REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 523/92

RE RS

AT AUCKLAND

Before:	A.R. Mackey (Chairman) R.P.G. Haines (Member) J.M. Priestley (Member) V. Shaw (Member)
Counsel for the Appellant:	R.J. Hooker and G.M. Monk
Appearing for the NZIS:	Ms S. Scott
Date of Hearing:	17 August 1994, 20 & 21 September 1994
Date of Decision:	17 March 1995

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

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This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, an Indian national of the Sikh faith born in the Punjab.

INTRODUCTION

The appellant arrived in New Zealand on 7 March 1989 but his application for refugee status was not received by the Ministry of External Relations and Trade until 28 September 1990 (under cover of a solicitor's letter dated 25 September 1990). At the relevant time, the Secretary of External Relations and Trade was the convenor of the Inter-departmental Committee on Refugees, an advisory panel of government officials who made recommendations to the Minister of Immigration and Minister of Foreign Affairs as to whether a particular applicant was a Convention refugee. Whether refugee status was granted or denied was the decision of the Ministers.

That procedure was replaced by the present refugee determination system which came into operation at the beginning of 1991. The Refugee Status Section of the New Zealand Immigration Service now makes a determination of refugee status at first instance following an interview with the applicant. In the event of a negative decision there is a right of appeal to this Authority which conducts the appeal by way of a rehearing *de novo*. The appellant is interviewed once more and a written decision delivered.

The present appellant was interviewed by the Refugee Status Section on 15 October 1991 and after affording the appellant an opportunity to comment on the Interview Report, the application was declined by letter dated 31 August 1992. Through his then solicitors, the appellant appealed by letter dated 2 September 1992.

By letter dated 16 October 1992, the appellant's present solicitors, Messrs Vallant Hooker & Partners, advised that they were now acting. Subsequently, in October 1993, advice was received that the appellant was to be represented by Mr John Long, an Auckland barrister.

By letter dated 10 February 1994, the Secretariat notified the appellant through Mr Long that his appeal would be heard on 1 March 1994. In compliance with Part II paragraph 12 of the Authority's Terms of Reference of 30 August 1993, the letter enclosed a numbered copy of the file held by the Authority.

On 25 February 1994, Mr Long advised that the appellant had decided that Messrs Vallant Hooker & Partners would represent him at the appeal hearing. On the same day a letter from Vallant Hooker & Partners was received confirming their instructions to act for the appellant and seeking an adjournment due to the late notice of the hearing date. That application was granted.

By facsimile dated 28 February 1994, the Secretariat notified Vallant Hooker & Partners that a new date of hearing for 10 May 1994 had been set. This was confirmed by letter dated 8 April 1994 which enclosed a numbered copy of the file. However, by letter dated 5 May 1994, Messrs Vallant Hooker & Partners sought an adjournment as no-one was available to appear on the set date. This adjournment application was also granted.

By facsimile dated 9 May 1994, the Secretariat gave notice that the appeal would be heard on 20 June 1994, which date was subsequently amended to 19 July 1994 and then to 17 August 1994, principally to allow counsel for the appellant to prepare for what he believed was "a leading case".

Briefly, the appellant claims to be in fear of persecution at the hands of a Sikh terrorist organization known as the Khalistan Commando Force (KCF) and says that if the truth of his claim is accepted, he could not be denied refugee status by being expected to relocate from the Punjab to another part of India. He challenges, both on the facts and on the law, earlier decisions of the Authority dealing with the relocation principle.

This case was said by counsel for the appellant to be in the nature of a "test case" in two respects:

(a) The Authority was asked to reconsider its previous decisions on relocation. In particular, it was argued that Refugee Appeal No. 135/92 Re RS (18 June 1993) was wrongly decided.

(b) As to the facts, this Authority's previous assessment of human rights conditions in the Punjab was erroneous. In particular, it was submitted that persons who possessed a well-founded fear of persecution in the Punjab at the hands of terrorists (non-state agents) could not access effective state protection in the Punjab or

elsewhere in India and could not, therefore, be denied refugee status in New Zealand.

In the circumstances a four-member panel of the Authority was convened. The hearing of the appeal commenced on 17 August 1994 and continued on 20 and 21 September 1994. During the course of the hearing the appellant personally gave evidence, as did [DS], his brother-in-law, being the brother of the appellant's wife. [DS] lives in Auckland with his New Zealand-born wife and is the holder of a residence permit issued in 1988. The Authority was also presented by the appellant with several reports and a considerable quantity of background country information. Further background information and submissions were presented on behalf of the Refugee Status Section of the New Zealand Immigration Service.

For the appellant, considerable reliance was placed on a report prepared by AJ & JS, Caught Between the Devil and the Deep Sea: Relocation Within India: A Non-Choice (June 1994 "Draft Only"). The report (hereinafter the "J & S Report") was prepared at the request of the appellant' solicitors.

At the conclusion of the hearing on the third day, counsel for the appellant was requested to provide further information which in general terms was:

(a) An outline of the brief given to J & S.

(b) Details of the methodology followed by J & S in the selection and citation of the numerous newspaper articles referred to in the draft report.

Twenty-one days was allowed.

By letter dated 11 October 1994, the solicitors for the appellant reported that they had only just managed to relocate the fax number and address for J & S and expected their reply "within the next few days" and would then be able to file "a brief". An extension of time for one week was sought.

Subsequently, by letter dated 19 October 1994, the requested information was provided by the solicitors for the appellant. The information contained in this letter has been taken into

account by the Authority.

One further preliminary matter requires to be addressed. The appellant's refugee application was filed under cover of a solicitor's letter dated 25 September 1990. The first paragraph of the letter states:

> "Mr RPG Haines has been instructed as counsel."

Had Mr Haines been so instructed, he would be disqualified from hearing this appeal. However, it is common ground that Mr Haines has never been so instructed, has never given advice in this matter nor met with the appellant. When this matter was raised at the commencement of the appeal hearing, the appellant through his counsel accepted the foregoing and expressly consented to Mr Haines sitting as a member on this appeal.
Broadly speaking, the issues raised by this appeal are three-fold:

1. Identification of the nature of the proceedings before the Authority, the interpretation of the Terms of Reference and the nature of the burden of proof.

2. The law to be applied in New Zealand in relation to the relocation principle.

3. The findings of fact in relation to the appellant's claims.

We will endeavour to address each of these issues.

PROCEDURAL ISSUES

Notice that "test case" issues were to be raised by the appellant did not reach the New Zealand Immigration Service until Friday, 12 August 1994, two working days before the commencement of the hearing.

On 17 August 1994, Ms Scott appeared as counsel for the Immigration Service and sought leave to be heard. She was accompanied by two officers of the Refugee Status Section of the Immigration Service.

Counsel for the appellant submitted:

(a) That the Immigration Service had no right to be heard.

(b) If either officer was called to give evidence, the appellant had a right to cross-examine those officers on their evidence.

(c) As the Immigration Service was present at the hearing as a "party", it carried the onus of establishing that the appellant was able to relocate in the Punjab or elsewhere in India.

As to the second submission, Ms Scott conceded that if either Refugee Status Section officer gave evidence, the appellant would have a right to cross-examine him or her on the evidence so given. As to the first and third points, Miss Scott explained that it was not intended that the proceedings be turned into an adversarial hearing and indicated that the Immigration Service was merely making itself available to the Authority in case its assistance was required, given the appellant's claims as to the importance of the case. In view of the late notice received, Ms Scott asked that the two Refugee Status Section officers, both of some experience, be permitted to be present during the hearing to assist her in evaluating the voluminous country information to be relied on by the appellant and to advise her as to the relevant information held by the Refugee Status Section which might assist the Authority. She stated that it was not intended that either of the officers give evidence, unless the Authority wished to question them. As events transpired, neither officer gave evidence.

In a brief oral ruling the Authority stated:

> "We have decided Ms Scott will be heard by us and we grant leave in her application for the two officers, Ms Timms and Mr Boggs to remain with her to assist her and possibly to assist the Authority if required."

In the event, the Authority on two separate occasions requested that the Immigration Service, through Ms Scott, make investigations:

(a) To ascertain which parts of India had certain toll prefixes. This became relevant in

the context of the toll records submitted by the appellant in support of his claims to have spoken to his wife and other relatives in the Punjab. The information received from the Immigration Service during the hearing was consistent with the appellant's claims.

(b) To ascertain whether a report prepared by a delegation from Switzerland's Refugee Determination Office could be made available to the Authority. Unfortunately the information could not be obtained.

The Authority also received from the Immigration Service written submissions on the issue of relocation together with country information. The appellant had full opportunity to comment upon and reply to both the submissions and the information.

The Authority's jurisdiction to receive these submissions under the Terms of Reference was put in issue by the appellant, it being argued in the alternative that by appearing at the hearing the Immigration Service bore the onus of having to establish that the appellant could relocate elsewhere in India. We will return to this issue later.

THE RIGHT TO HEAR THE IMMIGRATION SERVICE

As mentioned, the Immigration Service called no witnesses and did not seek to question the appellant. Its role was confined to making investigations, reporting to the Authority, submitting information in writing and making legal submissions. This role is entirely in accord with the Terms of Reference of both the Refugee Status Section and the Refugee Status Appeals Authority which came into force on 30 August 1993. Part I of the Terms of Reference, which applies to the Refugee Status Section, provides in para 4:

> "4. The RSS shall also have the following functions in any particular case before the Refugee Status Appeals Authority:
>
> (1) Either of its own initiative or upon request by the Refugee Status Appeals Authority, to make representations to the Authority or to answer questions by the Authority about the case or about any information relevant to the case; or
>
> (2) When requested to do so by the Authority, to obtain further information about the case and to report to the Authority accordingly; or
>
> (3) When requested to do so by the Authority, to carry out further investigations in relation to the case and report to the Authority accordingly; or
>
> (4) When requested to do so by the Authority, to request the presence of a particular witness or type of witness; or

(5) To report to the Authority when the General Manager of the NZIS considers it is not practicable to do the thing or things requested by the Authority."

In the present case, paras (1), (2) and (3) clearly justify the functions performed by the Refugee Status Section in this case.

Part II of the Terms of Reference, which applies to the Authority provides in paras 8, 10 and 16:

"**Procedure**

8(1) Every appeal to the Authority shall be in writing and shall contain an address for service which may be either the appellant's personal address or the address of the appellant's representative.

(2) In determining matters brought before the Authority in accordance with these Terms of Reference, the Authority shall consider each written decision of officers of the Refugee Status Section that relates to that appellant and any other information in writing submitted by the New Zealand Immigration Service and any material submitted in writing by the appellant.

(3) Subject to paragraphs 5(2) and 8(4) of these Terms of Reference, the Authority shall give the appellant an opportunity to attend an interview and shall consider any evidence presented by the appellant, unless the claim to refugee status is prima facie "manifestly unfounded" or "clearly abusive" or manifestly well-founded.

(4) The Authority may determine appeals made under paragraphs 5(1)(f) and 5(1)(g) of these Terms of Reference without interviewing the appellant and shall consider any evidence presented in writing by the appellant and the NZIS. Where the Authority allows an appeal under paragraph 5(1)(f), it shall proceed immediately to consider the merits of the claim pursuant to paragraph 5(1)(g).

(5) Where the Authority interviews appellants (who may be accompanied by their representatives should they so wish), officers of the Refugee Status Section or other officers of the Department of Labour shall also be entitled to give evidence in person to the Authority.

(6) The Authority may question officers of the Refugee Status Section and, if necessary, other officers of government on the issues before the Authority, provided however that any information to be used by such officer before the Authority which may be prejudicial to the appellant shall be put to the appellant who shall be given a reasonable opportunity to comment to the Authority on that information.

9. ...

10(1) The Authority may, in relation to any matter properly brought before it, request the Refugee Status Section to do one or more of the following things:

(a) Seek to obtain further information and report to the Authority; or

(b) Carry out further investigations and report to the Authority; or

(c) Request the presence of a particular witness or particular type of witness.

(2) If, in the opinion of the General Manager of the New Zealand Immigration Service in any such case, it is not practicable to obtain or seek to obtain the information or to carry out the investigation or request the presence of a witness, the Refugee Status Section shall report accordingly to the Authority.

16. Subject to these Terms of Reference, the Authority may regulate its own procedure and receive such evidence and conduct any hearings in such manner as it thinks fit."

In the present case, paras 8(2), (5) and (6) apply.

There is a clear correlation between the provisions of Part I and Part II. Some moment was made by the appellant of the fact that when this appeal was lodged in September 1992, the Authority was operating under its previous Terms of Reference dated 1 April 1992. Nothing turns on this point as the relevant provisions are similar, if not identical in parts. Furthermore, the transitional provision in paragraph 19, Part II of the present Terms of Reference explicitly provides that the April 1992 Terms of Reference continue to apply only in relation to hearings which began prior to 30 August 1993.

It was in the light of the provisions of the Terms of Reference referred to that we ruled that Ms Scott would be heard and that the two officers would be permitted to remain in the hearing room with her.

We turn now to the issues of cross-examination and burden of proof. As matters turned out, no officer of the Refugee Status Section of the Immigration Service wished to give evidence under Part II paragraph 8(5), nor did the Authority request the presence of a particular witness under Part II paragraph 10(1)(c).

The issue of cross-examination did not arise and it was a point which was in any event conceded by Miss Scott. We need, however, to address the issue of the onus or more concisely, the burden of proof. This, in turn, raises the broader issue of the nature of the hearing before the Authority. As Professor Guy S. Goodwin-Gill observes in "The Determination of Refugee Status: Problems of Access to Procedures and the Standard of Proof", International Institute of Humanitarian Law Yearbook (1985) 56, 61 questions raised in the asylum process can go to the heart of conceptions of the judicial process and to the meaning of justice itself.

THE NATURE OF THE APPEAL: A HEARING *DE NOVO*

In Shotover Gorge Jet Boats Ltd v Jamieson [1987] 1 NZLR 437 (CA) a distinction was

made between an appeal *de novo* and an appeal by way of rehearing. An appeal *de novo* was described by Cooke P at 440 in the following terms:

> "In such cases it is the duty of the appellate Court to reach its own independent findings and decision on the evidence which it hears or admits. It is entitled to give weight, if it sees fit, to the opinion of the tribunal appealed from, but is in no way bound thereby."

As to an appeal by way of rehearing, Cooke P stated at 440:

> "There is another type of appeal which, although open on fact as well as law and to be by way of rehearing, is by the terms of the relevant statute to be heard on the record of the oral evidence given below, subject to a discretionary power to rehear the whole or any part of the evidence or to receive further evidence. The New Zealand paradigm is the District Courts Act 1947, s 76, governing civil appeals from the District Courts to the High Court. An example in the licensing field is Mitchell v Mt Wellington Licensing Trust [1964] NZLR 353, 364-366. In that class of case the appellate Court makes the customary allowance for any advantages that the Court or tribunal appealed from may have had in seeing and hearing the witnesses. It is also customary in such cases to exercise restraint in interfering with discretionary decisions. The authorities as to the traditional constraints on appellate review in this area are numerous and some are very well known. In practice an appellate Court which has not seen and heard the witnesses is slower to disturb a discretionary decision of a Court that has had that advantage; stress is laid on the need to show that the decision under appeal was wrong."

In each case it is a question of statutory interpretation whether an appeal proceeds *de novo* or by way of rehearing.

The primary mandate of the Authority is to determine whether a particular individual is a refugee within the meaning of Article 1A(2) of the Refugee Convention (the Inclusion clause). Part II paragraph 5(1)(a) of the Terms of Reference provides:

> "**Function and Jurisdiction**
>
> 5(1) The Authority's functions shall be:
>
> (a) To make a determination on appeal from decisions of the Refugee Status Section of the New Zealand Immigration Service as to whether persons are refugees within the meaning of Article 1A(2) of the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees."

There is no need for present purposes to address paragraphs 5(1)(b) to (g) of the Terms of Reference which each address the Exclusion and Cessation clauses of the Refugee Convention as well as other situations which do not arise on the facts of the present case.

The essential task of the Authority is to decide whether a particular individual is a refugee.

There is no "dispute" between the individual and the Immigration Service, nor is the Authority charged with resolving a "contest" between them.

The fact that under Part II paragraph 5(1)(a) the determination of refugee status is made "on appeal" adds nothing to this essential task as the issue remains the same, namely: in the particular case are the Inclusion Clause criteria prescribed by Article 1A(2) of the Refugee Convention satisfied. The words "on appeal" signify only that the determination of refugee status by the Authority follows a negative decision made at first instance by the Refugee Status Section. The words do not, on their own, indicate that there is an onus on the appellant to show that the decision at first instance is wrong in fact or in law or that there is a dispute between parties. On the contrary, the statement that it is the function of the Authority to make a determination whether a person is a refugee very much suggests that the jurisdiction is original in the sense that the decision is to be made unfettered by that taken at first instance and that there is no "contest" between the appellant and the Refugee Status Section of the Immigration Service.

This conclusion is reinforced by the following provisions of the Terms of Reference (TR):

(a) The Authority is required only "to consider" the written decision of officers of the Refugee Status Section which relates to the appellant and any other information in writing submitted by the NZIS. It is not required to give any prescribed weight to such decision or submissions. There is no presumption in favour of the Refugee Status Section decision. See TR Part II paragraph 8(2).

(b) The Authority is required to give the appellant an opportunity to attend an interview and to consider any evidence presented by the appellant. See TR Part II paragraph 8(3).

These first two factors alone strongly suggest that consideration of the case on appeal is a *de novo* consideration. The clear inference is that the Authority is to make a decision on the facts as they stand as at the date of the determination of the appeal and is not confined to the facts as they stood (or as they were presented) at first instance, which, given the present backlog of appeals, could be some considerable time in the past. This accords with the basic refugee law principle that the appropriate date at which the well-foundedness of the fear of persecution is to be assessed is the date of determination: Chan v Minister for Immigration and

Ethnic Affairs (1989) 169 CLR 379, 386 (Mason CJ), 398 (Dawson J), 405 (Toohey J), 414 (Gaudron J), 432 (McHugh J) (HCA) adopted and applied by this Authority in numerous cases. See the line of decisions beginning with Refugee Appeal No. 81/91 Re VA (6 July 1992) 5-11. For more recent authority see Lek v Minister for Immigration, Local Government and Ethnic Affairs (1993) 117 ALR 455, 458-463 (Wilcox J).

There is no need in the present case to address the exceptions envisaged by TR Part II paragraph 8(3) to the mandatory interview or hearing, namely claims which are *prima facie* "manifestly unfounded" or "clearly abusive" or "manifestly well-founded". The Authority has not to date accepted that it is appropriate to make determinations of refugee status "on the papers". Our reasons for holding this view are set out more fully in Refugee Appeal No. 1/92 Re SA (30 April 1992) 12-19.

(c) In addition to imposing on the Authority a duty to hear an appellant, the Terms of Reference require the Authority to hear also officers of the Refugee Status Section or other officers of the Department of Labour. See TR Part II paragraph 8(5).

This provision clearly envisages a hearing at which the Authority conducts an independent investigation into the question whether the individual is a Convention refugee. The Authority's power to request the Refugee Status Section to obtain further information, to carry out further investigations and to request the presence of a particular witness or particular type of witness reinforces this view, as do the provisions of paragraph 10 which empower the Authority to request the Refugee Status Section to obtain and provide information.

The Terms of Reference even envisage the receipt by the Authority of information or advice from the United Nations High Commissioner for Refugees. Such information can be taken into account provided there is disclosure to the appellant and an opportunity afforded to comment on it. See TR Part II paragraph 9.

(d) The Authority's power to regulate its own procedure and to receive such evidence and to conduct hearings in such manner as it thinks fit underline the Authority's duty to make a full investigation of the circumstances on which the refugee application is based: See TR Part II paragraph 16.

(e) Finally, there is TR Part II paragraph 5(4) which provides:

> "The Authority's decision on any matter properly before it shall be final and there shall be no right of appeal or rehearing on that matter, and the Minister of Immigration agrees to be bound by the decision."

The finality of the Authority's decision and the Minister's agreement to be bound by that decision point again to the need for the appeal hearing to be a full and independent assessment by an overtly independent body.

The emphasis upon an oral hearing at the appellate level is possibly the most important feature of the New Zealand refugee status determination procedure, recognizing as it does that only the highest standards of fairness will suffice in this unique jurisdiction: Refugee Appeal No. 474/92 Re KA (12 May 1994) 15-21. Fairness in this context requires a face-to-face interview with the refugee claimant. Even in second applications under TR Part II paragraphs 5(1)(f) and (g) where the Terms of Reference permit a determination without an interview, the Authority has held that in most cases the second application will need to be heard in its entirety: Refugee Appeal No. 2254/94 Re HB (21 September 1994) 23 and Refugee Appeal No. 2245/94 Re SS (28 October 1994) 16-18.

In Australia, by contrast, it has been held that procedural fairness does not, in the refugee context, require an oral hearing in each case: Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs (1993) 118 ALR 165 (Wilcox J), a decision which was upheld on appeal in Chen Zhen Zi v Minister for Immigration and Ethnic Affairs (1994) 121 ALR 83 (FC:FC). These decisions became largely academic with the establishment of the Refugee Review Tribunal, an independent statutory body which now hears appeals on disputed refugee decisions. The Tribunal, which began on 1 July 1993, operates on a non-adversarial basis similar to that of the already existing Immigration Review Tribunal. An oral hearing is now mandatory unless, on the papers, a decision in favour of the applicant is made: Migration Act 1958, ss 424 and 425. Oral hearings are also mandatory in Canada: Immigration Act 1985, ss 69(2) and 69.1 consequent on the decision of Singh v Minister of Employment and Immigration (1985) 1 SCR 177 (SC:Can).

THE BURDEN OF PROOF

In dealing with the appellant's submission that the Immigration Service carried an onus of proof, it is necessary to distinguish the two separate burdens which conceivably arise in the present case.

First, there is the question whether a refugee claimant carries a burden of proof to establish his or her claim.

Second, there is the question whether on appeal, there is a burden on the claimant to show that the decision of the Refugee Status Section is wrong.

As the second of these issues can be easily disposed of, it will be addressed first.

THE BURDEN ON APPEAL

In Shotover Gorge Jet Boat Ltd v Jamieson [1987] 1 NZLR 437, 440 (CA) applied in Naden v Judicial Committee of the Auckland Racing Club Inc [1995] 1 NZLR 307 (CA) it was held that in an appeal *de novo* there is no onus on an appellant to show that the decision at first instance was wrong. Cooke P in the Shotover case stated:

> "In some of the foregoing authorities it is put that in this type of appeal there is no presumption in favour of the decision under appeal. Clearly that is so in the sense that the appellate Court has to approach the case afresh. The proceeding is an appeal, however, and if in the end the appellate Court could not make up its mind as to what was the right decision, the decision under appeal would, I think, stand. But that equipoise is unlikely if the appellate Judge accepts his or her true responsibility."

In the refugee law context one qualification must, however, be added to these observations in order that proper recognition be given to the centrality of the benefit of the doubt principle in refugee determinations.

If at the conclusion of the hearing the Authority cannot make up its mind as to whether the appellant is a refugee, then the benefit of the doubt principle requires a decision in favour of the appellant to be given. This principle is fundamental to refugee jurisprudence and is reflected in Part II paragraph 15 of the Terms of Reference which relevantly provides:

> "... Where members are evenly divided on a decision, the outcome shall be in favour of the appellant."

The principle, however, is not narrowly confined and operates in a number of different contexts. See, for example, Refugee Appeal No. 758/92 Re WL (12 May 1994) 15 (credibility); Refugee Appeal No. 992/92 Re PS (12 May 1994) 8-9 (documents); Refugee Appeal No. 9/91 Re AMR (27 August 1991) 14 (country conditions); Refugee Appeal No. 135/92 Re RS (18 June 1993) 39 (relocation). Further reference can be made to Joanna Ruppel, "The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants" (1991) 23 Columbia Human Rights Law Review 1 and Savitri Taylor, "Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions" (1994) 13 University of Tasmania Law Review 43, 62-71.

Our conclusion is that the observation of Cooke P in Shotover Gorge Jet Boats Ltd v Jamieson [1987] 1 NZLR 437, 440 that:

> "... if in the end the appellate Court could not make up its mind as to what was the right decision, the decision under appeal would, I think, stand."

has no application in the context of refugee status determinations.

We can now address the issue whether a refugee claimant carries a burden of proof to establish his or her claim.

WHETHER A REFUGEE CLAIMANT IS REQUIRED TO ESTABLISH HIS OR HER CLAIM

A person who claims the right to be recognized as a refugee under the Refugee Convention must necessarily be aware of the circumstances which justify the assertion that he or she holds a well-founded fear of persecution for one of the five Convention reasons. By making a claim to refugee status, that person must shoulder the obligation of establishing the claim as the facts on which it is based lie peculiarly within the knowledge of the claimant.

This is a basic proposition which would ordinarily require no articulation given that a

person in fear of persecution would be expected to make every effort to establish his or her claim.

It is also inherent in a claim on New Zealand's international obligations under the Refugee Convention that claimants must act in good faith. The requirement that they prove their claim to the surrogate protection afforded by the Refugee Convention is not, therefore, to place on them an unreasonable obligation. Otherwise the door will be opened to abuse, with claimants doing no more than lodging an application for refugee status unsupported by any account of the facts, and expecting the decision-maker to carry out an investigation without the claimant's assistance. It is only a small step from there to say that refugee status is established if the decision-maker is unable to prove that the claimant is **not** a refugee. This would be an absurd state of affairs. In fairness to the appellant, it must be said that no such claim on his behalf was advanced. However, the submission that a non-party to the appeal (the NZIS) carried a burden of proof in the relocation context cannot be separated from the general issue of the burden of proof in refugee applications. A submission that a claimant does not carry the burden of proof as to relocation is not very different from a submission that the claimant carries no burden at all to establish the refugee claim. Certainly the appellant's submission did not address the issue as to why there should be two separate burdens, or why the burden as to relocation only fell on the NZIS if it appeared at an appeal hearing. In short, there was a distinct absence of logic and merit to the appellant's submission.

Our holding that a refugee claimant carries the burden of proving his or her claim does not break new ground. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status para 196 opines:

> "It is a general legal principle that the burden of proof lies on the person submitting a claim."

In Canada the principle is enshrined in s 8(1) of the Immigration Act 1985, a fact noted in Canada (Attorney-General) v Ward [1993] 2 SCR 689, 707 (Can:SC).

Resting the burden of proof on a claimant does not impose an unreasonable responsibility as it is mitigated by three principal factors:

1. The standard of proof. As will be shown in the next section, the standard of proof in the Inclusion clause context is that of a "real chance" of persecution. This is a low threshold and adequately addresses the concerns expressed by Grahl-Madsen in The Status of Refugees in International Law (Vol 1) (1966) 145-146 where, in addressing the issue of proof refugeehood, he observes:

> "In one respect, however, a liberal attitude is called for outright, in order that full effect may be given to the provisions of the Refugee Convention and the purposes for which they are intended: it is a well-known fact that a person who claims to be a refugee may have difficulties in proving his allegations. He may have left his country without any papers, there may be nobody around who may testify to support his story, and other means of corroboration may be unavailable. It would go counter to the principle of good faith if a contracting State should place on a suppliant a burden of proof which he, in the nature of things, could not possibly cope with."

2. The benefit of the doubt principle is to be applied liberally, as decisions of this Authority will show. The principle is that if a decision-maker is unable to make up his or her mind as to whether the claimant is a refugee, a decision in favour of the claimant is to be given as it is inherent in such a situation that the claimant's account could be true.

3. The non-adversarial nature of the proceedings means that **the enquiry** is shared between the claimant and the decision-maker. This ameliorates any disadvantage a claimant might face in the elucidation of the facts, especially information relating to the human rights conditions in the country of origin. This information is relevant both to the overall issue of credibility and to the objective or "well-founded" aspect of the claim. However, the fact that the claimant and decision-maker each have a responsibility to ascertain the facts does not relieve the claimant of the legal burden of proof to establish the claim.

We believe that very much the same is said in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status para 196:

> "It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an application can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if

> the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."

However, as Grahl-Madsen points out in The Status of Refugees in International Law (Vol 1) 146, the liberal attitude to refugee determination adopted by the Authority should not lead to:

> "... an uncritical acceptance of any and all allegations made by suppliants."

It has therefore been the Authority's practice from the outset to conduct a detailed and lengthy examination of all appellants and the witnesses called by them. Typically, hearings commence with an introduction in which the members are introduced to the appellant, the procedures explained and the refugee definition re-emphasized. Stress is placed on the need for the appellant to tell the truth. The appellant's representative is then invited to make opening submissions and to lead any further evidence from the appellant as may be necessary. The Authority then examines the appellant. Thereafter, the representative has an opportunity to re-examine and to make final submissions. Usually a hearing lasts for one half day though it is not uncommon for a whole day to be taken if the factual matrix is more complex. In the present case the hearing lasted three full days.

We return briefly to the role of the Immigration Service and the appellant's submission that the Immigration Service, by appearing, carried the burden of establishing that the appellant is able to relocate in the Punjab or elsewhere in India.

It will be seen from Part II of the Terms of Reference that while the Minister of Immigration agrees to be bound by the Authority's decision (paragraph 5(4), neither the Minister nor the Immigration Service (including the Refugee Status Section thereof) is a party to the appeal, nor is there anything in the nature of or resembling a *lis inter partes*. There is no adverse party with an interest to contest applications for refugee status. The hearing before the Authority is not adversarial.

Put another way, a negative decision at first instance by the Refugee Status Section followed by an appeal cannot in any way be seen as creating a *lis* in which the Refugee Status Section has an interest in defending its decision. The appeal process means no more than that the question whether the individual is a refugee becomes one for determination by

the Authority on a *de novo* basis. In this process the Authority must consider the written decision of the Refugee Status Section officer and any other information in writing submitted by the Immigration Service (TR Part II paragraph 8(2)) and officers of the Refugee Status Section or other officers of the Department of Labour are entitled to give evidence in person to the Authority (TR Part II paragraph 8(5)). The Authority also has power to question officers of the Refugee Status Section and if necessary, other officers of government on the issues before the Authority (TR Part II paragraph 8(6)). The Refugee Status Section can also be called on by the Authority to obtain information and to carry out investigations (TR Part II paragraph 10)). But it is clear that these provisions are intended to enhance the Authority's ability to enquire into the question whether the refugee criteria are satisfied in the particular case, not to make the Refugee Status Section, the Immigration Service or the Minister of Immigration a party or to somehow create a *lis inter partes*.

The appellant's argument on the burden of proof issue overlooks these important factors and also ignores the basic difference between a *lis inter partes* and an enquiry by the Authority. It is fallacious to suggest that because the Terms of Reference just cited permit the Immigration Service a role, albeit a rather limited one, at the appeal hearing, that the Immigration Service is to be treated as being in the same position and as having the same rights as a party to a legal cause. In this regard, while there is no close analogy between the Authority and a Commission of Inquiry, we have nevertheless been assisted in arriving at our conclusions by the judgment of Cleary J in In Re the Royal Commission to Enquire Into and Report Upon State Services in New Zealand [1962] NZLR 96, 115-116 (CA).

We accordingly reject as entirely misconceived the submission that the Immigration Service carries a burden of proof on the relocation issue.

In addition, the Canadian cases on which the appellant so heavily relied to support this limb of the argument establish, if anything, the contrary proposition, namely that it is for the **claimant** to demonstrate that relocation is unreasonable. We will discuss these cases shortly in the context of the relocation principle itself.

We turn now to the question of the standard of proof as some of the appellant's submissions evidenced misconceptions as to the application of the "real chance" test.

THE STANDARD OF PROOF

The definition of a refugee in Article 1A(2) of the Refugee Convention requires that the individual possess a "well-founded" fear of persecution. The definition relevantly provides that a refugee is a person who:

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."

The meaning of the phrase "well-founded fear" has been considered by the Supreme Court of United States of America in Immigration and Naturalization Service v Cardoza-Fonseca (1987) 94 L.Ed 2d 434, the English Court of Appeal and House of Lords in R v Secretary of State for the Home Department, Ex parte Sivakumaran [1988] AC 958 and the High Court of Australia in Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379. These Courts have unanimously rejected a balance of probability standard in ascertaining the well-foundedness of the fear of persecution.

In Immigration and Naturalization Service v Cardoza-Fonseca (1987) 94 L.Ed 2d 434, Stevens J, delivering the majority opinion, said at 447:

> "That the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a "more likely than not" one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."

And at 453 he pointed out that there is no room in the definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening. Quoting from an earlier decision of the Supreme Court in Immigration and Naturalization Service v Stevic (1984) 81 L.Ed 2d 321, he continued:

> "... so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."

In the United Kingdom, the view of the Court of Appeal was that "well-founded fear is demonstrated by proving (a) actual fear, and (b) good reason for that fear, looking at the situation from the point of view of a person of reasonable courage circumstanced as was the applicant for refugee status": R v Secretary of State for the Home Department, Ex parte Sivakumaran [1988] AC 958, 964H.

The second part of this test was unanimously rejected in the House of Lords for the reasons given by Lord Keith at 993A-C:

> "The Court of Appeal's formulation would accord refugee status to one whose fears, though genuine, were objectively demonstrated to have been misconceived, that is to say one who was at no actual risk of persecution for a Convention reason. The Court of Appeal would qualify this by denying refugee status to one who, while holding a genuine fear, was not a person of reasonable courage, so that his fears were not such as a person of that degree of courage would entertain. The differentiation means that the fears of some, but not those of others, would be allayed, and it might be by no means easy to decide what degree of courage a person of ordinary fortitude might be expected to display."

At 994F Lord Keith arrived at the conclusion that the requirement that a claimant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that the claimant will be persecuted for a Convention reason if returned to his or her own country. As to the degree of likelihood to be satisfied, the test is not one of "more likely than not", but of "a reasonable chance, substantial grounds for thinking, a serious possibility": 995B-C.

When the issue was considered in Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 the High Court of Australia, having considered Cardoza-Fonseca and Sivakumaran, held that an applicant for refugee status would satisfy the definition if he or she showed a genuine fear founded on "a real chance" of persecution for a Convention reason, applying the formulation suggested by Grahl-Madsen in The Status of Refugees in International Law Vol 1 (1966) 181. See Mason CJ at 388-389:

> "... I prefer the expression "a real chance" because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 per cent chance of persecution occurring."

Dawson J at 397-398:

> "On the other hand, it is also clear enough that a fear can be well-founded without any certainty, or even probability, that it will be realized.
>
> ...
>
> ... a real chance is one that is not remote, regardless of whether it is less or more than 50 per cent."

Toohey J at 407:

> "The test suggested by Grahl-Madsen, "a real chance" gives effect to the language of the Convention and to its humanitarian intendment. It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial. It is a test that can be comprehended and applied. That is not to say that its application will be easy in all cases; clearly, it will not. It is inevitable that difficult judgments will have to be made from time to time."

McHugh J at 429:

> "The decisions in *Sivakumaran* and *Cardoza-Fonseca* also establish that a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. As the United States Supreme Court pointed out in *Cardoza-Fonseca* an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterized as "well-founded" for the purpose of the Convention and Protocol."

In Canada the preferred formulations are "reasonable chance" or "good grounds": Adjei v Canada (Minister of Employment and Immigration) [1989] 2 FC 680 (FC:CA).

The position in Europe is not straightforward and is discussed by Walter Kälin in "Well-founded Fear of Persecution: A European Perspective", Coll & Bhabha (eds), Asylum Law and Practice in Europe and North America: A Comparative Analysis (1st ed 1992) 21.

In New Zealand, the "real chance" test has been adopted by this Authority because of its clarity and simplicity of application in a determination process which is characterized by what Professor Hathaway has called "inherent evidentiary voids": Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB (11 July 1991) 7.

Professor James C. Hathaway, Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada (December 1993) 6, 57.

In summary, before it can be said that a fear is well-founded, there must be a real chance of persecution. There must be more than a remote chance of persecution occurring. It follows that the standard of proof is much less than fifty per cent and can be as low as a ten per cent chance. It is undesirable, however, to express chances in terms of percentages as this can be misleading. It is preferable to enquire whether there is a real chance as opposed to one which is remote.

The standard of proof is not only a low one, experience shows that genuine refugees are well able to meet this standard, particularly given the liberal application of the benefit of the doubt in relation to the "real chance" question. Our holding that the legal burden of proof is carried by the claimant does not, in the result, impose a burden of any great weight.

CONCLUSIONS ON THE PROCEDURAL ISSUES

1. A refugee claimant carries the burden of proving the claim to refugee status.

2. The proceedings before the Authority are non-adversarial and are in the nature of a *de novo* hearing.

3. On appeal, a refugee claimant does not have to establish that the decision at first instance by the Refugee Status Section was wrong.

   If at the conclusion of the hearing the Authority is in a state of equipoise, the benefit of the doubt principle requires that the appellant receive the benefit of that doubt.

4. The role played by the Refugee Status Section of the New Zealand Immigration Service and their counsel at the hearing of this appeal was entirely in accord with the Terms of Reference of 30 August 1993.

5. By appearing by counsel, neither the Refugee Status Section nor the Immigration Service became a party to the appeal, nor was an onus of proof thereby assumed by them.

RELOCATION

In recent years the Authority has heard a large number of cases in which both Sikhs and Hindus have left the Punjab following violence or threats of violence at the hands of various terrorist groups operating in that state.

While the "classic" model of persecution postulates harm inflicted by the state itself through its various agents, it is recognized that the Refugee Convention also interposes what Professor James C. Hathaway in The Law of Refugee Status (1991) 133, 135 calls the surrogate protection of the international community in those cases where the agent of persecution is not the state, but a non-state agent. This principle was accepted in New Zealand within months of the Authority's first hearings in June 1991: Refugee Appeal No. 11/91 Re S (5 September 1991) 10-19.

Surprisingly, the principle has not been accepted in some jurisdictions until quite late. It was not recognized in Canada until 1985: Gary Evans, Agents of Persecution: A Question of Protection Discussion Paper #3, Refugee Law Research Unit, Osgoode Hall Law School, York University (1991) 4-5 citing Rajudeen v MEI [1985] 55 NR 129 and not confirmed until Canada (Attorney-General) v Ward [1993] 2 SCR 689, 713 (SC:Can). In the United Kingdom see R v Secretary of State for the Home Department, Ex parte Jeyakumaran [1994] Imm AR 45, 48 (QBD), a decision given in June 1985 but not reported until almost ten years later. In the United States the jurisprudence is, from a New Zealand point of view, unnecessarily complicated, if not abstruse: Anker, Blum & Johnson, "The Supreme Court's Decision in INS v Elias-Zacarias; Is There Any "There" There? 69 Interpreter Releases 285 (March 9, 1992) reproduced in shortened form under the title "INS v Zacarias: Is There Anyone Out There?" (1992) 4 International Journal of Refugee Law 267. See also Ellen S. Moore, "Refugee Determinations: A Consolidation of Approaches to Actions by Nongovernmental Forces" (1993) 33 Virginia Journal of International Law 927.

More often than not, the non-state agent of persecution is a terrorist or guerilla group which the state is either unwilling or is unable to control with the result that there is often a regionalized failure by the state to protect its citizens. Depending, of course, on the strength of the terrorist or guerilla organization, it is not uncommon to find that the

activities of the group are confined to a specific area or areas. The question which arises is whether an individual who has a well-founded fear of persecution at the hands of a terrorist group in one part of the country of origin, but who can receive meaningful state protection in another part of the country, should be expected to seek out this protection before making a claim to refugee status in another country.

The general consensus is that an affirmative answer should be given. Professor Hathaway in The Law of Refugee Status (1991) 133 refers to this as the internal protection principle. Others describe it as the internal flight alternative (IFA) but in New Zealand the Authority has from the outset favoured the description "the relocation principle" as to pose any question postulated on an internal flight alternative is to ask the wrong question: Refugee Appeal No. 11/91 Re S (5 September 1991) 19; Refugee Appeal No. 18/92 Re JS (5 August 1992) 10; Refugee Appeal No. 135/92 Re RS (18 June 1993) 24. The question is not one of flight but of protection and is to be approached fairly and squarely in terms of the refugee definition which specifically emphasizes the protection issue:

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

The term "relocation" has in recent times been adopted by the Federal Court of Australia: Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 124 ALR 265, 269, 278, 280 (FC:Full Court).

We will now address the basis of the relocation principle.

RELOCATION: A STATEMENT OF THE PRINCIPLE

There is little that need be added to the explanation of principle to be found in Refugee Appeal No. 135/92 Re RS (18 June 1993) 24-25:

> "As is apparent from Article 1A(2) of the Refugee Convention, a fundamental premise on which the Convention is based is that of national protection:
>
> > "... is unable or ... is unwilling to avail himself of the protection of that country."
>
> The intention was that **international** protection under the Convention only comes into play where the maltreatment anticipated is demonstrative of a breakdown of national protection: Hathaway, The Law of Refugee Status (1991) 104. Hence the proposition that persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection: Hathaway op cit 104-105.

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

> "A person cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state."

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

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

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

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

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

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

It was recently emphasized in Thirunavukkarasu v Canada (Minister of Employment and Immigration) [1994] 1 FC 589, 592 (FC:CA) that relocation is an issue inherent in the definition of Convention refugee:

> "Despite the decision of this Court in Rasaratnam v Canada (Minister of Employment and Immigration) [1992] 1 FC 706, there remains some confusion about the nature of "the internal flight alternative" in Convention refugee claims. It should first be emphasized that the notion of an internal flight alternative (IFA) is not a legal defence. Neither is it a legal doctrine. It merely is a convenient, short-hand way of describing a fact situation in which a person may be in danger of persecution in one part of a country but not in another. The idea of an internal flight alternative is "inherent" in the definition of a Convention refugee (see Mahoney JA in Rasaratnam, *supra*, at p 710); it is not something separate at all. That definition requires that the claimants have a well-founded fear of persecution which renders them unable or unwilling to return to their home country. If claimants are able to seek safe refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country."

We entirely agree with this statement.

RELOCATION: THE PRINCIPLE IN NEW ZEALAND

As already mentioned, the three principal decisions of the Authority on relocation are Refugee Appeal No. 11/91 Re S (5 September 1991); Refugee Appeal No. 18/92 Re JS (5 August 1992) and Refugee Appeal No. 135/92 Re RS (18 June 1993). It is not practical to repeat what is said in these decisions, but they should be read with this present decision.

As stated by this Authority in Refugee Appeal No. 135/92 Re RS (18 June 1993) 25-27, the decisions delivered by this Authority since it began sitting in June 1991 show that relocation turns on two issues:

1. Can the individual ***genuinely access*** domestic protection which is ***meaningful***?

2. Is it reasonable, in all the circumstances, to expect the individual to relocate?

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

For the appellant it was submitted that the second limb of the New Zealand relocation test is wrong in law. There was no challenge to the first limb.

If the appellant's submission is correct, the curious result is that relocation will turn only on the question whether the individual can genuinely access meaningful domestic protection in the country of origin. The individual would lose the not inconsiderable benefit or advantage of the reasonableness override which will on occasion rule out relocation even though objectively, meaningful protection can be accessed. In these circumstances, the purpose of the submission is difficult to divine, particularly when the reasonableness element of the New Zealand test is also firmly part of the Canadian law ostensibly relied on by the appellant to support his submission. It is also an accepted element of the Australian test. However, be that as it may, it will be shown that the appellant's submission is misconceived and that it is appropriate for New Zealand to continue to apply

what is, from the refugee's point of view, a generous and humane test which permits refugee status to be recognized even where the individual has a well-founded fear of persecution in **one** part of the country of origin and who could access meaningful state protection by moving to a different part of the country of origin. On a narrow and begrudging application of the Refugee Convention, it could be said that once it is established that meaningful state protection is accessible, the individual has no claim to the surrogate protection of the international community. By challenging the reasonableness component of the New Zealand relocation test, the appellant's submission argues in favour of the narrow approach.

RELOCATION: APPELLANT'S SUBMISSION

The challenge by the appellant to the cumulative or super-added requirement that it be reasonable, in all the circumstances, to expect the individual to relocate rests on the following propositions. The paragraph references are to the written submissions presented in closing:

(a) Para 6.5 The House of Lords in R v Secretary of State for the Home Department, Ex parte Sivakumaran [1988] AC 958 interpretation of "well-founded fear" expressly overruled the English Court of Appeal test which was based on the "reasonable behaviour" of a person being fearful of persecution.

(b) Para 6.7 Assessments of refugee status are made in a context remote from the country of origin. Thus one should be "extremely cautious in making judgements of what a reasonable person should be expected to do".

(c) Para 6.8 The reasonableness test must be abandoned in looking at the matter of relocation.

The submission is based on a misreading of both Ex parte Sivakumaran and Refugee

Appeal No. 135/92 Re RS (18 June 1993). In Ex parte Sivakumaran the issue under consideration in both the Court of Appeal and the House of Lords was not that of relocation, but the logically prior issue of the well-foundedness of the fear of persecution. Unless such well-founded fear is demonstrated in at least **part** of the country of origin, the Refugee Convention has no application. The issue of relocation arises only once such fear is established and:

(a) Postulates that there is a well-founded fear of persecution in one but not all parts of the country of origin.

(b) Raises the question whether the individual can genuinely access domestic protection which is meaningful in some other part of the country of origin. The question is whether by moving to another location the individual can remove him or herself from the danger, thus eliminating the "real chance" of persecution.

(c) Even if the answer to the last question is "Yes", is it reasonable, in all the circumstances, to expect the individual to relocate.

If the answer to the last question is "No", the result is that a person who in one respect is not a person facing a real chance of persecution in each and every part of the country of origin is nevertheless able to take advantage of the Refugee Convention.

The very different issue considered in Ex parte Sivakumaran was whether the test for a well-founded fear of persecution is an objective one. In the Court of Appeal it was held that "well-founded fear" is demonstrated by proving (a) actual fear, and (b) good reason for that fear, looking at the situation from the point of view of a person of reasonable courage circumstanced as was the applicant for refugee status. As Lord Keith pointed out in the House of Lords at [1988] AC 958, 993A, the second limb of this formulation would accord refugee status to one whose fears, though genuine, were objectively demonstrated to have been misconceived, that is to say one who was at no actual risk of persecution for a Convention reason. He observed that the Court of Appeal would qualify this by denying refugee status to one who, while holding a genuine fear, was not a person of reasonable courage, so that his fears were not such as a person of that degree of courage would entertain. The differentiation meant that the fears of some, but not those of others, would

be allayed, and it might be by no means easy to decide what degree of courage a person of ordinary fortitude might be expected to display. It was his opinion, shared by the other Lords, that whether an applicant's fear of persecution is well-founded is to be determined objectively in the light of the circumstances existing in the country of origin: 993-994.

This is a very different issue to the enquiry, in the relocation context, whether it is reasonable to expect the individual to relocate.

It is also important to note that the test whether it is reasonable to expect an individual to relocate is not "what a reasonable person should be expected to do" (to quote the appellant's submission). This is to wholly misunderstand the subject matter. The test is what is reasonable in the particular circumstances of the specific individual whose case is under consideration. The focus is not on the hypothetical reasonable person, but on what is reasonable in the particular (i.e. subjective) circumstances of the specific individual claimant.

We accordingly reject without hesitation the challenge to the relocation test formulated in Refugee Appeal No. 135/92 Re RS (18 June 1993). As will be seen, the New Zealand test is entirely in accord with the law as has subsequently developed in both Canada and Australia.

RELOCATION: CANADA

The decision of the Supreme Court of Canada in Canada (Attorney-General) v Ward [1993] 2 SCR 689, 709 (SC:Can) delivered by La Forest J emphasizes the principle that international protection under the Refugee Convention is intended as a surrogate form of protection:

> "At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. 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 p 135."

At 752, La Forest J stated:

> "The rationale underlying international refugee protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option."

The impact of this principle on the objective component of the "well-founded fear" required by the Refugee Convention is that if a state of nationality is able to protect the claimant, then his or her fear is not, objectively speaking, well-founded: 712, 722.

Addressing the issue whether the claimant must first seek out the protection of his or her state before claiming refugee status, the Supreme Court at 723 accepted that in principle there cannot be said to be a failure of state protection when a government has not been given an opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming. However, recognizing that some states are willing, but unable to protect their citizens from harm, La Forest J continued at 724:

> "Like Hathaway, I prefer to formulate this aspect of the test for fear of persecution as follows: only in situations in which state protection "might reasonably have been forthcoming", will the claimant's failure to approach the state for protection defeat his claim. Put another way, the claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities; otherwise, the claimant need not literally approach the state."

It may be observed that this formulation is in accord with the first and second limbs of the New Zealand relocation test in Refugee Appeal No. 135/92 Re RS (18 June 1993).

Addressing the issue how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals, as well as the issue of the reasonable nature of the claimant's refusal to actively seek out this protection, the Court placed an onus on the claimant to provide clear and convincing confirmation of a state's inability to protect. If this cannot be done, the claim should fail: 724-725:

> "... clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a

claimant."

We see no reason why this statement of principle should not also apply in the New Zealand context.

And at 726, La Forest J concluded:

> "Although this presumption increases the burden on the claimant, it does not render illusory Canada's provision of a haven for refugees. The presumption serves to reinforce the underlying rationale of international protection as a surrogate, coming into play when no alternative remains to the claimant. Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already."

As the onus of establishing the state's inability to protect was placed by the Supreme Court on the claimant, Canadian decisions on relocation which predate Ward must be read with considerable caution. The appellant's submissions fail to take this important development into account. The relevant cases will be briefly discussed.

Prior to Ward, the IFA principle was considered in Rasaratnam v Canada (Minister of Employment and Immigration) [1992] 1 FC 706 (FC:CA). In this decision the Federal Court of Appeal recognized that the IFA concept is inherent in the Convention refugee definition. That is, a claimant cannot be a Convention refugee if there is an internal flight alternative: 710. The Court also held:

(a) The onus of proof rests on the claimant to show, on a balance of probabilities, that there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA: 709-710.

(b) However, a claimant is not to be expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument: 710-711.

(c) In assessing the IFA, the Convention Refugee Determination Division of the Immigration and Refugee Board was required to be satisfied:

(i) On a balance of probabilities that there was no serious possibility of the appellant being persecuted where the IFA is said to exist; and

(ii) That in all the circumstances particular to him, conditions in the IFA are such that it would not be unreasonable for the individual to seek refuge there: 711.

As to (c)(i), this holding is no longer good law in the light of the ruling in Ward that the onus is on the claimant to provide clear and convincing confirmation of a state's inability to protect. The appellant's somewhat substantial reliance on this aspect of Rasaratnam was for these reasons misconceived.

Further as to (c)(i), it should be observed that the prescription of a test couched in terms requiring the assessment of the occurrence of a less-than probable event according to a probability standard of proof does nothing to enhance clarity. It was precisely to avoid such convolutions that this Authority has adopted the "real chance" test and formulated the relocation test in the simple and direct language referred to.

It was nevertheless submitted for the appellant, relying on Rasaratnam that the onus was on "the Minister" to establish that the appellant could relocate in India (written submissions p 5 para 6.4; p 33 para 3). It was for this reason so much store was placed by the appellant on the appearance at the hearing of counsel for the Immigration Service and the two immigration officers from the Refugee Status Section.

As to this submission, we have already explained why, both in terms of principle and in terms of the Terms of Reference, the appellant's submissions on the nature of the New Zealand proceedings and on the burden of proof were misconceived.

We are also able to show that in terms of Canadian jurisprudence itself, the appellant's submission as to the burden of proof in the relocation context is wrong in law. The appellant relied on the following passage from Rasaratnam at 710:

> "That said, however, a claimant is not to be expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument."

Support for the appellant's submission is to be found in a two-and-a-half page oral judgment of the Court of Appeal in Bindra v Canada (Minister of Employment and Immigration) (1992) 18 Imm LR (2d) 114 dealing **not** with hearings before the Board, but with the pre-hearing "credible basis" assessment, In this decision language was used in an *obiter dictum* to suggest that there was an onus on the (Canadian) Minister. This decision was later followed at first instance in Sharbdeen v Canada (Minister of Employment and Immigration) (1993) 22 Imm LR (2d) 9 (FC:TD), a decision delivered seven days prior to Ward but specifically relied on by the appellant.

Unfortunately for the appellant, neither Bindra nor Sharbdeen could survive after the Supreme Court decision in Ward and both decisions have been expressly overruled by the Federal Court of Appeal in the two decisions of Thirunavukkarasu v Canada (Minister of Employment and Immigration) [1994] 1 FC 589 (FC:CA) and (on appeal) Sharbdeen v Canada (Minister of Employment and Immigration) (1994) 23 Imm LR (2d) 300 (FC:CA).

In Thirunavukkarasu the Court of Appeal approved the statement in Rasaratnam that as the question of whether or not there is an IFA is part and parcel of whether or not the claimant is a Convention refugee, the claimant must demonstrate on the balance of probabilities that there is a serious possibility of persecution in the area alleged to constitute an IFA. Given that this is a far heavier obligation than that imposed on claimants in New Zealand, it is ironic that the appellant should attempt to incorporate this element into New Zealand jurisprudence.

The only burden which Thirunavukkarasu and Sharbdeen do place on the Board, the refugee hearing officer or Minister, is to warn the claimant if an IFA is going to be raised. As explained in Thirunavukkarasu at 596:

> "A refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met. (See for example, Kane v Board of Governors (University of British Colombia), [1980] 1 SCR 1105, at p 1114. The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing ...
> These two very different obligations, therefore, should be carefully distinguished."

We see no reason why in the New Zealand context the rules of fairness should not impose a similar obligation on the Authority itself.

However, the obligation must be tempered with common sense. There are certain categories of cases where it is self-evident that relocation is an issue either because of the nature of the case (particularly if it involves a non-state agent of persecution) or because of the country of origin (in India's case, claimants from the Punjab) or both. Thus, over the past three and a half years the Authority has heard approximately 400 cases involving claimants from the Punjab which also involved a non-state agent of persecution. Our jurisprudence in this area is both detailed and extensive and the three leading cases have already been cited. The position has been reached where it can be said that it is inevitable that a non-state agent case from the Punjab will raise the relocation issue. This is recognized in the way the vast majority of cases are presented and relocation is addressed as part of the appellant's case. To suggest that in Punjab cases a claimant is entitled to sit back until the Authority raises the issue would be to reduce the rules of fairness to little more than a game in which technocratic justice is pursued for ulterior motives. We would expect that in the vast majority of cases, as happens now, that the relocation issue will be addressed without the Authority having to take the initiative to raise it. If in a particular case an appellant is genuinely caught by surprise, the Authority will look sympathetically at an application for further time to present evidence and submissions directed to the issue.

We also emphasize that simply because the rules of fairness require notice to be given that the relocation issue is to be considered does **not** cast on the Authority anything in the nature of an evidentiary or legal onus of proof as far as the relocation issue is concerned. The legal onus to establish the claim to refugee status rests, as always, on the claimant. The enquiry remains, however, a shared one and if there is a real, as opposed to a fanciful doubt on either of the two limbs of the New Zealand relocation test, the appellant must receive the benefit of that doubt: Refugee Appeal No. 135/92 Re RS (18 June 1993) 38-39.

RELOCATION: THE UNITED KINGDOM, THE UNITED STATES AND EUROPE

While the relocation principle is applied in the United Kingdom, the jurisprudence is as yet apparently undeveloped. The Courts have not progressed beyond citing the UNHCR

Handbook on Procedures and Criteria for Determining Refugee Status para 91 as justification for holding that if in all the circumstances it would be reasonable to expect someone to return to another part of his or her country of nationality, then that is a matter that can properly found an adverse decision on a claim to refugee status: R v Immigration Appeal Tribunal, Ex parte Jonah [1985] Imm AR 7 (QBD); R v Secretary of State for the Home Department, Ex parte Yurekli [1990] Imm AR 334 (QBD); Yurekli v Secretary of State for the Home Department [1991] Imm AR 153 (CA); R v Secretary of State for the Home Department, Ex parte Gunes [1991] Imm AR 278 (QBD); R v Secretary of State for the Home Department, Ex parte Onay [1992] Imm AR 320 (QBD); El-Tanoukhi v Secretary of State for the Home Department [1993] Imm AR 71, 74 (CA); R v Secretary of State for the Home Department, Ex parte Vigna [1993] Imm AR 93 (QBD).

Limited though the discussion of principle has been in these cases, it is nevertheless clear that the reasonableness element of the New Zealand relocation test is also present in the jurisprudence of the United Kingdom.

In the United States the picture is complicated by the fact that refugee claims can be processed either in the context of an asylum application or in the context of a withholding of deportation enquiry. Though the requirements of each form of enquiry converge, they are not identical. Furthermore, in some circumstances, past persecution, without more, satisfies the statutory requirement of the Immigration and Nationality Act, s 101(a)(42)(A) independent of the establishment of a well-founded fear of future persecution upon return to the country of origin. There are few parallels with the New Zealand system. However, the possibility of relocation has defeated claims of asylum eligibility. The issue has not to date received substantial judicial analysis, but it can be said that the reasonableness of expecting the individual to relocate has been specifically recognized: Singh v Ilchert 801 F.Supp. 313, 321 (N.D. Cal. 1992); Robert B. Jobe, "Establishing the Threat of Persecution on a Countrywide Basis" in Murphy (ed), 1994-95 Immigration and Nationality Law Handbook Vol II (1994) 610, 617-619.

In Europe, the internal flight alternative is well-recognized. For The Netherlands see Case Abstract **IJRL/015** (1989) 1 International Journal of Refugee Law 388 and Case Abstract **IJRL/0016** (1989) 1 International Journal of Refugee Law 389, both decisions of the Afdeling Rechtspraak van de Raad (Judicial Division of the Council of State).

For Germany, see Case Abstract **IJRL/0084** (1991) 3 International Journal of Refugee Law 343, a decision of the Bundesverfassungsgericht (Federal Constitutional Court) and the application of the principle by the Bundesverwaltungsgericht (Federal Administrative Court) in Case Abstract **IJRL/0081** (1991) 3 International Journal of Refugee Law 338.

For France, reference should be made to Case Abstract **IJRL/0101** (1992) 4 International Journal of Refugee Law 97, a decision of the Commission des Recours (Refugee Appeals Board).

The Authority has not had access to the full text of these decisions and only limited conclusions can be drawn from the brief Case Abstracts. It can be said, however, that the IFA alternative is recognized in the countries mentioned and that a range of considerations is taken into account before the principle is applied. In that sense there is a "reasonableness" element in the European jurisprudence.

RELOCATION: AUSTRALIA

The relocation principle, by that name, has been expressly recognized and applied in Australia by the Full Court of the Federal Court in Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 124 ALR 265 (FC:FC). Specific recognition was given to both the underlying protection principle and to the issue of reasonableness.

As to the protection principle, it was argued for Randhawa (a Sikh from the Punjab) that if, at least in relation to the part of a country that was his home, he had a well-founded fear of persecution for a Convention reason, such that he was unwilling to avail himself of the protection of that country (India), he was a refugee notwithstanding that he might not have that fear in some other part of the country. This submission was emphatically rejected. See, for example, Black CJ at 268:

> "Although it is true that the Convention definition of refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found

within those borders."

The Court also recognized that it was important to enquire whether the individual could reasonably be expected to relocate to another area. See Black CJ at 270:

> "This further question is an important one because notwithstanding that real protection from persecution may be available elsewhere within the country of nationality, a person's fear of persecution in relation to that country will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law the practical realities facing a person who claims to be a refugee must be carefully considered.
>
> Moreover, the range of the realities that may need to be considered on the issue of reasonableness of relocation extends beyond the physical or financial barriers preventing an applicant for refugee status from reaching safety within the country of nationality and easily extends to circumstances such as those present in R v Immigration Appeal Tribunal, Ex parte Jonah [1985] Imm AR 7."

After citing the passage from Professor Hathaway, The Law of Refugee Status (1991) 134 also relied on by this Authority in Refugee Appeal No. 11/91 Re S (5 September 1991) 23 and Refugee Appeal No. 135/92 Re RS (18 June 1993) 26 that:

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

Black CJ observed at 270 (Whitlam J agreeing at 280) that:

> "If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded. I should add that this seems to me to be a better way of looking at the matter than to say, as the first and last sentences of para 91 of the Handbook suggest, that the fear of persecution need not extend to the whole territory of the refugee's country of nationality if under all the circumstances it would not have been reasonable to expect a person to relocate."

As to the onus of proof, Beaumont J at 278 was of the view that this rested on the claimant:

"... [has] the appellant demonstrated, on the facts, that relocation [is] unreasonable?"

It can be seen that there is a close congruence between the New Zealand and Australian jurisprudence and we note that the Authority's decision in Refugee Appeal No. 18/92 Re JS (5 August 1992) is cited in the decision of Black CJ at 269.

RELOCATION: CONCLUSIONS ON THE LAW

The relocation principle, by its various names, is widely recognized in refugee jurisprudence and there is a growing consensus that the relevant principles are those of state protection and reasonableness. The New Zealand jurisprudence has for some time encapsulated these principles in a specifically formulated test which, on any view, is favourable to refugees.

The appellant's challenge to the test, or at least to the "reasonableness" element, can only be regarded as uninformed and if upheld, a retrograde step in the honouring by New Zealand of the humanitarian principles which underlie the Refugee Convention. In particular, the special consideration we have reserved for victims of torture under the reasonableness limb of the test (see Refugee Appeal No. 135/92 Re RS (18 June 1993) 27-49) would be jeopardized. We see no substance or merit in the appellant's challenge to the New Zealand relocation jurisprudence.

Because relocation is an issue inherent in the definition of a Convention refugee and because a claimant carries the legal burden of proof to establish the claim to refugee status, we wish to make it clear for the avoidance of doubt that it is for a claimant to establish that he or she cannot genuinely access domestic protection which is meaningful, and that relocation is unreasonable. Clear and convincing evidence of a state's inability to protect must be provided. Absent such evidence, the claim to refugee status should fail, as in terms of the passage from Ward at 724-725 earlier adopted, nations should be presumed capable of protecting their citizens.

In the result, we have had to deal at some length with the appellant's submissions due to their misconceived nature and because of the considerable damage which would be caused by their thoughtless adoption.

Since Refugee Appeal No. 135/92 Re RS (18 June 1993), it has been clear that the New Zealand approach to refugee claims, particularly where persecution at the hands of a non-state agent is feared, is as follows:

1. Is there a genuine fear?

2. Is the harm feared of sufficient gravity to constitute persecution?

3. Is the harm feared related to any of the five grounds recognized in the Convention, or is it related to other factors?

4. Is the fear well-founded at all.

   If so:

   (a) As to the whole of the country of origin?

   (b) As to only part of the country of origin, in which case, can the appellant genuinely access domestic protection which is meaningful, and is it reasonable, in all the circumstances, to expect the appellant to relocate elsewhere in the country of origin?

THE APPELLANT'S CASE

We do not intend setting out the appellant's evidence at length. What follows is an abbreviated summary.

BACKGROUND

The appellant is a forty-two year old married man who was born in B village some five kilometres distance from Banga which, in turn, is approximately thirty-five kilometres from Jalandhar. He has four brothers and two sisters. He married in April 1981 and has two children, CS (approximately twelve years of age) and SS (approximately ten years of age). His wife and children are presently living in the appellant's house in the village.

After matriculating in 1969, the appellant completed first a stenographer's course and then a welding course. In 1971, he enlisted in the Indian Army. After his initial training the appellant was first a wireless operator and then a clerk performing office duties. He has not seen "active" service.

In January 1987, he applied for early retirement as neither of his parents were in good health and as the only family member then living in the Punjab, he felt obliged to look after them. He was eventually released from the army in September 1987 after fifteen and a half years of service.

As a civilian the appellant had little difficulty obtaining employment due in large measure to a government scheme which reserves a certain quota of government jobs for ex-servicemen and also due in part to the appellant's favourable army record. In early 1988, he commenced employment as a clerk with the Punjab Consolidation Department which is an agency involved in land reform. The appellant's place of work was Jalandhar. Each day he rode his motorscooter to Banga and then travelled by bus to Jalandhar.

THE APPELLANT AND THE KCF

The appellant says that his difficulties began in December 1988. He had just arrived in Jalandhar on his way to work when two people on a scooter stopped him. He did not know either of the men but they addressed him by his name and said they knew who he was and where he lived and that he had been in the army. They said they were from the KCF, that their members required training and they wanted the appellant to join them. Fearing that he would be shot, the appellant said that he would do what they wanted and the men seemed pleased. The appellant also told them that he needed a week to think about it. The men left, saying that they knew where the appellant lived and would contact him.

Approximately one week later, two men were waiting for the appellant at the bus terminal at Banga. The appellant recognized one of the men from the previous encounter but did not recognize the other. They asked the appellant what he had decided to which the appellant replied that he needed one more week and would then go with them. The men agreed and said that next time they would take the appellant.

Approximately one week later the appellant encountered the two men again in Banga.

When the appellant asked for one more week they said that this was the last time and that they would next come to his house to collect him. The two men at the third encounter were the same as at the second. The appellant was cautioned that unless he was ready when they called there would be problems for his family, which he understood to mean that they would be killed.

After the first and second encounters, the appellant continued living at home and attending work. However, after the third encounter he began to feel under pressure and stayed at various houses belonging to both relatives and friends. He continued to attend work but constantly changed his route.

On an unspecified evening in February 1989, at a time when the appellant was staying elsewhere, two men visited his wife at the family home. She was alone with the couple's two children. The men asked for the appellant and when told that the appellant was not in, handed his wife a letter (undated) on the letterhead of the Khalistan Commando Force. The document is written in Punjabi. The English translation provided by UniServices Translation Centre reads as follows:

> "Dear Sir
>
> We met and talked with you earlier. You promised to join our group, but you have not kept your promise. We are in urgent need of your assistance because you have had proper military training in the use of all types of firearms. We gave you a warning when we met you at Jalandhar bus terminal. Consider this letter as a last warning. We shall wait for you for approximately one week. If you do not come to us within that period, we will kill you wherever we find you.
>
> Yours faithfully
> [signed]"

The signature is illegible.

By the time this letter was delivered, the appellant had been able to brush-off the two men by making promises and asking for further time. If his account is true, their visit to his home had an ominous note given the claim in his appeal statement (para 19) that at the last encounter the men had said that they would be calling at his house to pick him up.

The men were not to know that the appellant would not be at home when they called. It would seem unusual that anticipating this possibility the men forearmed themselves with the letter. Asked about this the appellant stated that his wife made no mention of the men

writing the letter at the house on discovering the appellant was not in. He did claim that the handwriting bore the marks of someone writing in haste. The terms of the letter are, however, somewhat contrived given the extremely violent and unforgiving method of operation of terrorists in the Punjab: Human Rights Watch, Dead Silence: The Legacy of Human Rights Abuses in Punjab (May 1994) 91-98. The punchline of the letter is contained in the last sentence, namely that unless the appellant joined the group within the week, he would be killed. The balance of the letter contains a somewhat leisurely preamble reciting the earlier meetings, the appellant's promise to join the group and the warning given by the KCF at the Jalandhar bus terminal. The most odd sentence is:

> "We are in urgent need of your assistance because you have had proper military training in the use of all types of firearms."

The Authority finds this sentence to be particularly self-serving as far as the appellant's case is concerned. It is overtly contrived in terms, as in the reference to "proper" military training and in the further reference to "the use of all types of firearms". The Authority does not consider the terms of the letter to carry the hallmark of a document written in haste at the door of the appellant's home on the men finding that he was not in. Nor do the contrived terms of the letter suggest that this was a letter written in anticipation of the appellant being out. In any event, we doubt very much whether a terrorist organization such as the KCF would, in advance of their visit to the home, prepare the letter in case the appellant was not in.

The appellant obtained a new passport on 19 September 1988. He explains this step on the basis that conditions in the Punjab were not good. Having decided to leave India after the first encounter with the KCF, the appellant in January 1989 telephoned his brother-in-law in New Zealand to arrange the necessary sponsorship form.

The appellant's visitor visa was issued by the New Zealand High Commission in New Delhi on 20 February 1989 and he arrived in New Zealand on 7 March 1989. He has been an overstayer since 7 September 1989.

Neither the appellant nor his family had any further contact with the KCF between the delivery of the undated letter and his departure for New Zealand in March 1989.

EVENTS POST-ARRIVAL IN NEW ZEALAND: KCF INTEREST IN THE APPELLANT

The next reference to KCF interest in the appellant was two years later in a letter from his then solicitors dated 24 June 1991 in the context of a request that the appellant's wife and children be permitted to enter New Zealand pending the determination of his application for refugee status. The relevant sentences at page 48 of the file are:

> "He says that they are being harassed by members of the KCF ..."
>
> "He says that the KCF have been asking about Mr Singh from his wife and also threatened her. He says that there is danger to the life of his wife and sons ...."

In an Expanded Statement prepared at about the same time (File page 67) similar statements are to be found. At the Refugee Status Section interview held on 15 October 1991, the appellant is recorded as saying (File page 75):

> "Wife writes to Singh. She is living with the 2 sons. All okay. May/June letter from KCF to wife. KCF know Singh not there. Tell husband he should join/difficult for her. Eldest son (10 yrs). He could be kidnapped. He has not joined KCF nor been asked (usually 14-15 years old)."

There is no explanation as to why the KCF should renew their interest in the appellant two years after he left India.

Strangely, when asked about these matters at the hearing on 17 August 1994, the appellant had no memory whatsoever of the claims he had made in 1991 and in particular that his wife had reported continuing KCF interest in him. If the events reported by the appellant in his Expanded Statement and at the Refugee Status Section interview were true, one would have expected him to have remembered them.

The next development occurred in March 1993, four years after the appellant left India. According to an undated letter from the appellant's wife, the KCF visited the family home looking for the appellant. When they found that he was not at home they demanded Rs 50,000, payment to be within twenty-three days on pain of death. The appellant's wife sold a small piece of land owned by the appellant (she held a power of attorney) for Rs 90,000

and when the KCF men next called they were paid the sum demanded. They in turn left a further letter for the appellant. The balance of the money (Rs 40,000) was used to repay money borrowed by the appellant for his trip to New Zealand. The appellant's wife enclosed with her letter:

(a) An affidavit by her dated 19 April 1993. This very brief document details only that the appellant's wife sold a certain piece of land to a named purchaser for Rs 90,000, received the purchase price and gave possession of the land.

(b) A statement by the sarpanch of the appellant's village certifying that the appellant "has been continually harassed by terrorists" and that they still come to his home looking for him. It mentions that the appellant's wife and children are being harassed by terrorists, that his wife has sold their property and gone to stay with her parents. The New Zealand Government is requested to give the appellant permission to live permanently in New Zealand.

(c) A letter carrying the printed letterhead "Khalistan Commando Force" dated 25 March 1993. The English translation reads:

> "We have been looking for you for a long time because we are currently in urgent need of your assistance. Once again we warn you that you should join our party immediately in order to provide training for our members so that we may continue our struggle. We shall keep on following you, wherever you may go. This is our last warning to you. Contact us as soon as possible, otherwise we will kill your family.
>
> Yours [signed]
> [stamped]
> KHALISTAN COMMANDO FORCE
> President"

The original document is signed in English:

> "Manjit Singh
> KHALISTAN CAMMANDO FORCE
> President"

The appellant was unable to explain why this letter would be signed by the President of the Khalistan Commando Force. He suggested that perhaps it was to put more pressure on him

(the appellant). Given that the letter was written four years after the appellant's departure for New Zealand, the Authority does not accept this. It is also to be noted that the English translation employs much the same phrase as that in the first (undated) letter, namely:

> "... we are [currently] in urgent need of your assistance."

On the first day of the hearing it was suggested to the appellant that the similarity could indicate that both documents had been contrived. When the hearing resumed on 20 September 1994, the appellant called Mr P.G. Hos, the manager and senior translator of UniServices Translation Centre. He said that having discussed the issue with the translator (a resident of Wellington), and having obtained "literal translations" the opinion reached was that in the original script the two sentences were practically identical. Such difference as there were were "so slight as to be insignificant". The literal translations were as follows:

(a) The undated letter (received February 1989):

> "We are in [very] urgent need of your assistance ...."

(b) Letter dated 25 March 1993:

> "We have been looking for you for a long time because at this time our party is in urgent need of you."

In his letter dated 19 September 1994 to the appellant's solicitors Mr Hos concludes:

> "In the undated letter, the degree of urgency expressed could be interpreted as being very slightly higher, although the difference is minimal."

Allowing for the minimal differences highlighted in Mr Hos' letter, the Authority cannot overlook the fact that in two letters written four years apart, the KCF has stressed the urgency of their need for the appellant's assistance. It is odd, to say the least, that the letter of 25 March 1993 should make this claim, suggesting as it does that notwithstanding the long effluxion of time the appellant, whose principal occupation in the army had been a clerk, was still important to the organization. We find this quite unreal as well as contrived. Our view is reinforced by the appellant's implicit claim that the KCF regarded

him as so important that the President of that organization would himself sign the document.

EVENTS POST-ARRIVAL IN NEW ZEALAND: KIDNAPPING OF APPELLANT'S SON

It is to be recalled that the appellant's appeal hearing was first scheduled for 1 March 1994 and notice to this effect was sent to the appellant, care of Mr Long by letter dated 10 February 1994. The appellant's case is that on 2 March 1994 his son was kidnapped by the KCF. The precise length of time the son was held is not clear but it would appear to have been approximately four days. He was released without payment of money. According to the appellant's evidence at the hearing the son was left outside the village near a ground where children play. He was unharmed, or in the appellant's words "they kept him nicely".

The appellant says that the link between him and the kidnapping lies first in the fact that the men questioned his son about him (the appellant) though his son does not know who the kidnappers were. Second, at the time of the kidnapping, the men left behind a letter on Khalistan Commando Force letterhead. It is dated 2 March 1994 and is the third letter said to be from the KCF. The English translation reads:

> "In spite of being warned a number of times, [the appellant] has not joined us. Now we will do whatever we consider necessary. In the event of the news of the kidnapping of the child being passed on to the police or to any other government agency, we will kill [your] whole family.
>
> [signed]
> Area Commander"

The appellant says that he first found out about the kidnapping when he was telephoned from the Punjab on 3 March 1994 by a brother-in-law, KS. This same person telephoned the appellant again a few days later to report that the son had been released.

In his appeal statement (para 32), the appellant states that several days after the release of his son he spoke to his son and to his wife:

> "Several days later I spoke to my son and my wife."

However, at the appeal hearing, he changed his evidence. He said that he first spoke to his wife about the kidnapping on 1 June 1994, some three months after the kidnapping.

The appellant is able to be precise about the dates of his telephone conversations in March and June as he has produced the Telecom accounts for the relevant period. While they establish that telephone calls were made as claimed, they do not establish what was said.

The Authority found it difficult to understand why the appellant did not speak to his wife about the kidnapping until three months after the event. Even allowing for the fact that if the account were true his wife would initially be upset, a period of three months without communication on such a traumatic event is unusual, to say the least, particularly when the appellant and his wife could communicate by telephone with little difficulty.

Even prior to his first telephone contact with his wife after the kidnapping the appellant was in receipt of the KCF letter dated 2 March 1994 as well as a statement from the sarpanch of his village dated 5 March 1994. The terms of the statement are somewhat brief. However, reference is made to the kidnapping of the appellant's son and to the fact that the sarpanch "was going to inform the police" but the appellant's family stopped him from doing so in view of the statement in the KCF letter which indicated that the life of the child would be in danger if the police were informed. The full text of the English translation is as follows:

> "I, the Acting Head of the Village Committee of [the appellant's] Village in Jalandhar District, do hereby certify that the family of [the appellant] (son of [name deleted]) is being greatly harassed by terrorists. Because the terrorists come to his home repeatedly, the police have become suspicious that he may be an associate of the terrorists. The terrorists come to his home very frequently, which implies that they will definitely seek to murder him. On the night of 2 March 1994, the terrorists kidnapped [the appellant's] son, [CS], from his home. I was going to inform the police about this incident, but the family members stopped me and showed me a letter from the terrorists which indicated that the life of the child would be in danger if the police were informed.
>
> Having seen the distressing situation in which [the appellant's] family find themselves, I request on behalf of the whole village that every effort should be made to save this family from harassment by these terrorists."

Strangely, the kidnapping is mentioned only after the sarpanch introduces a new element to the appellant's case, namely that the police have become suspicious that he (the appellant) may be an associate of the terrorists. The appellant had not to this time mentioned a fear of

the police and his claim now to be in fear of them is based on this single line from the sarpanch's letter. It is to be noted that whereas the letter claims that "the terrorists come to his home repeatedly", the appellant's evidence at the appeal hearing was that the only visits that he could recollect were the occasions when the second letter was left on 25 March 1993 and the occasion of the kidnapping on 2 March 1994. The appellant's case has not been helped by these substantial differences.

An unusual feature of the appellant's case is that he did not inform his New Zealand brother-in-law of the kidnapping until he (the appellant) came to Auckland from Gisborne in anticipation of the rescheduled hearing of his appeal on 10 May 1994. According to the brother-in-law ([DS]), the appellant first mentioned the release of his son in a discussion they had at the brother-in-law's Auckland superette. It seems that little or no other information was given. Nor was the brother-in-law told that the appellant's wife had had to sell land in order to pay the terrorists Rs 50,000.

The appellant explained his reticence on the basis that he has not disclosed details of his case to anyone. His attention was then drawn to the fact that the toll accounts show that on 23 March 1994 he (the appellant) called his brother-in-law's Auckland number. Given the proximity of this call to the alleged kidnapping he was asked whom he had spoken to and what the purpose of the call was. The appellant stated that the purpose of the call was to tell his brother-in-law of the kidnapping. However, his brother-in-law's wife answered the telephone and, for cultural reasons, he (the appellant) did not want to discuss the matter with her. Apparently the brother-in-law's wife is New Zealand-born. While this is understandable, it does not explain why the telephone call lasted fourteen minutes when the purpose of the phone call had been thwarted. Nor does it explain why the appellant did not ask to speak to his brother-in-law, or at the very least did not leave a message for the brother-in-law to call back. Or to the effect that the appellant himself would ring back at a more convenient time. It certainly does not explain why the appellant did not make any earlier or for that matter, any later attempt to contact his brother-in-law in order to carry out his purpose of informing him of the kidnapping.

When giving evidence about the post-arrival developments in his case the appellant was distinctly uneasy. In this regard the appellant has produced three medical certificates, the general purport of which is that the appellant shows symptoms of mild depression and high anxiety. These symptoms are related to his personal and family situation. The Authority

has taken these medical reports into account in assessing the weight to be given to the appellant's evidence and in the assessment of his credibility.

In developing his theme that he has kept to himself details of his case, the appellant stated in re-examination that at the time he came to New Zealand he did not tell his New Zealand brother-in-law why he left India. In particular, he did not tell him about the approaches from the KCF. When he contacted his brother-in-law from India he told him only that his (the appellant's) life was in danger and that the brother-in-law should get him out as soon as possible. These belated claims do not sit easily with the appellant's first statement submitted with his refugee application in September 1990 at a time when events were presumably easier to recollect. At paragraph 12 of the statement (File page 6) he stated:

> "I then talked to my relative in New Zealand and told him the whole story about the threats I had received from KCF. I requested that he help me."

The identical words are to be found in the appellant's Expanded Statement para 17 (File page 58) tendered in anticipation of the Refugee Status Section interview on 15 October 1991.

In view of the categorical statements that the brother-in-law was told "the whole story", including the threats the appellant had received from the KCF, the Authority was not impressed by the appellant's attempt to change his evidence.

There is one further aspect of the case which needs to be addressed. It arises out of the evidence of the appellant's brother-in-law, [DS]. He provided a signed statement dated 16 August 1994 and also gave evidence on 17 August 1994. [DS] returned to India in April 1992 for a two-month visit. Much of this time was spent in the Punjab and on one occasion he visited his sister (the appellant's wife) at [the appellant's] village. He was there three or four hours. In his statement he says:

> "I asked her how things were and she said that they had been visited by the Khalistan Commando Force."

However, in his oral evidence [DS] said that his sister told him that terrorists had visited the home but she did not know who they were - they were just "people". Each time they visited they asked about the appellant. Given the prominent part the KCF plays in the

appellant's account, as underlined by the three KCF letters, it is surprising that according to [DS], the appellant's wife made no mention of the KCF by name.

Upon his return to New Zealand, [DS] within a few days passed on to the appellant what he ([DS]) had learnt from the appellant's wife. The appellant did not convey this information to the Refugee Status Section which at that time was still considering his case. The decline letter was not sent out until 31 August 1992.

ASSESSMENT OF THE APPELLANT'S EVIDENCE

After carefully observing the appellant at the hearing, and after taking into account the medical reports relating to the appellant's mild depression and high level of anxiety, the Authority has concluded that much of the appellant's evidence has been untruthful.

We are prepared to accept that he has the qualifications claimed and that he served in the Indian Army for fifteen and a half years, retiring in September 1987. During most of this time he served as a clerk. Following the commencement of his employment with the Punjab Consolidation Department in Jalandhar, he was approached in December 1988 in Jalandhar by two men from the KCF. This incident was followed by the two further encounters at the bus terminal at Banga. We accept that on each of these encounters the appellant was told that his military background was believed to be of use to the KCF and that his services were required. We further accept that on one or more of these occasions the appellant was told that if he did not join the KCF he would be killed. As a result the appellant resolved to leave India, contacted his brother-in-law in New Zealand and left India very soon after the first incident with the KCF.

We do not accept, however, that the first (undated) letter from the KCF is a genuine document, nor do we accept the appellant's claim that this letter was delivered to his wife one evening when the appellant was away from home. We do not accept that the subsequent two KCF letters are genuine documents, nor do we accept any of the appellant's evidence concerning events in the Punjab since his arrival in New Zealand. We specifically reject the central elements of the appellant's case, namely that he has been of continuing interest to the KCF, that his wife was forced to pay the KCF Rs 50,000 in March 1993 and that his son was kidnapped by the KCF in March 1994.

Our reasons are as follows:

1. Whereas the appellant gave evidence about his background and experience in the army with confidence and ease, there was a distinct uneasiness about him when giving evidence concerning the three KCF letters and the events subsequent to his arrival in New Zealand. The contrast was marked. We have accordingly taken his demeanour into account.

2. The undated letter from the KCF allegedly delivered to the appellant's wife in February 1989 is contrived in its terms. We have mentioned earlier that the letter was either written in advance of the men calling at the appellant's home, or written out at the doorstep. If written in advance it suggests that the KCF men went well prepared for all contingencies, anticipating that the appellant might not be at home even though they had had no difficulty finding him on three occasions at busy bus stations. In addition, the letter is, as mentioned, contrived in its terms. There are incongruous statements by way of preamble and the entirely unnecessary assertion that the appellant has received "proper" military training "in the use of all types of firearms". It does not bear the hallmarks of being written in haste at the door to the appellant's home. In the circumstances we do not accept that it is a genuine document.

3. The second KCF letter dated 25 March 1993, written four years after the first letter, employs in its first few lines an expression remarkably similar to the opening line of the first letter, namely "... we are in urgent need of your assistance", or words to almost the same effect. It also asserts that the KCF "have been looking for you for a long time" when, on the appellant's evidence at the appeal hearing, there had been no contact with the KCF since February 1989. Remarkably, he could not at the appeal hearing remember the claims he had made in June and October 1991 that KCF visits to the family home had continued to that point at least. Had those claims been true we are of the opinion that the appellant would not so easily have forgotten them at the time he gave his evidence at the appeal hearing. It is also to be remembered in relation to this second letter from the KCF that it is apparently signed by the President of the KCF. It is difficult to conceive why the appellant, a desk clerk who had received only intermittent weapons training, would be of

interest to the President of the terrorist organization four years distance from the first approaches in Jalandhar and Banga.

4. The third KCF letter dated 2 March 1994 relates to the alleged kidnapping of the appellant's son. It is implausible that five years after the appellant's departure from India that he or his family would be of the slightest interest to a terrorist organization which, by all accounts, has been decimated at the hands of the authorities over the past eighteen months to two years. In addition, the Authority cannot help but observe that the kidnapping occurred at a particularly fortuitous juncture. In February 1994 the appellant's appeal was set down for hearing on 1 March 1994 but by 28 February 1994 notice was given by the Secretariat that the hearing had been adjourned to 10 May 1994. Certainly there are toll records showing that on 3 March 1994 the appellant telephoned relatives in India but we are asked to accept his evidence as to what was said. As we do not accept that evidence and as we do not accept that the KCF letter dated 2 March 1994 is a genuine document, we can accept no more than that on 3 March 1994 the appellant spoke to someone in the Punjab for two minutes 39 seconds and 17 minutes 45 seconds respectively.

Strangely, the appellant did not communicate these dramatic developments to his brother-in-law in Auckland. It was not until 23 March 1994 that he bothered to telephone. Because the wife of the brother-in-law answered the telephone the appellant made no mention of events in the Punjab but nevertheless spent 14 minutes 21 seconds speaking to a person to whom it was culturally inappropriate to mention the kidnapping of a family member. The appellant made no further attempt to contact his brother-in-law. Instead he waited until early May 1994 when he was in Auckland. In short, we do not find his account believable.

5. The appellant's evidence at the appeal hearing was also at variance with his earlier claims. Whereas in his previous statements he specifically claimed to have told his brother-in-law "the whole story about the threats I had received from the KCF", he now denied giving any meaningful detail to his brother-in-law when requesting his assistance to escape India. Specifically he denied telling him about the approaches from the KCF. This evidence was given in order to help explain his failure to communicate to his closest relatives in New Zealand the kidnapping of his eldest

son. We do not believe the appellant.

6. As mentioned earlier, the Authority found it difficult to understand why the appellant did not speak to his wife about the kidnapping until three months after the event. Even allowing for the fact that if the account were true his wife would initially be upset, a period of three months without communication on such a traumatic event is unusual, to say the least, particularly when the appellant and his wife could communicate by telephone with little difficulty. Our finding is that there was no kidnapping.

7. The appellant's claim (based on the letter from the sarpanch dated 5 March 1994) that the police have become suspicious of him is not believed. It is premised on the claim that terrorists have visited the appellant's home often. As we do not accept that claim we regard the letter from the sarpanch as being written with a view to assisting the appellant's attempts to stay in New Zealand, rather than to accurately record events in the Punjab. This is underscored by the fact that the claim that the police are now suspicious of the appellant is given prominence in the letter. The kidnapping of the son is mentioned in second place only.

   As to the first letter from the sarpanch dated 30 April 1993, we attach no weight to this document given the questionable nature of the documentation submitted by the appellant. In any event, this letter is notable for the fact that while it mentions harassment by terrorists and the sale of land, there is no mention at all of the wife's payment to the KCF of Rs 50,000.

8. Our unease at the veracity of the appellant's evidence was increased by the evidence of [DS], his brother-in-law resident in Auckland. We had no reason to doubt the evidence of this witness but the evidence that he gave, as compared with the more strongly expressed written statement, was that upon his visit to the appellant's home in the Punjab in 1992, the appellant's wife made no specific mention of the KCF. Mention was only made of visits by terrorists of unknown identity. We believe that this is indicative of the fact that the appellant and his wife have endeavoured to construct a story to secure residence in New Zealand for the appellant and, in turn, his wife and children.

We accordingly find that significant parts of the appellant's account are untrue and that he has been of no interest to the KCF since his departure for New Zealand. Since then counter-insurgency operations by the authorities have crushed most of the militant groups: Human Rights Watch, Dead Silence: The Legacy of Human Rights Abuses in Punjab (May 1994) 2. These facts, coupled with the considerable effluxion of time since the appellant left the Punjab, lead us to the conclusion that there is no real chance of persecution if the appellant returns to his home in the Punjab.

The appellant sought to rely on the principle that if a fear of persecution is well-founded at the time of departure from the country of origin, then a continuing fear ought to be accepted as well-founded unless, in the words of Gaudron J in Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379, 415 (HC:Aus):

> "... it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge of subsequent changes in the country of nationality."

The relevant passage from the decision of Mason J at 391 reads:

> "The Full Court placed insufficient weight upon the circumstances as they existed at the time of departure which grounded Mr Chan's fear of persecution. In the absence of compelling evidence to the contrary the Full Court should not have inferred that the grounds for such fear had dissipated. While the question remains one for determination at the time of the application for refugee status, in the absence of facts indicating a material change in the state of affairs in the country of nationality, an applicant should not be compelled to provide justification for his continuing to possess a fear which he has established was well-founded at the time when he left the country of his nationality. This is especially the case when the applicant cannot, any more than a Court can, be expected to be acquainted with all the changes in political circumstances which may have occurred since his departure."

We do not accept that this principle assists the appellant for the following reasons:

1. The appellant is not a credible witness. It is a corollary of our rejection of the central elements of his case that at the time he left India any fear of persecution he had was not well-founded.

2. There is in any event compelling evidence of a material change in the Punjab. The authorities have crushed most of the militant groups. The evidence in this regard is discussed in greater detail later in this decision.

3. This is reinforced by the fact that since the appellant's departure for New Zealand there has been both a considerable effluxion of time and, on the facts we have found, an absence of continuing interest in him by the militants.

4. We have found on the facts that there is no real chance of persecution if the appellant returns to the Punjab. The Chan principle cannot justify a finding of well-foundedness when the facts do not justify such a finding. The appellant's reliance on Chan is misguided.

5. In any event, as will be seen, even if we are wrong, the appellant can access meaningful domestic protection and can reasonably be expected to relocate either in the Punjab or elsewhere in India. The Chan point in no way overrides or qualifies the relocation principle which in any event did not arise on the particular facts of that case.

In view of our findings on credibility, our conclusions in relation to the four issues enumerated above under the heading Relocation: Conclusions on the Law are as follows:

As to issues (1) and (2), the appellant does not possess a genuine fear of persecution at the hands of either non-state agents or state agents of persecution in the Punjab or elsewhere in India.

As to issue (3), we have accepted on many occasions that in the Punjab context a refusal to assist terrorists results in the imputation by the terrorists to the individual concerned of a political opinion, if not religious belief on the basis that they regard those who are not for them as against them. We are prepared to find in favour of the appellant on issue (3).

As to issue (4), for the reasons we have given in our credibility assessment, there is no real chance of persecution at all were the appellant to return to India or to his home in the Punjab. It follows that the issue of relocation does not arise on the facts.

In these circumstances there is, strictly speaking, no need for us to discuss the voluminous country information submitted by the appellant addressing the relocation issue. However,

it might be helpful were we to make some general observations concerning our conclusions on that material.

RELOCATION: THE EVIDENCE

The appellant submitted that if it were accepted that he possessed a well-founded fear of persecution at the hands of the KCF, he could not be expected to relocate either within the Punjab or elsewhere in India because:

(a) Khalistan militants operate both within the Punjab and within other states in India.

(b) There are numerous cases of individuals being attacked and killed by militants in other states in India.

(c) The Indian authorities are unable to protect the human rights of citizens and are themselves actively involved in human rights abuses.

(d) There are practical impediments to relocation, namely ethnicity, linguistic barriers, religious faith, intolerance by Hindus, lack of central government support as well as problems with housing and employment.

In support of the above claim the Authority was referred to the report by J & S, Caught Between the Devil and the Deep Sea: Relocation Within India: A Non-Choice (June 1994 "Draft Only"). This report, commissioned by the appellant's solicitors, was written by two Indian nationals, the first being a journalist living and working in India and the second being a university professor living and teaching outside India. The report is stated to be on the issue of relocation and examines the conditions under which civilians in the Punjab seek to relocate within or outside Punjab and the attendant problems.

The Report is divided into various sections which examine (*inter alia*) rural to urban migration of Sikhs within the Punjab, the migration of Sikhs out of the Punjab, their movement back to the Punjab, the flight of militants to other states and overall conclusions. Annexed to the Report are various appendices which contain an extensive range of articles (several inches thick) from a variety of English language newspapers and magazines

published in India, primarily covering the period 1991 to June 1994. The Authority was told that the authors of the Report believe that the majority of the key stories for the period in question are covered by these press clippings. Also included in the appendices are statistics and press statements from the Punjab police, along with other miscellaneous items.

While not clearly stated in the report, it would appear that the report is largely based on the material in the appendices, in particular the newspaper and magazine articles.

In addition to the country information contained in the report referred to, the appellant also provided to the Authority an eighteen-page report by [Dr RV], The Problem of the Sikhs in India (undated and marked "Draft Only" but apparently prepared in either 1993 or 1994). At the request of the appellant the Authority also arranged for the transcription of the evidence given by [Dr V] in another appeal and its admission into the record of the present case. That evidence related to the general problems faced by Sikhs when attempting to relocate outside of the Punjab.

In addition to this information the Authority also had before it the following:

- Human Rights Watch, Dead Silence: The Legacy of Human Rights Abuses in Punjab (May 1994).

- Question and Answer Series, India: Punjab Human Rights Update, Research Directorate, Documentation, Information and Research Branch, Immigration and Refugee Board Documentation Centre, Ottawa, Canada (January 1994).

- Response to Information Request, India: Information on the Structure of the Police Forces and Whether there are Internal Flight Alternatives for Persons who are Sought by the Indian Authorities, Research Directorate, Documentation, Information and Research Branch, Immigration and Refugee Board Documentation Centre, Ottawa, Canada (22 April 1994).

- A selection of newspaper and magazine reports provided by the New Zealand

Immigration Service.

- A copy of a letter from John Meikle, the Branch Manager, NZIS, New Zealand High Commission in New Delhi, recording his perception of the security risk in the Punjab.

Turning to the appellant's argument that Sikh militants operate both within the Punjab and within other states in India, it is proposed to first examine the country information relating to the activities of militants within the Punjab itself.

MILITANT ACTIVITY INSIDE THE PUNJAB

Annexed to the J & S Report are a set of unofficial statistics said to have been obtained from the Punjab police for the period 1991 to June 1994. These detailed statistics provide the total number of terrorist killings in the Punjab, broken down according to Sikh/non-Sikh, male/female/child and rural/urban. Total killings by terrorists for the last four and a half years (the figures include civilian and police/paramilitary force casualties) are as follows:

TOTAL KILLINGS BY TERRORISTS

1990	2,467
1991	2,591
1992	1,518
1993	48
1994 (to June)	1

The number of police/paramilitary force (PMF) killed for the corresponding period (included in the overall total) is as follows:

TOTAL POLICE/PMF KILLED BY TERRORISTS

1990	506
1991	497
1992	252
1993	25
1994 (to June)	0

It can be seen, therefore, that at least up until 1993, the majority of those killed were civilians. Of the total deaths recorded the statistics also show that the majority were Sikh males in rural areas.

The statistics also record terrorists killed, injured and surrendered divided into hardcore and non-hardcore and the incidence of terrorist crime. The figures for 1993/1994 show a substantial reduction in all categories over the previous four years. We cite by way of example the figures relating to terrorists killed by the police:

TERRORISTS KILLED HARDCORE / NON-HARDCORE

1991	133 / 2,044
1992	139 / 1,974
1993	57 / 741
1994 (to June)	11 / 61

In his submissions to the Authority, counsel for the appellant suggested that the police statistics should be treated with a degree of caution as far as the years 1993 and 1994 are concerned because the Punjab Director-General of Police, K.P.S. Gill, has a vested interest in demonstrating that terrorists are under control. That is, terrorist activity has been deliberately understated by the police. A similar claim is made in the J & S Report at 17. Commenting on the Punjab police figures cited in the Report, the authors state they may be "under-estimated by as much as 35-45 per cent in terms of both, total number of killings as

well as the number of "terrorists" arrested". Interestingly, a contrary assertion, at least with respect to terrorist killings, is contained in an article annexed to the report at Appendix G. It is from Frontline, 8 October 1993 and contains a reference to a press release dated 28 August 1993 signed by the General Secretary of the Punjab Civil Service Officers Association which was issued during the course of a prolonged strike by the Punjab Civil Service officers led by the Provincial Magistracy, apparently in response to police excesses and what is described as the "unaccountability of the police regime". The press release contains an indictment of police conduct. Included in the indictment is an assertion that the number of killings carried out by militants was exaggerated by the police to "justify the extraordinary high rewards given for killing terrorists".

We see no evidence to justify a finding that the police in the Punjab have understated terrorist activity in the manner suggested by the appellant.

Putting aside the various motivations of the Punjab police either to exaggerate or minimize the extent of terrorist activities, including killings in the Punjab, the Authority accepts that such statistics will be subject to a degree of error. For instance, apparent discrepancies were easily noted between newspaper reports of killings attributed to militants in 1994 and the figure of one death only for the period up to June 1994. In particular, there is a report by [AJ] dated 20 April 1994 from the Asian Age (Appendix G(ii) 1), detailing the killing by two terrorists of eight members of a family in Dholewal Village in the Ferozepur District. The report states that the killings were said to be the work of militants belonging to a gang of a terrorist from that locality called Bohar Singh who had been reported dead more than four years previously. There is also mention of a possibility of a personal vendetta between the militant group and the murdered family. The report refers to the apparent reluctance of the police, on the information then available, to classify the killing as a terrorist crime. However, whatever the true motivation for the killings, the report is significant for expressly acknowledging that the strike by the terrorists was the first for more than a year.

Irrespective of any possible error in the total number of terrorist killings recorded for the years 1990 to June 1994, the Authority is satisfied that the statistics show an unmistakable and dramatic reduction in killings by terrorists. This trend is confirmed by the numerous articles annexed to the J & S report which repeatedly affirm that the capacity of the various Sikh militant groups to conduct a campaign of terror within the Punjab has been dealt a

crushing blow in the last two and a half years. Indeed, [AJ] in an article published in the Asian Age, February 19, 1994 states:

> "The end of Punjab's violent decade has seen the near complete annihilation of terrorist cadres."

In summary the articles appended to the J & S Report record the following:

(a) Militant groups have been either neutralized or put under extreme pressure through a combination of operations conducted by the army in 1991 and a re-invigorated police and paramilitary force push from September/October 1992 onwards employing well-directed, intelligence-based attacks.

(b) Most militant groups have sustained heavy casualties. In the case of the KCF, this has meant the virtual elimination of the organization. Its leader, Paramjit Singh Panjwar, is reportedly hiding in Pakistan having lost his base in his Panjwar village near Tarn Taran. Other important leaders of the KCF who have been killed include Sukhar Sipahal aka General Labh Singh, Harijit Singh Fauji, Acting Chief of the KCF (Panjwar) and Daljit Singh, Area Commander of the Uttar Pradesh region after the death of his brother Manjit Singh. Only a small group under the leadership of Jarnail Singh Shatrana are said by the Punjab police to be still operating.

(c) The top leadership of the main militant groups have either been killed or forced to take refuge in other states or outside India, in particular, Pakistan. Important leaders killed during 1993 include Manochahal, Chief of the BTFK (Bhindranwale Tiger Force of Khalistan), Satnam Singh Chhina (Cheena), Chief of the BTFK (Sanga) and Swaran Singh Jawanda of the Bhindranwale Saffron Tiger Force. Doctor Sohan Singh, the Chief of the Panthic Committee is also reported to have been arrested.

(d) Fresh recruitment to the militant ranks is almost non-existent. Sustained police killings, arrests, as well as surrender by militants have resulted in only small numbers of militants still operating in the Punjab, said by the police to be 250 (40 hardcore) at the end of 1993, compared with 1,500 at the beginning of 1993.

Other figures cited by India Today, March 11, 1994 (Appendix H 16) are "14 hard core terrorists and about four dozen committed middle-level members, mainly from the Babbar Khalsa and Khalistan Liberation Force (KLF).

(e) The militant groups have lost the support of many Sikhs, including their main support base amongst the landed Jat Sikhs, whilst many villages give active support to the police. This loss of popular support is attributable to the depredations inflicted by the militants on the civilian population, in particular rapes and killings and the widespread extortion of money, the proceeds of which have often been used to set up militant leaders and their families in lavish homes and businesses. Many criminals and lower caste Sikhs have also joined the terrorist groups, further alienating their original supporters.

(f) The improved security situation in the Punjab has resulted in reduced fear and tension. This has encouraged those migrants who left out of fear to return to the Punjab, especially Hindus who provided the early targets of the militants. Many small and large businesses are being re-opened and new businesses and industries established, including in those areas formerly plagued by militant activities, amongst them the towns of Tarn Taran and Batala. Land prices are escalating and there is an inflow of capital into the state. Traffic can again travel on roads at night and shops and eating houses are able to remain open.

In his submissions, counsel for the appellant, while suggesting on the one hand that the police statistics for the years 1993 and 1994 be treated with a degree of caution, submitted that the figures for the 1993 and 1994 terrorist crime index were still of some significance. In particular, he argued that the figures for 1993 showed a large number of incidents involving terrorists in the Punjab, with 57 hardcore and 741 non-hardcore terrorists being killed and 571 police encounters; 995 non-hardcore terrorists were arrested and 368 surrendered. Similarly, for the first part of 1994, eleven hardcore terrorists and 61 non-hardcore terrorists are shown as having been killed. These statistics, he argued, show that the level of terrorist activity in the Punjab is still very high so that it could not be said that the terrorists have been removed or are not active in the Punjab.

It is, of course, correct that the statistics reveal the continued presence of militants in the Punjab. But it would appear that the militants have been severely reduced in number,

deprived of much of their leadership as well as areas under their control, have lost popular support and are demoralized. Furthermore, they remain subject to intense police pressure. It is to be expected that they will be on the defensive, intent on survival, rather than pursuing an offensive strategy along the lines of the 1990 to 1993 period. It is therefore likely that the figures in the terrorist crime index reflect a high level of police, as opposed to, terrorist activity. The more active the police, the more weapons likely to be captured and the greater the number of shoot-outs and encounters.

It is also to be noted that most of the terrorist killings for 1993 occurred in the first part of the year (38 out of 48). This means that many parts of the Punjab will have remained free of any terrorist killings for over a year, as is confirmed by the statement by [AJ] in his Report of the killing of eight members of the family in the Ferozepur District in April 1994. This was the first terrorist strike in more than one year, even though the border districts were the "original hotbed of terrorism" and the Ferozepur District had "spawned a host of top-ranking terrorists".

It is also significant that so many articles annexed to the J & S Report refer to terrorism having been crushed or eliminated. Included among such articles is the one written by [AJ] himself (Asian Age, February 19, 1994) which reports on the abandoned, often opulent homes of the militant chiefs who have either been killed or have absconded. It also refers to the fact that those top militants who have surrendered and been allowed to return to their homes live in constant fear for their lives, at the hands of either those they have betrayed or their victims. There then comes the statement that "The end of Punjab's violent decade has seen the near complete annihilation of terrorist cadres".

MILITANT ACTIVITY OUTSIDE THE PUNJAB

The country information currently before the Authority records that as a result of the security crackdown in the Punjab, most of the surviving militant groups have been forced to find hide-outs in states outside the Punjab. The reports annexed to the J & S Report concerning the militant presence outside the Punjab fall into two categories. First, there are those which report militant activity, usually random killings and second, those which report militants taking refuge or hiding out in an area and/or being captured by the police.

In summary, the information as to the first category, that is terrorist crime/killings outside of the Punjab is as follows:

(a) Militant groups have been operating in the Uttar Pradesh and Haryana border areas for some years. In particular the Terai region in Uttar Pradesh has been used as a refuge and base by at least three of the main militant groups, KLF, BTFK and KCF. By 1992, this area had become subject to a level of terrorist crime and indiscriminate killing of civilians similar to that in the Punjab itself. The Tribune, 2 January 1992, refers to at least 170 persons killed in 200 incidents of terrorist violence during 1991 (Appendix D 24). The Punjab police have therefore targeted the Terai region as part of the anti-terrorist campaign. The majority of the reports of terrorist activity outside the Punjab referred to in the J & S Report are in respect of the Terai region, and all occurred, with the exception of the killing of four persons in January 1993, during the years 1991 and 1992.

(b) Newspaper reports of militant violence in states other than Uttar Pradesh annexed to the Report are as follows:

Haryana

There are a total of five reports, all of which, with the exception of the gunning down of the Additional Principal Secretary to the Haryana Chief Minister, his wife and two sons in February 1991 and the killing of four police officers, relate to indiscriminate killings of civilians in the period 1991 to 1992. These include the indiscriminate killing of 31 persons and the injuring of 10 persons in Tohan by four militants shooting from a car (The Tribune, 7 December 1991, Appendix D11), 14 persons shot indiscriminately by militants in Sirsa (The Tribune, 11 November 1991, Appendix D18) and 7 killed and 20 injured in a bomb blast in a train in Jind district in February (The Tribune, Appendix D17).

Assam

There is one report from The Times of India, 21 March 1992 (Appendix D 5) referring to the arrest of three suspected Sikh militants in connection with the gunning down of another Sikh youth, also a suspected militant, and also attempts to extort money from local businessmen.

Himachal Pradesh

There are reports of a bank robbery by a splinter group of the KLF in Paonta Sahib in early 1992 (Times of India, 3 April 1992, Appendix number illegible), and two attempted bank robberies in Una district (bordering Punjab) in May 1992 (Times of India, 15 May 1992, Appendix D21).

Maharashtra

Reports refer to the assassination of General A.F. Vaidya, Chief of Army Staff at the time of Operation Blue Star, who was shot dead on 10 August 1986 in Pune (The Tribune, 10 October 1992, Appendix D2), whilst another article from the same paper of 4 April 1992 refers to a series of bomb explosions in Bombay attributable to Punjabi insurgents who are said to have established links with underworld gangs in the city.

New Delhi

The assassination of D.S. Tyagi, the Chairman of the Agricultural Cost and Price Commission in May 1992 (Times of India, 24 June 1992, Appendix E6).

Shooting of a cook in a gurdwara by two Sikh youths (Hindustan The Times, 11 March 1992, Appendix C3).

Two militants throwing a bomb at a police vehicle, no casualties: The Tribune, 9 February 1992 (Appendix D49).

A report of attempted extortion by persons claiming to be militants, two KCF members caught: The Hindu, 2 January 1992 (Appendix D46).

Bomb attack on Youth Congress (I) office on 11 September 1993, killing eight and injuring 40 persons: Frontline, 8 October 1993 (Appendix G(ii)).

West Bengal

There is a reference to the indiscriminate killing of at least eleven persons in the Purulia District in early 1991: Hindustan Times, 20 May 1993 (Appendix Aii6) and six militants killing a petrol pump owner on 4 August 1992: Statesman, 4 August 1992, Appendix Ai6).

(c) It is to be noted that in the information provided by counsel for the appellant as to the methodology of the Report, one of the authors is reported to have stated in a written communication, with reference to repression by Khalistani militants: "Instances of persecution by ordinary Sikhs of militants outside of the Punjab, especially for the period under question are rare". As noted the period of the Report is 1991 to mid-1994. This observation would appear to be borne out by the relatively few newspaper reports of militant violence against civilians outside of the Punjab, apart from the border regions of Uttar Pradesh and Haryana. Furthermore, only two of the victims of the reported attacks are said to be Sikhs.

(d) Outside of the border areas of Uttar Pradesh and Haryana which have experienced the depredations of militants for some time, there has been no evidence submitted, at least up until September 1993 with the bomb blast in New Delhi, of any strategy and/or organizational capacity on the part of the militants to operate outside of the Punjab, apart from the occasional act of random/indiscriminate violence or assassination of a prominent official.

(e) The bomb blast outside the Youth Congress (I) office in New Delhi in September 1993 in which eight persons died was considered by K.P.F. Gill to signal a major change in militant strategy. In his opinion, while most militant groups have been organizationally crippled, there is likely to continue to be small groups of highly skilled terrorists, whose future strategy will be built around carefully planned attacks on key figures and targets. Terrorists are therefore likely to remain active, but primarily outside the Punjab, with the Punjab being used as a base or place of

hiding: Frontline, October 8, 1993, Pioneer, 14 September 1993 (Appendix G(ii)).

(f) In conjunction with this shift in strategy, the militant groups have been regrouping into broad coalitions. Joint responsibility for the September 1993 bombing in New Delhi was claimed by three groups, the KLF, the Cheena group of the BTFK and the KCF who are believed to have come to an agreement to form a united front under Dr Sohan Singh's Panthic Committee. The KCF is said to have joined such an alliance for want of any other option, its leader Paramjit Singh having been left in Pakistan "without anyone to command": Pioneer, 14 September 1993 (Appendix G(ii)). Pakistan intelligence is also thought to be supporting these new alignments and is promoting the building of a broad alliance between Kashmiri, Sikh and Moslem fundamentalist organizations. Allied groups such as the Babbar Khalsa, based in Pakistan, have also been endeavouring to rebuild their organization.

(g) Despite these fears of the emergence of a flexible alliance between the various regional insurgent movements, with small groups of highly motivated, professional terrorists, carrying out carefully planned and targeted attacks nationwide, the Authority has not been given, nor is it aware of, any reports of such attacks by Sikh militants in the last year. Furthermore, it would appear that the Punjab police made further inroads into the militants' strength with the killing in 1993 of the BTFK leader, Satnam Singh Cheena (Chhina) and the arrest of Dr Sohan Singh.

With respect to the second category, that is reports of militants taking refuge and/or being captured outside of the Punjab, it would appear that the militants have been forced to scatter widely outside of the Punjab, the reports referring to militants being killed or captured in Haryana, Uttar Pradesh, Delhi, Bihar, West Bengal, Orissa, Madhya Pradesh, Maharashtra and Gujarat. The documents annexed to the J & S Report catalogue numerous arrests and killings of militants, including significant leaders, as part of a concerted anti-terrorist push by the police in those states, not to mention the controversial and well-publicized sorties of the Punjab police outside the borders of the Punjab.

The counter-insurgency capacity of the Punjab police, including intelligence gathering, is also recognized now to be substantial, enabling them to work closely with police in other states.

INDIAN AUTHORITIES AND HUMAN RIGHTS

There is no doubt that the counter-insurgency operation that ultimately crushed most of the militant groups in the Punjab by mid-1993 was characterized by the gross violation of the human rights of individuals suspected of being militants. The following quote is from the Human Rights Watch, Dead Silence: The Legacy of Human Rights Abuses in Punjab (May 1994) 1:

> "Nineteen-ninety-three brought to an end one of the bloodiest chapters in India's post-independence history. The decade-long insurgency in the northern Indian state of Punjab and the brutal police crackdown that finally ended it cost more than 10,000 lives. Most of those killed were summarily executed in police custody in staged "encounters". These killings became so common, in fact, that the term "encounter killing" became synonymous with extrajudicial execution. Many civilians were also murdered in militant attacks. Hundreds of Sikh men also disappeared at the hands of the police, and countless more men and women were tortured. The price of the government's apparent success against the separatists is the legacy of these abuses: A corrupt and brutalized police force whose resort to murder and torture has been sanctioned by the state as an acceptable means of combatting political violence."

It does not follow from this that **all** persons in the Punjab have suffered human rights abuses. Nor does it follow that **all** persons in this state have a well-founded fear of persecution in the future. The issue we are called upon to decide is whether, on the specific facts of the appellant's case, there is a well-founded fear of persecution at the hands of either the militants or at the hands of state agents such as the Punjab police.

As to the militants, we have held that there is no credible evidence of a real chance of persecution at their hands.

As to the police, we have likewise held that there is no credible evidence of a real chance of the appellant suffering persecution at their hands, or at the hands of any other state agent of persecution.

It needs to be emphasized, given the breadth of the appellant's submissions under this heading, that the Refugee Convention does not protect persons against any and all forms of even serious harm. In the result, persons affected by civil war or by generalized violence in their country of origin are not refugees within the meaning of the Convention unless and until it can be shown that they are at risk due to their race, religion, nationality, membership of a social group or political opinion.

IMPEDIMENTS TO RELOCATION

The practical impediments to relocation listed by the appellant (ethnicity, linguistic barriers, religious faith, intolerance by Hindus, lack of central government support as well as problems with housing and employment) are present in one degree or another in societies other than India, including New Zealand. For intolerance by Hindus one can read racism in certain sections of New Zealand society.

The point being made is that the existence of the listed factors does not alone establish that relocation cannot be expected of a particular individual. As stated by the Canadian Federal Court of Appeal in Thirunavukkarasu v Canada (Minister of Employment and Immigration) [1994] 1 FC 589, 599 (FC:CA) it is not a matter of a claimant's convenience or the attractiveness of the relocation option, but whether one should be expected to make do in that location, before travelling half way around the world to seek a safe haven in another country. The following extract from the judgment at 597-598 bears quotation:

> "Thus, IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant. This test is a flexible one, that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so.
>
> Let me elaborate. It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?
>
> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.
>
> In conclusion, it is not a matter of a claimant's convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travelling half-way around

> the world to seek a safe haven, in another country. Thus the objective standard of reasonableness which I have suggested for an IFA is the one that best conforms to the definition of Convention refugee. That definition requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country. The prerequisites of that definition can only be met if it is not reasonable for the claimant to seek and obtain safety from persecution elsewhere in the country."

It should also be remembered that the "reasonableness" test requires account to be taken not just of the particular circumstances of the individual, but also the socio-economic matrix of the country of origin. Thus, dealing with the argument that it is not possible for Sikhs to settle outside the Punjab, the Authority in Refugee Appeal No. 18/92 Re JS (5 August 1992) at 12-13 stated:

> "This argument the Authority has rejected. In Refugee Appeal No. 11/91 Re S we stated:
>
> > "We are further of the view that it would not be unreasonable for the appellant to move out of the Punjab. In this regard we note that according to the Amnesty Report referred to, Sikhs in the Punjab form a majority of only 60% (approximately) of the population. The material supplied to us by Mr Chambers contains the following statement (at p.39):
> >
> > > "Punjab is the only Indian state with a majority of Sikhs - 60 per cent - and Punjabi is the mother tongue of about two-thirds of the people. The remainder speak Hindi. Hindus make up more than one-third of the population, and there are smaller minorities of Christians, Jainas, and Buddhists."
> >
> > Clearly, there can be no objection per se to Sikhs and non-Sikhs living and working alongside each other. Furthermore, there are significant Sikh populations in the neighbouring states. On the figures provided by the Immigration Service, in the Chandigarh area they comprise 21% of the population. In Delhi they comprise 6.3% of the population and in Haryana the percentage is 6.2%. In Rajasthan the percentage is 1.4% and in Uttar Pradesh it is 0.4%. The quality of protection offered in those states against non-state agent persecutors in the form of Sikh extremists would be neither illusory nor unpredictable. It may well be that the appellant will face language and employment difficulties but he faces these in New Zealand as well. But more importantly, difficulties of this kind are not the subject of protection offered by the Convention. Nor does the Convention offer protection against discrimination and harassment by hostile members of the population."
>
> To similar effect see Appeal No. 63/91 Re RL (13 April 1992) at 5; Refugee Appeal No. 83/91 Re SP (13 April 1992) at 8.
>
> For further statistics reference can be made to the Minority Rights Group report The Sikhs (1986) Report No. 65 at 4 and 9."

We should also point out that the J & S Report is fundamentally an enquiry as to whether normalcy has been restored in the Punjab. See p 1. This is apparently the benchmark taken by them for the purpose of their discussion of relocation. They have defined "normalcy" as follows:

> "When defined according to common parlance, the term "normalcy" implies that every aspect of civil life is back on the tracks, that law and order is restored, business is functioning as usual and that in general, the ordinary citizen of the province is conducting her/his life in the same manner as before the eruption of the Punjab crisis. Additionally, the term connotes that no special checks and balances or restrictions have been placed on any aspect of life within Punjab, and that people are allowed to exercise their basic fundamental rights in an undeterred manner. In the context of our experience and research, all these premises upon which the state of "normalcy" is based are open to question."

The issue for consideration in the refugee law relocation context is, however, different. It is primarily the state's ability to provide meaningful protection. No state can guarantee protection against any or all forms of harm. That is why persecution is appropriately defined as the **sustained** or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community: Hathaway, The Law of Refugee Status (1991) 112. Given the somewhat inappropriate benchmark adopted by J & S, it is as well to bear in mind, in the refugee context, the difficulties of protecting citizens against terrorism described by Hugessen JA in Canada (Minister of Employment and Immigration) v Villafranca (1992) 18 Imm LR (2d) 130, 132 (FC:CA) adopted and applied in Mendivil v Canada (Secretary of State) (1994) 23 Imm LR (2d) 225, 231 (FC:CA):

> "No government that makes any claim to democratic values or protection of human rights can *guarantee* the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however, much they may merit our sympathy, do not become Convention refugees simply because their governments have been unable to suppress the evil. Where, however, the state is so weak, and its control over all or part of its territory so tenuous as to make it a government in name only, as this court found in the case of Zalzali v Canada (Minister of Employment and Immigration) [1991] 3 FC 605, a refugee may justly claim to be unable to avail himself of its protection. Situations of civil war, invasion or the total collapse of internal order will normally be required to support a claim of inability. On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection."

To similar effect see Hathaway, The Law of Refugee Status (1991) 105:

> "It is axiomatic that we live in a highly imperfect world, and that hardship and even suffering remain very much a part of the human condition for perhaps the majority of humankind. It is also true that there is no universally accepted standard of quality of life, nor of the role that a government should play in meeting the hopes and needs of its citizenry. This plurality of experience and outlook restricts any attempt to define in absolute terms the nature of the duty of protection which a state owes to its people, as is clear from the deference that international law consistently pays to both cultural distinctiveness and sovereign autonomy."

While on the facts of the present case the issue of relocation does not arise, the Authority would in any event have held that both limbs of the relocation test were satisfied. There is no credible evidence of the appellant being at risk of the militants in other parts of the Punjab or in any other state in India. Furthermore, it is to be remembered that he served in the Indian Army for just over fifteen years and during that time lived and worked in different parts of India, albeit while accommodated in army barracks. Living outside of the Punjab will not be a new experience for him. He also has a good grasp of Hindi. He has an excellent army record and his experience as a clerk should open up a number of employment opportunities. As he is in receipt of his army pension, he has at least some financial security to tide him over any relocation period until he is able to secure employment.

All of these circumstances lead us to the conclusion that the appellant can genuinely access meaningful state protection and that it would be reasonable to expect the appellant to relocate elsewhere in the Punjab away from the problems he has experienced in his home locality, or alternatively, elsewhere in India. If there is any residual threat from the militants in his home area (and we see no credible evidence that would justify such finding), the appellant could reasonably be expected to access the protection of the country of his nationality by relocating.

OVERALL CONCLUSION

We find that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

CONFIDENTIALITY ORDER

Part II para 18(4) of the Terms of Reference of 30 August 1993 empowers the Authority to direct that certain matters put before the Authority not be published. Para 18(4) provides:

> "The Authority may, in the course of or at the conclusion of any appeal, direct that certain matters put before the Authority (such as names and evidence) not be published."

It was submitted that J & S as well as Dr V could face repercussions in India should the authorities there learn of the evidence they have given in this case. Far-fetched though this may be, the Authority directs that their names not be published in the For Publication version of this decision.

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(Member)