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Heard at Field House with
video link to Manchester
On 26 November 2002

APPEAL NO HX43346-2001

AA (Persecution- "Causing"-
Public Affection-Religion-
Unmarried) Iraq CG [2002]
UKIAT 07246

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

17.03.2003

Before:

Mr A R Mackey (Chairman)
Ms S S Ramsumair, JP
Mr D M Froome

Between

Ahmed Rasul Ameen

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation

For the appellant:	Mr M Schwenk of Counsel Representing Clifford, Johnston & Co Solicitors
For the respondent:	Mr M Blundell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Iraq, an ethnic Kurd from the City of Suleymania in the Kurdish Autonomous Area (KAA). This Area being recognised as controlled by the PUK. The appellant appeals with leave against the determination of an Adjudicator, Mr G Campbell, promulgated 20 May 2002 wherein he dismissed an appeal against the decision of the respondent who had refused leave to enter following refusal of asylum and human rights claims.

2. The Adjudicator noted that the basis of the appellant's claim was that he had formed a relationship with a young woman called Amil in April

1999 when she was 21 and he was 24. When the relationship became known to the brothers the appellant's problems began.

3. Amil came from a village situated outside the city of Suleymania and she was a student at an Institute of Health. She came from a large sub-tribe (Swara) which is evidently part of a larger Jafs tribe which comprises 10-15% of the total population of the KAA.

4. In September 1999 the appellant and Amil were in a park in Suleymania where they were sitting talking and holding hands. This act unfortunately was seen by some relatives of Amil. After that two of Amil's brothers X and O who it was claimed were uneducated Fundamentalist Islamic supporters came to the appellant's shop and threatened to kill him. In so doing they attempted to kidnap the appellant. Fortunately through the intervention of a number of the appellant's friends in the area and a larger crowd who gathered, the two brothers were unable to abduct the appellant. Following the incident the appellant fled from his shop and went to stay with relatives considering he could not return to his home. He explained that the relationship with Amil was an unauthorised one and was contrary to Islamic law and was condemned and could draw severe penalties. The brothers considered the appellant had disgraced their sister. The Adjudicator stated that they were coming to seek revenge on him and wanted to kill him for the wrong they believed he had done to the family. The appellant's father tried to intercede in the matter but no compromise could be achieved with Amil's family who continued with their insistence that they would kill the appellant. Beyond this Amil's tribe and family refused to curtail of X and O and this led to the appellant fleeing the KAA for fear of his life. He considered he could not move to another part of the KAA, such as that controlled by the KDP, as the Swara tribe had close contacts with that area and the KDP. The appellant understood that the brothers had taken Amil from the college and she had also fled the KAA to Iran. To the best of his knowledge she remains in exile there.

5. The claim put forward to the Adjudicator was that the appellant was a refugee based on his imputed political views or, in the alternative, was a member of a particular social group, namely "persons who have transgressed the law of Islam". The appellant also claimed that the details of his relationship and his transgression had been transferred on to the Islamic Party (IM) and its agenda in the PUK.

6. The Adjudicator considered background material including reports from Dr Maria O'Shea and Sheri Laser on which he attached "great reliance".

7. At paragraph 16 of the determination the Adjudicator set out findings that the appellant was generally credible and his evidence fitted well with the background material. The Adjudicator stated:

> "I have no reason to disbelieve what he has told me and I accept what the appellant has said in his witness statements and in the oral evidence before me. It is clear that the appellant was playing with fire when he chose to embark on a relationship with Amil in the circumstances that he found himself in within Kurdish society."

8. He then went on to find that the KAA could not provide a sufficiency of protection to the appellant and that the risk from the two brothers was a real one. Next he found that it was clear that at different times people have freedom of movement within the KAA "mainly to perform trades". However removal from one area to another, he considered, was a different matter with different dialects and different customs, and if the appellant moved from Suleymania to Erbril he would be seen as an outsider and possibly a spy. The Adjudicator did not believe relocation within the KAA was a viable option in this case.

9. He then addressed, what he stated were "questions of law", and applied them to the facts he had found.

10. The Adjudicator concluded that fears held by the appellant were not of the "State" but rather of individuals within it. He did not however go on to reach conclusions on whether the appellant would suffer serious harm on return to his home district from those non-state actors, although having decided at paragraph 16 that he fully accepted the appellant's credibility it would appear he also accepts that there is a real risk the appellant would suffer serious harm on his return. As stated above he also considered the appellant could not access sufficiency of protection on return. (Effectively therefore he found that the appellant would be persecuted if he returned to his home district as both limbs of the persecution test for non-state actors had been met, i.e. serious harm and lack of state protection.)

11. He then went on however to conclude that the appellant's case did not fall within one of the five reasons set out in the Refugee Convention. In his opinion the case had nothing to do with the appellant's political opinions but everything to do with revenge of family honour. "This case starts and remains a case of two ill educated brothers seeking a misplaced revenge against the appellant for apparent infringement of family honour." He found that the submission that the persecution that the appellant would suffer by reason of political opinions was "misplaced and wrong". Finally the Adjudicator considered the issue of whether the appellant was a member of a particular social group, that is "persons who have transgressed the m orals, mores, and social value of Islamic society". He stated in his opinion that this was not a social group.

> "Such individuals may very well draw upon themselves the condemnation and wrath of other members of society within an Islamic society, but that does not in my judgment classify them

> as a social group within the definition of the 1951 Convention. It is the attention that such individuals suffer that identifies them rather than their activities themselves. In other words a group cannot claim protection merely by virtue of the fact that persecution is the only identifying factor."

12. He then dismissed the refugee claim.

13. The consideration given to the human rights claim is very short. He simply states that he had examined the arguments put forward and found no substance in them and, that in the light of his conclusions, presumably relating to the refugee claim, that there would not be a breach of the obligations of the United Kingdom under the ECHR. He dismissed the appeal made under Articles 2, 3, 5, 8, and 10 of the ECHR.

The Human Rights Appeal

14. Because of the findings of fact made by thee Adjudicator and concession made by Mr Blundell that he was in some difficulties in arguing that Article 3 of the ECHR was not applicable we reach our conclusions on the human rights issue firstly before moving on to consider the more vexed question of whether the appellant is a refugee which requires close consideration of the nexus issue.

15. Mr Schwenk rightly submitted to us that the Adjudicator, having reached positive credibility findings to the effect that the appellant would be persecuted on return to his home district and that no relocation or internal protection was available within the KAA for this appellant then, following the conclusions of this Tribunal in Kacaj (01/TH/00634)* that there must be substantial reasons for concluding that there is a real risk that this appellant would suffer maltreatment in breach of Article 3 of the ECHR.

Decision on Human Rights Issue

16. It is abundantly clear in this case that the appeal on human rights, particularly Article 3, must succeed. The Adjudicator simply did not give consideration to the human rights issues or follow the leading decision of this Tribunal in Kacaj. There is no requirement for the torture, inhuman or degrading treatment that the appellant is at risk of receiving on return to the KAA to be for a specified reason or reasons as is the situation with the Refugee Convention. The appeal therefore succeeds on human rights grounds.

The Refugee Convention

17. Both parties agreed that the only matter at issue in this regard was whether, given that the findings of the Adjudicator of positive credibility and the lack of an internal flight alternative in the KAA, the persecution feared by this appellant would be for one or more of the five Refugee Convention grounds.

18. Mr Schwenk submitted to us that the Adjudicator had incorrectly concluded that there was not an imputed political opinion or a particular social group nexus in this case. When we asked him for comments on the possibility of there being a religious nexus, given the several statements in the determination that referred to the appellant having breached Islamic mores of Fundamentalist beliefs, he also submitted that direct or imputed religious beliefs should be seen as one of the reasons for the risk of persecution to this appellant on return.

The Respondent's Submissions on the Nexus Issue

19. Mr Blundell submitted to us that there was not a nexus in this case for either an imputed political opinion or a particular social group. However the religious issue was a more mixed one. He agreed It was a more vexed issue. He submitted that such a nexus did not exist in this case and it was appropriate to follow decisions such as Gomez and Omoruyi [2001] Imm AR 175. He contended we should follow the Court of Appeal in Omoruyi and conclude that the risk to this appellant was not because of his religious beliefs but because the two brothers wished to seek revenge on him for his attentions to their sister. This situation was therefore very similar, in his submission to the findings in Omoruyi where the nexus for the persecution feared was found to be the refusal by the appellant to give up his father's body to the Ogboni rather than his Christian beliefs.

20. In final reply Mr Schwenk submitted that a religious nexus could be established and the appellant had established this where he stated in his uncontested evidence that his SEF (page 47 of the bundle) that:

> "My girlfriend Amil has two brothers who are Islamic Fundamentalists. They disapprove of my relationship with her and believe I have brought shame on them and their family. They now want to kill me and I cannot seek protection from any authority against this desire. … I regard myself as educated and free-minded. I have been brought up in the Muslim faith but Amil's brothers think that my beliefs contradict with some of the aspects of Islam and that I have broken the rules of conduct and as such that I should be punished. I approach religion in a much different way to them. They are very strict Muslims and members of the Islamic Party."

21. He submitted therefore that the brothers wished to carry out their death threats against this appellant for reasons of their religious beliefs and his conduct with their sister was a breach of their standing (ie.fundamentalist) of correct behaviour in Islamic society. He further submitted that the appellant's conduct of showing open affection to Amil indicated, to the brothers that he was opposed to some basic Fundamentalist tenets of Islam.They thus discriminated against the appellant for his religious beliefs (or non-beliefs) they perceived him to hold.

22. Finally he submitted that in the Fundamentalist Islamic society pursued by the Islamic Party (IM) that political and religious beliefs cannot be separated and are fundamentally entwined.

The Issue

23. As stated we found the only issue before us to be whether the persecution feared by this appellant, which has been accepted as well founded by the Adjudicator,is for reasons of one of the five Refugee Convention grounds. In particular, consideration is required of religious, political opinion and particular social group issues.

Assessment

24. We are satisfied that the particular social group argument does not have merit. We find that the appellant does not have any inherent or inalienable characteristics.

25. Turning to consideration of the possible religious nexus. While there is some weight in Mr Schwenk's submissions that the fundamentalist Islamic culture of the Islamic Party in the KAA religious and political views may be indistinguishable, because of our findings reached on the religious nexus, it is unnecessary for us to be conclusive on whether one or both grounds is also present.

26. The decision in Omoruyi is a starting point. This is a decision of the Court of Appeal given by Simon Brown LJ in October 2000. The appellant was a citizen of Nigeria who had claimed asylum on the basis that he had incurred hostility from a Nigerian secret society, the Ogboni. When his father died, because of his won Christian beliefs the appellant refused to release his father's body for ritual burial by the Ogboni. As a result of this he was threatened with death and claimed that his brother had been brutally murdered by the Ogboni, in mistake for himself and that his brother's body had been mutilated. He also claimed that his 3-year old son had been killed since he left Nigeria and his body had also been mutilated. Both these acts he claimed were in revenge although the Ogboni got the wrong target with his brother.

27. While there were some problems in credibility acknowleged Simon Brown LJ go on to consider the crucial nexus issue states at paragraph 8:

> "I come now to the critical question for decision which is whether on the basis of the assumed facts the appellant can properly be said to be a refugee as defined by Article 1(A2) of the Convention:
> "For the purposes of the present Convention, the term refugee shall apply to any persons who … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, he 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 … The appellant's case is that he has a well-founded fear of being persecuted for reasons of religion. His fear of serious, indeed fatal harm at the hands of the Ogboni. … it is clear too that on the assumed facts he cannot look for protection of the authorities in Nigeria: they are either unable or, more probably, unwilling to protect him. The real question is whether such harm as may be befall him on return home should be properly characterised as "persecution for reasons of religion".

28. Lord Justice Simon Brown then went on to consider what was meant by "religion" and found authority in Professor Hathaway's book "The Law of Refugee Status" (Butterworths 1991) at paragraph 5.3. After quoting from that paragraph Simon Brown LJ states:

> "It is, therefore, plain (and hardly surprising) that, whether the harm is perpetuated by the religious on the non-religious or vice versa (or indeed by one religious body against another), and whether because of adherence (or refusal to adhere) to a belief or because of behaviour, there will be persecution for reasons of religion provided always that the other ingredients of the definition are satisfied."

29. We consider this last finding to be highly significant in this case. It is not argued that Islamic beliefs, including fundamentalist Islamic beliefs, are not religious beliefs in this case. It would be ridiculous to suggest otherwise. However in Omoruyi determination Simon Brown LJ firmly rejected adherence to the Ogboni cult as being a religious belief. He states at paragraph 12:

> "This argument I would utterly reject. The notion of a "devil cult" practising pagan rituals of the sort here described is in any sense a religion I find deeply offensive. Assumed opposition to any practises on the part of a secular state; is that to be regarded as a religious difference? I hardly think so. It seems to me rather that these rights and rituals of the Ogboni are merely the trappings of what can only be realistically recognised as an intrinsically criminal organisation – akin perhaps to the voodoo element of the Ton-Ton Macoute in Papa Doc Duvalier's Haiti."

30. To this extent therefore Mr Ameen's case differs substantially from that of Omoruyi.

31. Simon Brown LJ also goes on to give consideration to the view of whether discriminatory behaviour is required to establish a Convention ground. He traverses the arguments on this issue in the House of Lords' decision in Shah [1999] 2AC629. He concludes at paragraph 21:

> "If, as I believe, these are correct statements of Convention law (that is statements from Shah and from the Australian High Court decision in Chen Shi Hai [2000] HCA19 it plainly follows that discrimination, at least in the sense that the substantive law or its enforcement in practise is unequally on different people or different groups, i.e. essential to the concept of persecution under the Convention. Only those who for one or another Convention reason are singled out, whether malevolently or not, can qualify for asylum."

32. The decision in Omoruyi goes on to conclude that the Nigerian State authorities were not unable or unwilling to protect the appellant because of his being a Christian but rather because he was at risk having crossed this particular cult and he was not being discriminated against by the Ogboni because of his Christian beliefs but rather because he had dared to defy them: "the cult would have been wholly indifferent to his underlying reasoning or beliefs".

33. Simon Brown LJ then states at paragraph 26:

> "This case fails not for want of enmity or malignity on the part of the Ogboni (these feelings, we must assume, were present in abundance), rather because that motivation (that hostility and intent to harm) was in no realistic sense discriminatory against the appellant on account of his Christianity but rather stemmed from his refusal to comply with their demands."

34. Turning now to the predicament of this appellant, we find a quite different situation to that in Omoruyi. It is accepted that the brothers X and O were Islamic fundamentalists and followers of the Islamic Party, those are their religious beliefs. In those religious beliefs is the conviction that Muslims should not indulge in public displays of affection. The evidence would not appear to indicate that fundamentalists would wish to kill or punish every Muslim that they perceived was breaching this banned behaviour. However, it is quite clear, that where it is a sister of such fundamentalists who engages in such practices with another Muslim that there is a real risk that they will carry out their death threats, as is the situation here. The issue is therefore whether the enmity or malignity that X and O wish to visit upon the appellant is merely because he was engaged in a public display of affection with their sister and thereby crossed the two brothers or because of the fundamentalist Islamic beliefs of the two brothers such behaviour had to be punished. It is our view that there is clearly an element of both in the motivation of these brothers. If they were not fundamentalist Islamic believers there is not a real risk that they would pursue the appellant in this fashion.

35. At this point we return to the findings of Simon Brown LJ after his consideration of the meaning of "religion" as cast in Professor Hathaway's book. He states whether the harm is perpetuated by the

religious upon the non-religious or vice versa and whether because of adherence (or refusal to adhere) to a belief or because of behaviour that there will be persecution for reasons of religion. In Mr Ameen's case therefore it is not so much the religious beliefs of this appellant (or lack of beliefs) that is part of the causation but very much the religious beliefs of the two brothers and their attitudes towards the appellant's behaviour that brings about their desire to kill him.

36. We are satisfied therefore on the facts as found and accepted by this Adjudicator and on the basis of the above analysis that there is a well-founded fear of this appellant being persecuted for reasons of religion.This conclusion is reached very much on the facts of this case and does not imply that in every case where there is a mix of personal revenge and religious beliefs that the religious element will be sufficiently significant to reach the conclusion we have. We now turn to address this issue.

37. In the assessment of causation we consider it relevant to take into account whether it is necessary for the religious element within the causation to be found central or predominant to the cause of the risk, to be a contributing factor to the risk ,or merely a marginal or insignificant element to the risk faced by the appellant. At the outset we are satisfied that the religious element is at least a contributing cause and not a marginal or virtually insignificant element within the risk. In this regard our conclusions would fall within paragraph 13 of the recently published "Michigan Guidelines on Nexus to a Convention Ground" [2002] 23(2) Michigan Journal of International Law 207-221 which states:

> "In view of the unique objects and purposes of refugee status determination, and taking into account the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognised."

38. "The Michigan Guidelines on Nexus" are of course not part of UK refugee law. They are however well informed and researched academic commentary.We must now look at the UK position and then the international jurisprudence to see if throw light on the current "positions "on causation or nexus.
<u>The position of causation in UK law where there is more than one reason for an Applicant's well-founded fear of being persecuted</u>

39. It is well accepted that the Refugee Convention does not require that one or more of the five grounds is the only reason for an applicant's well-founded fear of being persecuted. For example, Lord Hoffman in <u>Shah & Islam</u> [1999] ImmAR 283 recognises this where he states that:

> "I turn, therefore, to the question of causation. What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women."

40. In this case, as stated, the reasons for the persecution feared by Mr Ameen is made up of two elements. The personal threat to the appellant by the two brothers because of his conduct towards their sister and secondly the threats to him by the same brothers for reasons of their Fundamentalist Islamic beliefs which they considered the appellant had transgressed by his public display of affection to their sister. The first of these reasons is apparently a purely personal one directed towards the appellant as an individual and does not, to us, to have an apparent linkage to any one of the five Convention reasons. The second however clearly involves a religious, and possibly to a small extent, political element.

41. This leads us to the next issue of whether the Convention ground, in this case religion, must be the essential, central or predominant cause of the applicant being persecuted or simply is it a contributing cause. The international jurisprudence on which is the most appropriate test to apply is probably best described as being in a developing state.

42. The UK position, at this time, appears to encompass the possibilities of two tests at this time with the preference being to leave the issue to a "common sense,case by case"approach. The two tests are; the "but for" test which is taken across from the law of tort and the "effective cause" which appears to mean that an essential, central or predominant cause must be found.

43. In Shah & Islam both Lord Steyn and Lord Hoffman both declined to make a choice between these tests and do not appear to have come down firmly in favour of one or the other. The development therefore of a "contributory cause" jurisprudence in this country along the lines set out in the Michigan Guidelines on Nexus, may still be open.We see considerable logic and practical assistance in these Guidelines for those involved in refugee status determination at all levels,particularly when confronted, as often happens,by more than one or mixed reasons for the persecution.We recognise that those who would wish to adhere to the "effective cause" test may consider the "contributory cause" test to be possibly a more liberal approach but after considering the UK jurisprudence, particularly the Court of Appeal decision in Montoya [2002] INLR 399, discussed below,we consider the

"contributory cause' approach is a more helpful one for refugee decision makers , particularly noting the seriousness of the issues before them and need to reach clear decisions often very promptly.It also can not be confused in a way we consider the "effective cause" test can be with an erroreous predominancy principle.

44. Lord Steyn in Shah & Islam when the "but for" and "effective cause" were argued by the parties before the House of Lords decided that, in that case, it made no difference which test was applied and stated "in these circumstances the legal issue regarding the test of causation, which did not loom large in this appeal, need not be decided".

45. Also in Shah & Islam Lord Hoffman is critical of the "but for" test. He stated:

> "Once one has established the context in which a cause or question is being asked, the answer involves an application of commonsense notions rather than mechanical rules. I can think of cases in which a "but for" test would be satisfied but commonsense would reject the conclusion whilst for the reasons of sex." [He then goes on to set out an example which was particularly applicable to the gender persecution issues in the Shah & Islam case].

46. The Court of Appeal have also rejected the "but for" test in the decision in Velasco [2000 Lexis, EINdatabase SLJ-1999, 7981-C] a decision of April 2000 and also considered the causation issue in Montoya, a decision that upheld a determination of the Tribunal. At Paragraph 28 of Montoya Schiemann LJ states:

> "We are thus brought to the potentially difficult issue of causation. Lords Steyn,Hope of Craighead and Hutton in *Shahana Islam v SSHD:IAT-ex parte Syeda Shah* [1999] 2 A C 629 did not find it necessary to add to the vast amount of doctrine on causation. Lord Hoffman, at 653G and 164C respectively, points out that answers to questions about causation will often differ according to the context in which they are asked. At 654H-655A and 165D-F respectively he indicates that in the present context such cases have to be considered by the factfinders on a case-by-case basis as they arise. We agree."

47. The commonsense or case-by-case approach is thus concurred with in Montoya, although not actually applied as, like in Omoruyi, a Convention reason is not found, on the facts.

International jurisprudence

48. A US Court of Appeals for the 9th Circuit decision in Gafoor v INS, [2000] 231F3d645 (3 November 2000) sets out the range of competing approaches. This was a case where the applicant was an Indo-Fijian police officer who had witnessed a rape of a 13-year old girl by an

ethnic Fijian army officer. He arrested the officer but however the officer's superior, also an ethnic Fijian informed the applicant that the officer must be released. Following this the applicant was assaulted by the army officer and his colleagues and then detained in an army camp where he endured beatings and warnings not to publicise the arrest. He was again attacked on release by other soldiers and threatened with death and told to "go back to India". He then fled the country to the United States. The Board of Immigration Appeals confirmed a decision that the attacks were motivated solely by revenge. The arrest of the army officer and that there was no nexus between the incidents and a Convention ground. The majority of the 9th Circuit Court of Appeal overturned the decision applying the principal that the applicant need only establish that the harm "was motivated" at least in part, by an actual or implied protected ground. The Court did not attempt to weigh up the significance of the protected ground to the well-founded fear of being persecuted, rather it concluded that once the applicant had established that race played a part in the fear of being persecuted the nexus had been established. Arguments relating to the applicant being required to establish that the protected grounds must stand alone or that the persecution would not have occurred in the absence of a protected ground were rejected. They went on to refer to anti-discrimination legislation in the United States and considered it was equally appropriate in the refugee context. The dissenting Judge appears to have effectively applied a "but for" test.

49. The Australian Federal Court, in the decision in Rajaratnam v IMA [2000] FCA 1111 (10 August 2000) in a decision prior to the legislative amendment (Migration Legislation Amended Act (No. 6) 2001) which legislates that the definition is not satisfied "unless that reason is the essential and significant reason (s) for the persecution" set out that decision-makers should undertake a sophisticated evaluation allowing "for the possibility that the extortive activity has [a] dual character." The Federal Court of Canada in Zhu (DC.NO.A-1017-91) also made the relevant comment that "people frequently act out of mixed motives, and it is enough for the existence of political motivation that one of the motives was political".

50. However as the dissenting judge in Gafoor appears to indicate simply asking whether a Convention ground was at least one factor in producing the risk of being persecuted may trivialise the refugee enquiry that a role of that factor was, at best, extraordinarily minor. A similar approach is taken in Velasco regarding the "but for" test in that it "opens up the possibility of an infinity of causes".We firmly agree with these comments.

51. The New Zealand Refugee Status Appeals Authority (NZRSAA) decision in Refugee Appeal No 72635/01 (6 September 2001), at paragraphs 167 to 179, sets out a very detailed and informative commentary on causation/nexus issues both in New Zealand and

international refugee law, including a full statement of the "Michigan Guidelines on Nexus". After that review, at paragraphs 177, it states:

> "… on the decisive question of the standard of causation, we accept that as a matter of principle the only proper conclusion to be drawn from the language, object and purpose of the Refugee Convention is that the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted."

The decision goes on to note that if the Convention ground is remote, to the point of irrelevance, refugee status should not be recognised.

Application to the appellant's case

52. In the facts as found in this determination however we are satisfied that regardless of whether a "but for", "effective cause", "commonsense", or "contributory cause" approach is taken the same result follows. Indeed if we adopted a distillation of that approach, which was succinctly and pragmatically suggested by Professor Hathaway at the recent "Advanced Refugee Law Seminar" (International Association of Refugee Law Judges Conference – Auckland, New Zealand -October 2002), of "How did the applicant get himself in the mess he is in?" clearly the religious beliefs of the brothers are a significant part of that "mess".

53. Applying a "but for" test, if the brothers X and O were not Islamic fundamentalists but merely wishing to stop the appellant having any form of relationship with their sister, we do not consider there would be a reasonable likelihood they would wish to persecute or kill him in the manner threatened and accepted here. Similar logic applies with the "effective cause" test. We consider that the real risk to this appellant arises through the transgression of fundamentalist Islamic mores rather than mere association with the sister of the two possible persecutors. A commonsense approach also adopts a similar logic in that it is reasonably likely that the tenets of fundamentalist Islamic beliefs held by the two brothers in this case are the driving force behind their wish to kill or persecute the appellant rather than merely just the appellant's behaviour and the family association. Finally, as set out above, we consider it clearly a contributory factor.

Decision

54. The appeal is allowed both on refugee and human rights grounds. We consider that there is a reasonable likelihood of this appellant being persecuted for reasons of religion (and other factors which may not be protected by the Refugee Convention) on return to the KAA. As noted at Paragraph 16 the Human rights appeal under Article 3 ECHR is also allowed.

A R Mackey
Vice President