprehensive and helpful submissions.

THE ISSUES

[60] 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."

[61] 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 APPELLANTS' CASE

CREDIBILITY

[62] The Authority has no doubt that the wife and husband are credible witnesses. Their story is accepted in full.

THE WIFE

Right to Freedom of Religion – the Law

[63] The test for refugee status is prospective. The Authority must assess whether the wife would face the risk of persecution, at the real chance level, if she was to return to Malaysia.

[64] The right principally invoked by the wife is the right to freedom of religion, set out in Article 18 of the International Covenant on Civil and Political Rights, 1966 (ICCPR).

[65] Article 18 provides as follows:

- "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No-one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are described by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

[66] The ICCPR states that even in terms of public emergency, no derogation may be allowed from Article 18 rights; Article 4.2. Article 18 is classified, according to a leading refugee academic, Professor Hathaway, as a first level right; see Hathaway *The Law of Refugee Status* (1991) 109.

[67] The United Nations Human Rights Committee, in its "General Comment 22" concerning Article 18 (48th session, 1993), recognises the "fundamental character" of the freedoms contained in Article 18.1, given that this provision cannot be derogated from, even in times of public emergency (para 1).

[68] The distinction between freedom of religion (as to which no limitations are allowed) and the freedom to manifest a religion (which may be limited as provided in Article 18.3) is acknowledged in the General Comment (paras 3 & 4). As to freedom of religion, the Committee has this to say (para 3):

"[Article 18] does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no-one can be compelled to reveal his thoughts or adherence to a religion or a belief."

[69] As to the right to "have or to adopt" a religion, the Committee says (para 5):

"The Committee observes the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, **including the right to replace one's current religion or belief with another** or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use or threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature." (*emphasis added*)

[70] As to the freedom to manifest one's religion, the Committee states (para 4):

"The freedom to manifest religion or belief in worship, observance, practice and

teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of particular language customarily spoken by a group. ...”

[71] The Committee further states that the fact that a religion is recognised as a state religion or that its followers comprise the majority of the population, does not result in any impairment of the enjoyment of any of the rights under Article 18; para 9.

[72] It is against that background as to the rights to which the wife is entitled that the Authority must assess the extent to which she can enjoy such rights in the future and whether any limitation on her enjoyment would amount to serious harm tantamount to persecution.

Past Experiences

[73] A strong indicator of her future predicament are her past experiences. They are not determinative but are plainly an important factor in assessing what might happen in the future.

[74] Prior to considering the wife’s history, the Authority records that while the Malaysian Federal Constitution provides for freedom of religion (Article 11), Islam is the official religion. In September 2001, the Prime Minister declared that the country was an Islamic State. The government imposes Islamic religious law on Muslims only and does not impose Islamic law beyond the Muslim community. (see United States Department of State *International Religious Freedom Report 2003: Malaysia* (18 December 2003) 1)

[75] The wife sought to convert to Christianity in 1998 but her partner’s mother was advised by their family priest that he was not prepared to take the risk of doing so. Neither the wife nor her partner’s family approached any other Catholic priest. They did seek however advice from a lawyer in the context of their desire to marry as Christians. The wife was advised that it was unlawful for her to attend a Christian church so she stopped doing so. She was advised to make a statutory declaration renouncing Islam and declaring herself to be a Christian (which she duly did) but was ultimately advised that this renunciation would be ineffective

before the Shariah courts which determine such matters. At no time did the wife approach a Shariah lawyer or court to obtain consent to convert, as she was afraid that once she declared her intention to do so, she would be at risk of prosecution from the religious authorities.

[76] While it may appear that the wife made little real effort to convert, her belief that other priests would not facilitate her conversion and that in reality she would not be able to convert was (and remains) justified.

The Situation in Malaysia

[77] In an earlier decision of the Authority, refugee status was granted to a Christian husband and wife from Malaysia; *Refugee Appeal No 1039* (13 February 1995). The husband was regarded as a Muslim under Malaysian law (though considered himself to be Christian) and the wife was Buddhist. They married in New Zealand and claimed that their marriage would not be recognised in Malaysia as the husband, being Muslim, was forbidden to marry a non-Muslim. The Authority in that appeal received letters (dated 1991 and 1993) from a Malaysian lawyer, Saran Singh, setting out his opinion (see p8 of the decision):

“... there is no provision under the Syariah Law for the renunciation by a Moslem of his religion. ... A Moslem can only marry a Moslem.”

[78] The Authority in its decision recorded that its own research confirmed his opinion. It found that the procedures for renouncing Islam were difficult, if not impossible, to take advantage of and concluded that the guarantee of religious freedom in the constitution of Malaysia was, in effect, denied to Muslims (pp10, 21).

[79] The situation has not improved since that decision was published.

[80] The United States Department of State *International Religious Freedom Report 2003: Malaysia* (18 December 2003) states (p2):

“Muslims who wish to convert from Islam face severe obstacles. For Muslims, particularly ethnic Malays, the right to leave the Islamic faith and adhere to another religion is a controversial question, and in practice it is very difficult for Muslims to change religions legally. The legal process of conversion is unclear. In 2001 a High Court judge rejected the application of a woman who argued that she had converted to Christianity and requested that the term “Islam” be removed from her identity card. The judge ruled that an ethnic Malay is defined by the constitution as “a person who professes the religion of Islam”. The judge also reaffirmed a 1999 High Court ruling that secular courts have no jurisdiction to hear applications by Muslims to change religions and stated that only an Islamic court has jurisdiction to rule on the woman’s supposed renunciation of Islam and conversion to Christianity.

In August 2002, the Court of Appeals ruled that only the Islamic court is qualified to determine whether a Muslim has become an apostate. **These rulings make conversion of Muslims nearly impossible in practice.** (*emphasis added*)

[81] This inability to convert out of Islam has consistently been recognised by the Authority, including recently; *Refugee Appeal Nos 71757 & 71768* (24 June 2002) [40], *Refugee Appeal Nos 74741-74742* (21 January 2004) [56].

[82] The wife has provided two legal opinions from the couple's Malaysian lawyer, Leonard Teoh, concerning herself and her (now) husband. He sets out the law of Malaysia relating to conversion as follows, citing specific precedent cases:

- (1) The federal civil courts have no jurisdiction to grant a declaration that a person is not a Muslim. Only the Syariah courts have that jurisdiction.
- (2) A Muslim who wishes to make an admission that he is no longer Muslim must obtain the prior leave of the Syariah court. Until validated by such a Court, the person is deemed to be of the Muslim faith.
- (3) The issue of whether an individual is an apostate or not is one of Islamic law and not civil law.
- (4) The issue of whether, by making the admission that she had renounced Islam, the wife remained Muslim or not was an issue of fact to be decided by the Syariah court in accordance with Islamic law. The validity of her renunciation of Islam could only be determined by a Syariah Court.
- (5) Muslims converting out of Islam face numerous bureaucratic obstacles from various government departments and officials.

[83] In his (second) opinion of 13 August 2004, Mr Teoh reiterates that the wife's conversion cannot be enforced by the civil court in Malaysia and that she would therefore be deemed to be a Muslim by the Shariah courts of all states and hence subject to Islamic criminal laws. According to the wife, the lawyer advised her that no priest would take the risk of converting her.

Conclusion as to Freedom to Convert

[84] The Authority finds that the country materials concerning the law and practice in Malaysia for those Malay Muslims who wish to convert to another religion corroborate the wife's experience that it could not be achieved. While she

made only modest efforts to convert, it is highly unlikely that more assiduous conduct would have been successful. According to the United States Department of State, those who wish to convert face “severe obstacles” and conversion is “nearly impossible in practice”.

[85] It is found that the wife does not in practice have the right to replace her current religion, contrary to Article 18.1 of the ICCPR. For legal and official purposes, she will remain Muslim. This is a serious infringement of a fundamental right.

[86] The next step for the Authority is to assess the consequences of this lack of recognition of her conversion. In doing so, we will put aside, for the moment, the consequences to her in terms of her marriage and any lack of recognition of her marital status.

Consequences of the Inability to Convert

Attendance at Church

[87] The wife is concerned about attending church but, given that she attended for some years without incident, such concern is unwarranted.

[88] She further says she could not receive communion or undertake confession. These are important rites of Catholicism. The experiences of the wife, in the refusal of the family priest of her husband to baptise her, shows the sensitivity of the clergy to the law and public sentiment. The advice of her lawyer that no priest would take the risk of converting her reinforces this view. The Authority accepts that it is likely she would not be able to enjoy the normal rites of Catholicism, her chosen religion, even though she has been baptised in New Zealand. The Authority is not confident the Catholic Church in Malaysia will recognise her conversion, but instead is likely to continue to treat her as Muslim.

[89] While the wife will not be physically obstructed from attending church, she will only be an observer and will not be able to participate as one of the faithful. This is a serious limitation of the freedom to manifest her religion. It is not saved by any arguments as to the scope of the allowed limitations in Article 18.3, as this is not a limitation prescribed by law to the manifestation of a religion, but a consequence in practice of the effective prohibition on conversion.

Prosecution for Apostasy

[90] Her greatest fear though is of prosecution in the religious courts for apostasy (leaving aside prosecution for offences relating to the non-recognition of her marriage - considered later).

[91] According to Mr Teoh, the appellants' Malaysian lawyer, the wife is "most likely" to be charged in a Shariah court for conversion to Christianity; see opinion of 27 January 2004 p7. The lawyer says the state of Negeri Sembilan "indirectly" creates an offence of apostasy, for which there is a maximum fine of RM5,000 and/or imprisonment for up to three years. He opines that, in those states for which apostasy is punishable (notably in the context of the wife in Negeri Sembilan and Kuala Lumpur), she is "likely to be sent to prison" unless she repents and returns to Islam; opinion of 13 August 2004 p3.

[92] However, there is a paucity of country information to support such an opinion. He has provided only one example where he has identified a charge of *inter alia* apostasy after the government's 1998 announcement that it would not prosecute apostasy (see later), namely the case of *Priyaathaseny v Agama* [2003] 2 MLJ 302 as discussed in the opinion of 27 January 2004 at p3. The female defendant was fined RM3,000 for apostasy, in the state of Perak.

[93] Mr Teoh states that cases decided by the Syariah courts are not reported and hence he is unable to provide statistics of Muslims sentenced to imprisonment under Syariah laws; see opinion 27 January 2004 p3.

[94] However, the lack of reported cases probably has more to do with the government's stated position on prosecutions, than on any inadequacies in reporting. In 1998, the government stated that apostates would not face government punishment as long as they did not defame Islam after converting; United States Department of State *International Religious Freedom Report 2003: Malaysia* (18 December 2003) 2.

[95] In *Refugee Appeal Nos 71757 & 71768* (24 June 2002), the Authority reviewed considerable country information on prosecutions for apostasy and reached the following conclusion ([57]):

"... while apostasy is an offence in all states and federal territories of Malaysia, the application of the laws and its enforcement is varied and sporadic. The chance, therefore of anyone being caught by these laws is neither real or substantial. On the contrary, it is remote and speculative."

[96] The Authority in that case found the absence of evidence of prosecution notable, particularly given the monitoring of the situation by Christian organisations in Malaysia. If a significant proportion of converts to Christianity were being prosecuted or persecuted, then it expected to see evidence of this from these organisations; see [59].

[97] This was recently followed in *Refugee Appeal Nos 74741-74742* (21 January 2004) [63]-[66].

[98] This panel of the Authority agrees. The absence of reports of prosecutions for apostasy is telling. It is conceivable that the 1998 announcement covers prosecutions only by the federal or civil authorities and not state or religious agencies, but again the absence of reports by Christian and human rights groups suggests otherwise. Mr Teoh states that such cases in the Syariah courts are not reported, but we have little doubt that, if such prosecutions were sufficiently prevalent to provide a real risk for a convert (such as the wife), there would be disclosure in the media or by Christian human rights groups.

[99] It is concluded that the wife does not face a well-founded fear of prosecution for apostasy.

Other Religious Offences

[100] According to Mr Teoh, the wife (deemed to be a Muslim) could be punished for the following offences in both Negeri Sembilan and Kuala Lumpur (see 13 August 2004 opinion p1 where the specific provisions of the legislation are cited):

- (1) worship contrary to Islamic law;
- (2) eating in public during the month of fasting;
- (3) failing to pay tithe; and
- (4) drinking in public.

[101] The maximum punishment is a fine of 5,000 ringgit and/or three years' imprisonment; see materials presented by Mr Teoh.

[102] Again there are no country materials establishing that such prosecutions occur in practice, let alone in volume or resulting in punishment at the upper end of the scale, such that it could be said that the wife faces a real chance of serious

harm, tantamount to persecution.

Religious Instruction of Children

[103] As to the child of the couple, Article 18.4 provides that the State parties undertake to have respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions. It is noted the appellants would not have the right to bring up their child as Christian, as children are deemed Muslim, given that the mother is so deemed; see, in respect of Kuala Lumpur, s2(b) Administration of Islamic Law (Federal Territories) Act 1993, as set out in the opinion of Mr Teoh 27 January 2004 p2 (according to Mr Teoh, the definition of Muslim is the same or similar in all other states).

[104] In one case, the Federal Court granted custody of two children to a Hindu mother (rather than the Muslim father) but as the children were deemed Muslim (given that one of the parents was Muslim), the mother was ordered not to interfere with the children's Muslim religion and was warned that if she did so, she would lose custody; World Evangelical Alliance Religious Liberty Commission *Malaysia: The Great Apostasy Debate* (2 August 2003) 3.

[105] Article 18.4 is not however couched in imperative terms. State parties undertake only to "have respect" for the liberty of parents to determine the religious instruction of their children. In view of the Authority's conclusions concerning the appellants, there is no need to consider whether there is any breach of Article 18.4 in this case.

Summary of Consequences of Inability to Convert

[106] Accordingly, the practical effect of the non-recognition of her conversion is that she will be unable to attend church, except as an observer. Furthermore, she will continue to be recognised as a Muslim officially and in law. There are also certain consequences in terms of her privacy (see later).

[107] This brings the Authority to consider her right to marriage and the consequences of any failure to recognise her marriage.

Marriage

[108] The right to marry is set out in Article 23 of the ICCPR:

- “1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognised.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

[109] General Comment 19 of the Human Rights Committee (39th session 1990) (para 5):

“The right to found a family implies, in principle, the possibility to procreate and live together.”

[110] The appellants sought advice from a Malaysian lawyer as to how they could marry in accordance with Christian rituals. They were eventually advised by the lawyer, following the decision of the federal courts in a number of cases, that they could not do so. The husband was not prepared to convert to Islam in order to marry. Not only would he have to deny his religion, but he would come under the jurisdiction of Shariah law and risk prosecution for religious offences.

[111] According to the appellants’ Malaysian lawyer, there are two types of marriage recognised in Malaysia, a marriage registered with the Registrar of Marriages pursuant to the Law Reform (Marriage and Divorce) Act 1976 or one recognised in accordance with state Islamic laws. A civil marriage is registerable under the Act, but the Act does not apply to Muslims, whose marriages may not be solemnised or registered under the Act (section 3(3) of the Act). In his opinion, Islamic law would apply and any marriage to her husband would be deemed to be null and void under such law. He observes that the Registrar refuses to register the marriages of persons with Muslim names or whose birth certificate shows at least one parent is Muslim unless he or she produces a letter from “the respective Islamic department” certifying apostasy (see opinion of 27 January 2004 p6).

[112] There is a detailed discussion of these laws in *Refugee Appeal Nos 72558 & 72559* (19 November 2002). Section 3 of the Act is set out therein; [59]. While marriages contracted abroad are recognisable as valid under the Act, that is only where the parties (if a citizen of or domiciled in Malaysia) have the capacity to marry according to the Act; section 104(c) of the Act – see [60]. This couple, living

in New Zealand on temporary permits, remain domiciled in Malaysia and citizens of that country. In light of section 3(3) of the Act, the wife does not have such capacity, as she is a Muslim. It follows that her marriage in New Zealand will not be recognised in Malaysia.

[113] Hence, the wife's marriage must be in accordance with state Islamic law; see opinion of 27 January 2004 p6 and *Refugee Appeal Nos 72558-72559* (19 November 2002) [58]. However, Islamic law prohibits a Muslim from marrying a non-Muslim and so her marriage to her husband, a Christian, will be "deemed to be null and void"; see opinion of 13 August 2004 p3. As to Kuala Lumpur, the law could not be clearer:

"No woman shall marry a non-Muslim"

(see s10(2) Islamic Family Law (Federal Territories) Act 1984).

[114] The Authority will now turn to the consequences of the non-recognition of her marriage.

[115] They are as follows:

1. There is the risk of prosecution for religious offences, such as *khalwat* (close proximity), *zinah* (unlawful sexual intercourse), acts preparatory to having sexual intercourse and pregnancy or giving birth out of wedlock.
2. Her property will not devolve onto her "husband".
3. The child will be regarded as illegitimate (and would be brought up Muslim). The wife may lose custody of the child.
4. She will be shunned by the Muslim community in general and will face social censure and harassment.

[116] The Authority will deal with each *seriatim*.

Prosecution for Religious Offences

[117] Turning to the first, the appellant's Malaysian lawyer has identified in his opinion of 13 August 2004 the relevant sections of the Syariah Criminal Offences (Federal Territories) Act 1997 and the Syariah Criminal (Negeri Sembilan) Enactment 1992 creating these offences, and provided copies of the same.

[118] For example, in Kuala Lumpur, any woman who performs sexual intercourse with a man who is not her lawful husband is guilty of an offence and liable to a fine not exceeding 5,000 ringgit and/or imprisonment not exceeding three years and/or six strokes of the whip; s23(2). Pregnancy out of wedlock is *prima facie* evidence of this offence; s23(3). In Negeri Sembilan, any person who commits “illicit” intercourse commits an offence with the same punishment as above, except that whipping is not provided for; s60.

[119] In Kuala Lumpur, any person who does an act preparation to sexual intercourse out of wedlock is guilty of an offence and liable to a fine not exceeding 3,000 ringgit and/or imprisonment not exceeding two years; s24. In Negeri Sembilan, the same offences carry the same penalties; s61(1). An explanatory note in the Negeri Sembilan legislation states that any female found living with or cohabiting with any male (not her spouse or in her “*mahram*”) “giving rise to suspicion that they are committing vice” commits this offence.

[120] In Kuala Lumpur, any woman who is found with a man (not being her husband or *mahram*) in any secluded place or in a house under circumstances which give rise to suspicion that they are engaged in immoral acts is guilty of an offence and liable to a fine not exceeding 3,000 ringgit and/or imprisonment not exceeding two years; s27.

[121] Despite research undertaken by counsel and also by the Authority, the extent to which these offences are prosecuted (relevantly in Kuala Lumpur and Negeri Sembilan) is not clear, though it is apparent from the opinions of Mr Teoh that prosecutions do occur in Malaysia.

[122] For example, in the state of Perak, a woman was arrested on 5 September 2000, convicted of having a child out of wedlock (and of apostasy) and fined 2,000 ringgit. Upon leaving the Syariah court, she was further charged with having her second child out of wedlock; *Priyaathaseny v Agama* [2003] 2 MLJ 302 (as discussed in the opinion of 27 January 2004 p3).

[123] In *Tongiah Bte Jumalil v Government of Jahor* [2003] CLJ 280, a Muslim woman converted to Christianity, married in Singapore and re-registered her marriage under the Law Reform (Marriage and Divorce) Act 1976. The religious authorities raided her home and charged her with “*khalwat*” with her husband. No further details are given by Mr Teoh; see opinion of 13 August 2004 p2.

[124] According to Mr Teoh, it is common in Malaysia for Muslims to be charged with *khalwat*. He encloses an article from the *New Straits Times* (11 August 2004) reporting that three people, including a woman, were fined RM1,600 after pleading guilty in the Syariah court to *khalwat*. The report mentions that another couple was to be charged with the same offence on 5 October.

[125] Their Malaysian lawyer states that for offences more serious than *khalwat*, such as acts preparatory to sex, there have been reports of offenders being imprisoned for three months; see opinion of 13 August 2004 p3. No further details are given.

[126] It is clear to the Authority that the risk of prosecution for the wife is higher than might otherwise be the case for an ordinary Muslim, given the hostility of her family and the husband's brother-in-law. It is accepted that there is a grave risk that one or both will report them to the religious authorities, should the couple return to Malaysia. It is unrealistic to expect that their presence would remain unknown to both families for any appreciable period. The risk of such prosecution, while giving rise largely to only modest monetary punishment, lies as much in the humiliation of the process and its attendant public opprobrium as in the punishment itself. Nor can the Authority be confident that, should the couple continue to remain together after their first prosecution or have any more children, any punishment arising from any subsequent prosecution would not be serious.

[127] It was this fear of detection and prosecution by the religious authorities that prevented this couple from living together (except as part of the household of the husband's family) and from appearing as a couple in public (except as part of her husband's family or with a group of friends). As a couple, they lived "in hiding" (as the wife described to us). It would be the same if they returned. This is a serious consequence of the infringement of the right of each of them to marry.

Distribution of Property

[128] This brings us to the next consequence of non-recognition of the marriage, namely the wife's inability to distribute her property to her husband, not being a Muslim.

[129] The lawyer states that the wife's property will be distributed according to Islamic laws and non-Muslims are not entitled to inherit the property of Muslims; see opinion of 13 August 2004 p3, *Persekutuan v Seng* [2002] 2 MLJ 572 (as

discussed in his opinion), *Refugee Appeal No 1039* (13 February 1995) 9-10. Nor can she inherit from her non-Muslim husband; *Refugee Appeal No 1039* (13 February 1995) 10.

Children

[130] The couple have one child. As their marriage is unregistrable, she will be regarded as illegitimate; see opinion of Mr Teoh dated 13 August 2004 p3 and *Refugee Appeal No 1039* (13 February 1995) 9.

[131] According to Mr Teoh, there is a risk that the wife will lose custody of the child; see opinion of 13 August 2004 p3. The custody of illegitimate children is given exclusively to the mother and her relatives; s85 Islamic Family Law (Federal Territories) Act 1984 (concerning Kuala Lumpur). But only persons “of good conduct from the standpoint of Islamic morality” are qualified for custody and the right of custody is lost by “abjuration of Islam”; ss82(d), 83(d) Islamic Family Law (Federal Territories) Act 1984. In the event that she lost custody, her mother would have the superior right to the children; s81(2) Islamic Family Law (Federal Territories) Act 1984. The Authority observes though that, at least in one (unknown) state, the Federal Court granted custody to a Hindu woman; see [104] herein.

Forced Marriage

[132] The wife says that she fears her family will kidnap her and force her to marry a Muslim since, as her marriage is not recognised, they have the right to do so. She refers to the case of Nur’aishah as a pointer to her own fate. However, there is no evidence before us that incidents of this nature (including the collusion of the police) are sufficiently commonplace that it can be said there is a real chance of such a destiny, or that the authorities would not appropriately intervene.

Public Censure

[133] Finally, the wife would suffer opprobrium from the Muslim community in general. As the Authority said in *Refugee Appeal No 1039/93* (13 February 1995) 9, the “alienation feared by [the appellant] is not to be under-estimated”.

Conclusion as to Marriage

[134] It will not be possible for the appellants to live as a married, or indeed *de facto*, couple in Malaysia. The failure to recognise their marriage and hence their status as a *de facto* partnership draws with it the consequences for the wife set out above, in terms of the risk of prosecution of the wife for religious offences, the inability to devolve property on each other, the illegitimacy of the child (and possible loss of custody) and censure from the community. The Authority agrees in this regard with the conclusion in *Refugee Appeal No 1039* (13 February 1995) 25 that the inability of the appellants to marry unless the husband converts to Islam amounts to a substantial denial of the wife's rights enshrined in Article 23. As observed therein, this is even more so when living in a *de facto* relationship is not possible.

Privacy

[135] The right to privacy is guaranteed by Article 17 of the ICCPR:

- “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.”

[136] The importance of “privacy” to individual existence and autonomy is addressed in *Refugee Appeal No 1039* (13 February 1995) 23. In particular, in relation to the wife, there are real issues relating to her identity, such as her ability to retain her married name (including her Christian first name and the family name of her husband as she is now known). According to Mr Teoh, the National Registration Department does not allow applicants to change the names on their identity cards from Muslim to non-Muslim unless approved by the Syariah court or State Islamic Department, giving consent to renunciation of Islam; see opinions of 27 January 2004 p6, 13 August 2004 p4. Furthermore, the word “Islam” will be printed on the card identifying the holder's religion unless the court or Department approves otherwise; 13 August 2004 p4.

[137] There is also interference with her family life in that the non-recognition of the marriage and her husband's Christianity means that she will have no rights of inheritance or to matrimonial property and possibly no right to custody of her children. Furthermore, their home will be subject to “raids” by the religious authorities.

[138] In light of the more serious infringements of Articles 18 and 23, the Authority

does not propose to assess whether these problems for the wife infringe Article 17, seriously or otherwise.

THE WIFE – SUMMARY

[139] In relation to the wife, the Authority finds as follows:

1. She does not have the right to replace her official Muslim religion. Her conversion to Christianity is unlikely to be officially recognised. She will continue to be legally and officially identified as a Muslim. She will not be able to receive certain rites of the Catholic church, such as communion and confession. These are breaches of Article 18 of the ICCPR.
2. The wife does not have the right to marry her husband and their marriage will not be officially recognised. This puts her at risk of prosecution for religious offences such as *khalwat*, illicit sexual intercourse and acts preparatory to sexual intercourse. She cannot succeed to his property or devolve hers on him. They cannot lawfully found a family and she is at risk of losing custody of the child. She cannot enjoy her husband's company publicly, except as part of a larger group of family or friends. This is a breach of Article 23 of the ICCPR.
3. The wife will suffer alienation and hostility from society to a marked degree.

[140] Persecution is defined for the purpose of New Zealand refugee jurisprudence as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection; *Refugee Appeal No 72558 & 72559* (19 November 2002) [85]-[88]. Refugee law concerns itself with actions which deny human dignity in any key way; *idem*.

[141] The Authority finds that, cumulatively, the infringements of her freedoms of religion and marriage and the consequences of these breaches of her human rights, amount to persecution.

THE HUSBAND

[142] The husband, born a Christian, has never suffered any harm (beyond minor harassment) as a result of his faith. He says he fears being forced to convert to Islam or being prosecuted for proselytising, given his wife's conversion. However, he has presented no country materials that forced conversions or prosecutions for

proselytising occur, let alone to the extent that his fears could be considered well-founded. According to the Department of State, there were no reports of forced conversions in 2004; *International Religious Freedom Report 2004: Malaysia* (15 September 2004) Section II “Forced Religious Conversion”. There is no infringement of Article 18 in relation to the husband.

[143] However, the assessment above in relation to Article 23 (the right to marriage and to found a family) and to Article 17 (the right to privacy and family life) applies to the husband except that he is not subject to prosecution for any religious offences, as he is not a Muslim.

[144] In particular, his daughter would be illegitimate and he would have no right to custody; as to Kuala Lumpur, see s85 Islamic Family Law (Federal Territories) Act 1984. He cannot inherit property from his wife on her death or the dissolution of their marriage, nor can he distribute his property to her. As is the case for his wife, he cannot enjoy her company publicly, except as part of a larger group of family or friends.

[145] The inability of the husband to marry (or to have his New Zealand marriage recognised) in Malaysia, unless he converts to Islam, is a substantive denial of his rights enshrined in Article 23; *Refugee Appeal No 1039* (13 February 1995) 25.

[146] The husband says he fears serious harm at the hands of the wife’s brother, essentially due to his refusal to convert to Islam in order to legally marry the wife. Despite threats from the brother and an earlier incident where the wife and her sister were assaulted some years ago, it would be speculative to find that the brother-in-law would physically harm the husband, to any serious degree. Nor is there any evidence before us that the police and judicial authorities would not appropriately deal with the threat of, or actual, serious physical harm. This fear is discounted.

[147] The Authority finds that, cumulatively, the infringements of his freedom of marriage and its consequences, amount to persecution.

INTERNAL PROTECTION ALTERNATIVE

[148] In the circumstances of this couple, given the national reach of the law of marriage and the existence of Islamic laws in every state and federal territory, there is no place to which the couple could relocate to avoid persecution.

CONCLUSION

[149] For the above reasons, the Authority finds that both the wife and the husband have well-founded fears of being persecuted. The first principal issue is answered in the affirmative for each of them. The relevant Convention reason for each of them is religion.

[150] The appellants are therefore refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeals are allowed.

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D J Plunkett
Member