REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 1312/93

RE GJ

AT AUCKLAND

Before:	R.P.G. Haines (Chairman) A. Wang Heed (Member, UNHCR)
Counsel for the Appellant:	R J McKee
Appearing for the NZIS:	No appearance
Date of Hearing:	24 August 1994
Date of Decision:	30 August 1995

DECISION

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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, a national of the Islamic Republic of Iran.

INTRODUCTION

The appellant claims to be in fear of persecution in Iran due to his clandestine activities in support of the banned Tudeh Party and because he is a homosexual.

The delay in delivering this decision is due to the fact that the Authority received little from the appellant by way of country information and even less assistance on one of the central issues of the case, namely, whether homosexuals in Iran constitute a particular social group for the purposes of the Refugee Convention. In the result, the Authority has been required to carry out its researches into both the facts and the law.

By way of background, we will refer first to general information concerning the Tudeh Party and also to the position of homosexuals in Iran.

THE TUDEH PARTY

The communist Tudeh Party is a long established political organisation, the members and supporters of which have been persecuted by both the monarchy and by the present regime which came to power in 1979: Ramy Nima, The Wrath of Allah: Islamic Revolution and Reaction in Iran (1983) 36, 94. In 1979, the Tudeh Party claimed a right to participate in the revolutionary regime because of its role in ousting the Shah. But unlike the

outspoken Mojahedin, Tudeh leaders deferred to the Mullahs, despite the often hostile response. They quietly accepted restrictions banning them from running for the presidency, and they chose not to publicly criticise electoral conduct when their candidates failed to win seats in parliament. But subservience was not sufficient to survive in the Islamic Republic: Robin Wright, In the Name of God, The Khomeini Decade (1989) 124. Wright identifies two events which precipitated the fall of the Tudeh Party. First, the USSR resumed arms sales to Iraq (Iran and Iraq were at war). Second, a list of agents used by the Soviet Union in Iran came into the possession of the Iranian authorities. A crackdown against the Tudeh Party began in the northern Spring of 1983 and lasted until the Fall of 1983. Throughout this period, Tudeh leaders were put on nationwide television to confess their crimes, ranging from subversion to espionage, and to disclose the malevolent intentions of the Soviet Union in Iran. The purge of the Tudeh Party was the final step in consolidating the rule of the Clergy: Robin Wright *op. cit* 124.

According to the Amnesty International report Iran: Women Prisoners of Conscience (AI Index: MDE 13/05/90) the dissolution of the Tudeh Party was announced in May 1983 by the Prosecutor General who stated that any activities on behalf of the Tudeh Party would be considered as counter-revolutionary acts. Members of the Party were advised to report to the Islamic Revolutionary Prosecutors' Office within a week or else be considered as counter-revolutionaries and as plotters against the state. The following quote is taken from op.cit 3:

> "The party structures of the Tudeh Party and the PFOI (Majority) were dismantled, their premises closed, their newspapers and publications proscribed. By mid-1983 the leadership of both parties and hundreds of supporters were imprisoned. On 14 May 1983, the Prosecutor General of the Islamic Revolutionary Court announced that "1,500 members of the defunct Tudeh Party" had been arrested throughout the country. Many

> were tortured to force them to confess to crimes such as treason, or espionage on behalf of the Soviet Union. Some were forced to make televised confessions. Having been forced to confess, prisoners were then brought before Islamic Revolutionary Courts where they were given summary trials. Many were sentenced to death, or to long prison terms after being tried by a single Islamic judge in court hearings lasting only a matter of minutes. In such trials there was no provision for appeal against verdict or sentence. Defendants were not represented by a lawyer, nor were they permitted to call witnesses in their defence. Some prisoners were held for years without trial, or tried and not informed of their sentences."

The imprisonment, persecution and execution of Tudeh Party members has been consistently reported by Amnesty International since 1983. See by way of example the following Amnesty International reports: Iran: Amnesty International Briefing (AI Index: MDE 13/08/87, 5); Iran: Political Executions (AI Index: MDE 13/12/88); Iran: Written Statement to the 45th Session of the United Nations Commission on Human Rights (AI Index: MDE 13/04/89); Iran: The Death Penalty (AI Index: MDE 13/06/89); Iran: Violations of Human Rights 1987-1990 (AI Index: MDE 13/2/90). Those sentenced to imprisonment can expect to serve long sentences: Amnesty International Report 1994 163.

The United States Department of State Country Reports on Human Rights Practices has equally consistently reported that members and supporters of the Tudeh Party "may be in danger" if they return to Iran. See for example the Country Reports on Human Rights Practices for 1992: Iran (February 1993) 999, 1003 and Country Reports on Human Rights Practices for 1993: Iran (February 1994) 1176, 1180.

HOMOSEXUALS IN IRAN

Certain crimes in the Penal Code such as adultery, sodomy and malicious accusation are regarded as crimes against God (*Hodoud*) and therefore liable to divine retribution, and carry a mandatory death sentence: Amnesty International, When the State Kills ... The Death Penalty v Human Rights (1989) 149, 150:

> "The Law of *Hodoud* (Crimes Against Divine Will; *Hadd*) and *Qisas* (retribution) forms a part of the Islamic Penal Code of Iran provisionally approved by the Islamic Consultative Assembly in 1982. It provides for the death penalty for a large number of offences including premeditated murder, rape, "moral" offences such as adultery, sodomy and repeated counts of drinking alcoholic liquor. The Law of *Hodoud* and *Qisas* also provides for the death penalty as a possible punishment for those convicted of being corrupt on Earth or at enmity with God. Such broad terms can apply to political opponents, including those expressing their views in a non-violent manner."

The specific provisions of the Law of *Houdoud* and *Qisas* prescribing the death penalty for the relevant offences are: sodomy (Article 140), *tafhiz* (homosexual conduct, without penetration) for the fourth time, having been punished for each previous offence (Article 153), lesbianism for the fourth time, having been punished for each previous offence (Article 161): Amnesty International, Iran: Violations of Human Rights - Documents sent by Amnesty International to the Government of the Islamic Republic of Iran (AI Index: MDE 13/09/87) 63-64.

The following summary is taken from Amnesty International, Breaking the Silence: Human Rights Violations Based on Sexual Orientation (AI USA Report, February 1994) 33:

> "International human rights standards recognise each person's right not to be arbitrarily deprived of their life and categorically state that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or

punishment. The UN has committed itself to the gradual abolition of the death penalty. Amnesty International opposes the death penalty in all circumstances, and also points out when it is used in a discriminatory manner, such as against persons based on their sexual, racial, or ethnic identity.

Although referred to as a "punishment" for crime, the death penalty is often arbitrary, used as a tool for political repression or disproportionately imposed on the poor and powerless. Like other disenfranchised groups, lesbians and gay men sometimes face the death penalty for their identity, including their homosexual conduct.

In Iran, sodomy is punishable by death. During 1992, at least 330 people were executed in Iran. It is unclear how many of these executions may have resulted from accusations of homosexuality. Although Amnesty International has received reports that some lesbians and gay men have been stoned to death or beheaded for their homosexuality, it has been extremely difficult to substantiate these reports. What is clear is that homosexuality is a capital crime in Iran. In July 1980, a 38-year-old man, married with 6 children, was stoned to death in the town of Kerman in southern Iran. He had been convicted of homosexuality and adultery.

In at least one case, homosexuality was used as one of the pretexts for application of the death penalty. Dr Ali Mozaffarian, a well-known surgeon and one of the leaders of the Sunni Muslim community in Fars province in southern Iran, was executed in Shiraz in early August 1992. He was convicted of spying for the United States and Iraq, as well as adultery and sodomy. His video taped "confessions", which may have been obtained as a result of physical or psychological pressure, were broadcast on television. Amnesty International believes that his trial may have been unfair, that the charges of spying, adultery and homosexuality were merely used to target this Sunni Muslim leader."

The suspicion that the Iranian authorities are wont to use a charge of homosexuality in order to target opponents of the regime is strengthened by the recently reported case of Ali Akbar Saidi-Sirjani, a writer who, following his arrest, is purported to have confessed to being a homosexual, as well as

to gambling, drinking and smoking opium. See HRW, Human Rights Watch World Report 1995 (December 1994) 269, 270:

> "One of the few remaining public voices of dissent in Iran appeared to have been silenced with the detention in Tehran in March [1994] of Ali Akbar Saidi-Sirjani. His associate, Mohammad Sadeq Said, a poet, whose pen-name is Niazi-Kermani, was also arrested. The arrest of Saidi-Sirjani, a prolific writer, further narrowed the scope of expression in the Islamic Republic.
>
> Since 1989, the authorities have imposed a complete ban on all of Saidi-Sirjani's seventeen volumes of essays and social commentary. The writer responded to this muzzling by circulating open letters to the authorities, courageously denouncing censorship and the lack of freedom in Iran.
> A month after his arrest, the authorities produced an alleged confession they attributed to Saidi-Sirjani, of a wide range of crimes "conspiring to defame the Islamic regime and its founders". He also purported to have confessed to being a homosexual (a criminal offense in Iran punishable by death), as well as to gambling, drinking, and smoking opium. At the end of the year, Mr Saidi-Sirjani's status was unclear."

The Authority has also received expert evidence that:

> "Khomeini has written in great detail on matters of sexuality and secular behaviour in a puritanical fashion more akin to some Wahhibi texts than traditional Shi'a ones. This sort of attitude has given the Iranian authorities a green light to persecute sexual minorities regardless of the express provisions of the Iranian Penal Code.
>
> Taking as their text Khomeini's pronouncement:
>
> > "A man must not look upon the body of another man with lustful intent. Likewise, a woman may not look upon another woman with such interest."
> > (*Sayings of the Ayatollah Khomeini - Political, Philosophical, Social and Religious*; Bantam Books, New York, 1979 at

p.105.)

the persecution of homosexuals in Iran has been severe. Arlene Swindler in her book *Homosexuality and World Religions*, (Trinity Press, Pa., USA, 1993) writes (p.194):

> "Under Khomeini, hundreds of people were executed as homosexuals. Most of these were not gay at all .... the fact that the accusation of homosexuality is used for the purpose of physically eliminating people not of the party line (is similar to the situation) in Nazi Germany."

Similarly, the persecution of Iranian homosexuals is commented upon in the book by Schmitt, A. and Sofer, J. *Sexuality and Eroticism Among Males in Moslem Societies* (Harrington, N.Y., 1992). In Helene Kafi's study (in Schmitt and Sofer at 67/9) details are given of the 100 to 200 executions of homosexuals in 1981/2 and the torture and rape of homosexual prisoners in Iranian jails. The persecution of homosexuals is further detailed in the chapter by David Reed in the same volume (pp.61-66), and in a particularly detailed study in that book by Maarten Schild (pp. 185-186) who further cites Khomeini's assertion that homosexuals had to be eliminated because they were parasites and corrupters of the nation by spreading "the stain of wickedness". Schild draws attention to the fact that "what occurred in Iran is certainly not typical of the attitude towards homosexuality in the whole spectrum of Islamic countries". This reinforces the point that the situation for homosexuals in Iran is a particularly dangerous one even compared with other Islamic countries."

The expert witness concludes his evidence with the following statement:

> "My own discussion with judicial figures in Iran such as the former Chief Justice, the former head of the Revolutionary Tribunal, members of the Majlis and Guardianship Council leave me in no doubt that the regime is intent on identifying and punishing anyone regarded as "*mofsed fil arz*" or "*mohareb*" (corrupt on earth or at enmity with God) and that this includes in particular homosexuals who have been singled out by Khomeini and others

> as both corrupt and as dangerous manifestations of "westification". There is no doubt in my mind that the purging of "morally corrupt" elements is regarded as a duty by the highest political and judicial authorities in Iran and that this duty, sanctioned by the specific institutions of the first *velayat-e faqih*, over-rides any provisions of the Shari'a, the Penal Code or the Iranian Constitution. The evidence for this is clear, documented and abundant. It is reinforced by every conversation or observation which can be made within the country."

In a 1983 decision to which we will return later, the Verwaltungsgericht Wiesbaden (Administrative Court in Wiesbaden) (Judgment of Apr.26, 1983, No. IV/I E 06244/81) held that it was undisputed that homosexuals can be and are executed in Iran. The court cited press reports of the execution of homosexuals, quoted from the *Koran*, referred to the applicability of Islamic law to the general population, and concluded that there is systematic punishment of homosexuals in Iran: Maryellen Fullerton, "Persecution due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany" (1990) 4 Geo.Immigra.L.J. 381, 408, and Maryellen Fullerton, "A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group" (1993) 26 Cornell International Law Journal 505, 534. See also the 1986 decision of the Bundesverwaltungsgericht (Federal Administrative Court) reported as Case Abstract **IJRL/004** (1989) 1 International Journal of Refugee Law 110 where the court found that the Iranian state treats homosexuals as "counter revolutionary criminals".

Reference may also be made to Suzanne B Goldberg, "Give me Liberty or Give me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men" (1993) 26 Cornell International Law Journal 605, 622, and to Eric Heinze Sexual Orientation: A Human Right (1995) 3.

THE APPELLANT'S CASE

The appellant is a 29 year old single man who was born in Tehran. He has seven sisters and one brother. His father passed away in 1981.

After Khomeini's consolidation of power in 1983 and the purge of rivals to the Islamic regime, the appellant's brother became active in an underground organisation. Finally, in 1988 he (the brother) left Iran and went to Germany to seek refugee status. In late 1991, the appellant learnt in a telephone call from his brother, that his brother had received residence status in Germany. The word "refugee" was not used in this discussion. The appellant frankly acknowledges that he is not and has not in the past been in danger because of his brother's activities. He explains that the authorities in Iran made no connection between him and his brother. The appellant also acknowledges that none of his sisters have been involved in political activities, nor have any been arrested on suspicion of being involved in such activities.

The appellant states that while he and his family consider themselves to be Muslim, they are not very devout and he does not observe the prescribed rituals (such as attending Friday prayers) very strictly.
In describing his family, his education and interests, the appellant painted a picture of a modest working class family. He explained his attraction to the communist Tudeh Party as based on its emphasis on social justice, education and absence of extreme Islamic dogma.

He first became interested in the Tudeh Party in 1981 through his brother-in-law. The appellant was then still at school and the Tudeh Party had not yet been banned. The appellant attended meetings but, after his brother-in-law was arrested in the May 1983 crackdown, he suspended his activities.

In 1986, on completing his secondary education, he was required to serve in the Iran-Iraq war for three months but he was exempted from further military service as he was expected to help provide for the large family left behind when his father died. The appellant's brother was unable to assist as he was married with his own family to support.

Following the appellant's return from the war, he became involved in an underground "cell" of the Tudeh Party. In that same year (1986), the appellant attended a birthday party which was in reality a cover for a meeting of the appellant's group. The party was raided by the Komiteh and the appellant and his friends arrested, ostensibly for breaching various provisions of the moral code. While most of those arrested were released, the appellant and three others were detained for five days as they were identified as the organisers of the party. Their questioning was not so much about the breach of the moral code but about the authorities' suspicions that the appellant and his friends were political activists. They insisted that the occasion for the meeting was nothing more than a birthday party and because the Komiteh could find no evidence to the contrary (and searches of their respective homes revealed no incriminating evidence), the appellant and his friends were given 70 lashes and released.

Approximately three months later, in September 1986, the sister of the appellant's brother-in-law was arrested for being a member of the Tudeh Party. She was jailed for approximately ten months and, in the words of the appellant, "treated very badly". She was released in April 1987 after giving an undertaking not to attend any meetings and was deprived of all privileges. She and her two children subsequently escaped to Sweden where she was granted refugee status.

Following his own arrest and the arrest of the brother-in-law's sister, the appellant became fearful and ended his involvement in the "cell". However,

approximately two years later, the appellant met a man and his wife whose business premises were very close to where the appellant worked. After a while, he learned that they were members of the Tudeh Party. They asked the appellant to help distribute pamphlets and he agreed. In addition, he attended meetings of the Tudeh Party "cell" organised by the man and his wife. Asked why, given his earlier experiences, he resumed his activities, the appellant stated that he was willing to face the dangers involved as it was important that the Iranian people learnt the truth about the present regime.

Because of their close geographic proximity, the appellant had almost daily contact with the man and his wife. However, in April 1992, the couple were arrested. Immediately the appellant went into hiding, taking his mother and sisters to live at an aunt's house. The appellant himself left Tehran and hid in a village. After paying a substantial sum of money, the appellant received assistance to obtain a passport and left Iran by air on 2 June 1992.

Prior to leaving, the appellant saw his mother twice. On neither occasion did his mother mention any visits by the authorities but he believes that even if there had been such visits, his mother would have withheld this information from him as she would not have wished him to be concerned.

The appellant arrived in New Zealand on 10 June 1992. Since his arrival in this country, he has made contact with his mother both by letter and by telephone. In none of these contacts has there been any mention of enquiries by the authorities. Again, however, the appellant believes that even if there had been such enquiries, this information would not have been passed on by his mother.

The appellant has no information as to the fate of the husband and wife who were arrested in April 1992.

As to his homosexuality, the appellant described in his evidence how gay and lesbian sexual orientation was not accepted in Iranian society and under Koranic law. He also described witnessing the execution of two men in Tehran in 1989 for being homosexuals. He said that prior to his arrival in New Zealand, he was a non-practising homosexual.

In New Zealand as a consequence of the Homosexual Law Reform Act 1986, criminal sanctions against consensual homosexual conduct between males over the age of sixteen years were removed from the Crimes Act 1961. More recently, the Human Rights Act 1993, s21(1)(m) prohibits discrimination on the grounds of sexual orientation which, under the Act, means a heterosexual, homosexual, lesbian, or bisexual orientation.

The appellant's evidence, supported in material respects by corroborating witnesses, is that since his arrival in New Zealand, he has become a practising homosexual and is now of the belief that his sexual orientation is an essential part of his identity.

He accepts that the sexual orientation ground of his refugee application was not raised until the hearing of this appeal but has satisfactorily explained his reticence on this issue. The Authority accepts that this limb of his case is genuine.

THE REFUGEE STATUS SECTION DECISION

It is to be remembered that at first instance the appellant's case did not include the sexual orientation ground.

As to his support of the Tudeh Party, the Refugee Status Section declined

the application in a letter dated 3 March 1993 on the basis that the appellant's fear of persecution was not well-founded. In arriving at this conclusion, several misdirections were made:

(a) The reason given for finding that the appellant's fear of persecution was not well-founded was because the appellant's return to Iran would not "necessarily be intolerable":

> "... we consider that the fear is not well-founded, as we do not believe [the appellant's] return to Iran would necessarily be intolerable".

The "intolerable" test has been repeatedly identified by the Authority as a misdirection in law:

Refugee Appeal No. 81/92 Re AN (25 June 1992);
Refugee Appeal No. 55/91 Re SR (10 August 1992);
Refugee Appeal No. 89/92 Re MS (11 August 1992);
Refugee Appeal No. 992/92 Re PS (12 May 1994);
Refugee Appeal No. 855/92 Re HHM (5 August 1994);
Refugee Appeal No. 1817/92 Re ET (4 January 1995);
Refugee Appeal No. 1492/93 Re UAD-R (12 January 1995);
Refugee Appeal No. 324/92 Re HB (27 January 1995);
Refugee Appeal No. 1039/93 Re HBS and LBY (13 February 1995)
Refugee Appeal No. 1101/93 Re VNZ (15 February 1995);
Refugee Appeal No. 1908/93 Re PTT (15 March 1995).

(b) The next reason given for holding against the appellant on the well-foundedness issue was that the appellant's activities were

not of “a significant nature”:

> “If we are to take his apparent support of this group into perspective, we should also consider that his role in the Tudeh Party can hardly be described as one of a significant nature. All [the appellant] did was attend meetings and distribute pamphlets.”

It is surprising to see a misdirection of this kind given that it was established in Benipal v Minister of Foreign Affairs (High Court, Auckland, A No. 878/83, 29 November 1995, Chilwell J.) and applied by this Authority in its first decision in Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB that it is not the extent of a claimant’s political involvement or activity which is determinative of the claim. The crucial test is the view taken of those activities by the authorities in the country of origin. See further Refugee Appeal No. 856/92 Re GLA (28 June 1994).

(c) The next ground given by the Refugee Status Section is as follows:

> “We doubt that the authorities would be at all interested in him, given the fact that although he had been previously detained and questioned in relation to his activities, after this the authorities did not come back to him, even after he began his activities against in earnest (1988-1992).
>
> This fact is also substantiated by the fact that [the married couple] were arrested yet he was not and his association with the couple was close. If the authorities suspected he was involved, why was he not detained? The only reason is that he was not easily targeted due to his low profile, unlike [the married couple’s] more active role.”

These findings fail to take into account the fact that up until 1992, the appellant had been able to allay the suspicions of the authorities. However, by 1992, the appellant had built up a two year relationship with the married couple and because of his frequent calls to their business premises, his face would be a familiar one to those in the neighbourhood and therefore closely identifiable as an associate of those arrested. Furthermore, it is well known that political detainees are tortured more often than not by the Iranian authorities, creating, in the circumstances, a real chance of the appellant's activities being disclosed by either or both of the arrested couple. These central issues are simply not addressed in the Refugee Status Section decision.

(d) The Refugee Status Section then referred (although not by name) to the Amnesty International Report, Iran: Women Prisoners of Conscience (AI Index: MDE 13/05/90) the relevant contents of which are set out earlier in this decision under the heading "The Tudeh Party". The conclusion drawn by the Refugee Status Section was that the Tudeh Party was ruled counter-revolutionary and disbanded in 1983 on the grounds that its activities were said to be against "the foundations of the Islamic Republic". The Refugee Status Section therefore considered that the appellant's continued involvement in the activities of the banned party would result in a situation of prosecution, **not** persecution:

> "Therefore, we do not consider that [the appellant], if forced to return to Iran, would face persecution, due to his political beliefs, but rather it would be looked at if necessary, as a case for prosecution. The point to be made is that the applicant knew the penalties associated if implicated with

> the Tudeh Party and therefore should have thought about the risks associated."

The Authority must confess to being quite amazed at this assertion, revealing as it does a complete lack of understanding of the facts of the case, the human rights situation in Iran and of refugee law. Given the complete suppression of all political activity in Iran (outside of a very narrow band of "acceptable" conduct as defined by the current regime) the appellant was denied a core human right, albeit a so called "second level" right. But, as observed by Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) 336 commenting on Article 19 of the International Covenant on Civil and Political Rights (the ICCPR), freedom of opinion and expression is not infrequently termed the core of the Covenant and the touchstone for all other rights guaranteed therein. It symbolises more than any other right the inter-dependence of the two large categories of human rights of the "first generation" that lend the Covenant its name. It unites civil and political rights into an harmonious whole. And as observed by Professor James C Hathaway in The Law of Refugee Status (1991) 151, reasoning of the kind found in the Refugee Status Section decision:

> "... is at odds with the human rights context within which refugee law was established, and is inexplicably unsympathetic to persons who demonstrate the courage to challenge the conformism of authoritarian states. Since the purpose of refugee law is to protect persons from abusive national authority, there is no reason to exclude persons who could avoid risk only by refraining from the exercise of their inalienable human rights."

This is the second occasion on which the Authority has had cause to rely on this passage. See Refugee Appeal No. 1101/93 Re VNZ (15 February 1995) 9.

The Refugee Status Section failed to appreciate that in Iran, the severe if not extreme penalties imposed on those engaged in the non-violent expression of their political opinion cannot, on any sensible view, be described as prosecution rather than persecution.

(e) The next ground given by the Refugee Status Section for holding that the appellant's fear of persecution was not well-founded was that the Komiteh had been amalgamated into the Ministry of Justice (and could no longer act alone). Therefore, it was found, that the appellant's fear of them was not justified.

With respect, the reasoning is facile and once again fails to take into account the repressive nature of the current regime in Iran and its persistent and flagrant abuse of human rights. There is no evidence to suggest that the re-organisation of government agencies responsible for internal security has led to a diminution in either their vigilance or their ruthless suppression of those actively engaged in supporting banned political organisations. The finding of the Refugee Status Section, made without any evidence whatsoever to support it, is an unreasonable one.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention 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."

In the context of this case, the four principal issues are:

1. Is the appellant genuinely in fear?

2. Is it a fear of persecution?

3. Is that fear well-founded?

4. Is the persecution he fears persecution for a Convention reason?

In this regard we refer to our decision in Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB (11 July 1991).

In the same decision this Authority held that in relation to issue (3) the proper test is whether there is a real chance of persecution.

ASSESSMENT OF THE APPELLANT'S CASE: CREDIBILITY

On the issue of credibility, we note that when the appellant first arrived in New Zealand on 10 June 1992 and claimed refugee status at the airport, he made a statement containing information which he now admits to be

untrue. In particular, he sought refugee status on the ground that he had deserted while doing military service because he objected to a military offensive mounted against Iranian Kurds. The appellant told the Authority that he gave this false story on the advice of the "helper" who had assisted him to escape from Iran and to come to New Zealand. He had been advised not to mention political activity otherwise he would be jailed upon arrival in New Zealand.

The appellant came across as an unsophisticated, inarticulate individual from a working class background. He is not highly educated and he impresses as a person who is more a follower than a leader. We accept that the account given at the appeal hearing is a truthful account of his case, and that in the circumstances no adverse inference can fairly be drawn from the false claims he initially made upon his first arrival in New Zealand.

As previously indicated, we also accept the sensitive reasons he has given for not wishing to disclose his homosexuality until shortly before the hearing of this appeal.

Having accepted the appellant's account, the Authority finds that he has a bona fide subjective fear of persecution. As to the remaining three issues, these ought to be determined individually within the context of his two discreet claims, namely:

(a) His fear of persecution for reason of his involvement with the Tudeh Party.

(b) His fear of persecution for reason of his sexual orientation.

ASSESSMENT OF THE APPELLANT'S CASE: THE TUDEH PARTY

Unquestionably, persecution of the appellant by the Iranian authorities for reason of his involvement in the Tudeh Party falls within the "political opinion" limb of the Refugee Convention. It is also clear from the evidence recited earlier that members and supporters of the Tudeh Party are punished by the Iranian authorities with a degree of severity which is properly stigmatised as persecution.

The real issue is whether the appellant's fear of persecution in this regard is well-founded. We have decided that it is. Our reasons are as follows:

(a) It is likely that upon their arrest, the married couple were tortured and there is a risk that one or both disclosed the appellant's identity.

(b) The consequences of the appellant being apprehended by the authorities will be severe. See, for example, the punishment meted out to the sister of the appellant's brother-in-law who was detained from September 1986 to April 1987 and harshly treated during that time. Her situation is directly comparable to the appellant's as their only offence has been the distribution of party pamphlets. Also to be taken into account is the severe punishment of the brother-in-law himself. He was arrested in May 1983 and not released until 1989. The appellant said that following his release, his brother-in-law would not discuss what had happened during his time in prison apart from saying that he had suffered badly. His (the brother-in-law's) wife however told the appellant that her husband's body was marked with scars from torture and that "his mind was very different".

(c) Neither the appellant nor the Authority know whether the Komiteh has made an effort to locate him. The appellant has given a credible account of taking his mother and sisters to live with his aunt

immediately after he discovered that the Komiteh had arrested the married couple from whom he obtained the Tudeh Party pamphlets. It would not be unexpected, therefore, for the appellant's family not to know whether the Komiteh have been making visits to the family home. In any event, the Authority accepts the appellant's statement that even if his mother knew of visits by the Komiteh, she would not pass this information on to the appellant.

(d) The appellant rightly stressed that he visited the married couple's premises almost daily over a period of two years. It was only five minutes from where he (the appellant) worked. People in the neighbourhood would readily identify the appellant from these frequent visits. It would not be safe to assume that the Komiteh made no enquiry in the neighbourhood about the activities of the arrested couple and the identity of their visitors.

Taking all these factors into account, we find that there is a real chance of persecution.

In summary, in relation to this aspect of the appellant's claim, all four issues are answered in the affirmative.

ASSESSMENT OF THE APPELLANT'S CASE: SEXUAL ORIENTATION

The country information received by the Authority, and which is summarised earlier in this decision, establishes that in Iran, homosexuals, or persons suspected or accused of being homosexuals, are punished with extreme severity. It is inevitable that we must find that the fear held by the appellant is a fear of persecution.

The real issue is whether the persecution feared by the appellant is for a Convention reason. The appellant relies on the "particular social group" limb of the Convention definition. It is this issue which will now be addressed.

PARTICULAR SOCIAL GROUP

The Authority's principal decision on the interpretation of particular social group is Refugee Appeal No. 3/91 Re ZWD (20 October 1992) 59-85 and no purpose would be served by repeating what is said there.

Several points, however, bear emphasis as they substantially affect our approach to this limb of the appeal.

First, great care must be taken in attempting to define something that is itself a definition because even small differences in emphasis may be decisive in a particular case and may greatly enlarge or reduce the number of people who would fall within the definition of refugee on account of membership of a particular social group: Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417, 420 (FC:FC) per Black CJ (French J agreeing).

Second, the particular social group category must be evaluated on the basis of the basic principles underlying the Refugee Convention: Canada (Attorney General) v Ward [1993] 2 SCR 689, 731 (Can: SC):

1. Interpretation of the particular social group category must allow for the fact that the Refugee Convention does not apply to **all** individuals who have a well-founded fear of persecution. International refugee law was meant to serve as a "substitute" for national protection where the latter was not provided. The Convention has built-in limitations to

the obligations of signatory states. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals: Ward 731-732. We agree with the following passage taken from Ward at 732:

> "... the drafters of the Convention limited the included bases for a well-founded fear of persecution to 'race, religion, nationality, membership in a particular social group or political opinion'. Although the delegates inserted the social group category in order to cover any possible lacuna left by the other four groups, this does not necessarily lead to the conclusion that any association bound by some common thread is included. If this were the case, the enumeration of these bases would have been superfluous; the definition of 'refugee' could have been limited to individuals who have a well-founded fear of persecution without more. The drafter's decision to list these bases was intended to function as another built-in limitation to the obligations of signatory states."

2. The particular social group category is limited by anti-discrimination notions inherent in civil and political rights: Ward 734, 739.

In Chapter 5 of his text, The Law of Refugee Status (1991) 136, Professor James C Hathaway explains the inter-relationship between the five recognised grounds of persecution and the notion of civil and political rights:

> "The modern refugee definition gave voice to this premise by moving away from protection on the basis of named, marginalized groups, and toward a more generic formulation of the membership principle. Given the prevailing primacy of the civil and political paradigm of human rights, it was contextually logical that marginalization should be defined by reference to norms of non-discrimination: a refugee was defined as a person at risk of serious harm *for reasons of* race, religion, nationality, membership of a

> particular social group, or political opinion. The rationale for this limitation was not that other persons were less at risk, but was rather that, at least in the context of the historical moment, persons affected by these forms of fundamental socio-political disfranchisement were less likely to be in a position to seek effective redress from within the state."

It follows that if the refugee claimant cannot link the harm feared to his or her socio-political situation and resultant marginalisation, the claim to refugee status must fail as refugee law requires that there be a nexus between who the claimant is or what he or she believes and the risk of serious harm in the home state: Hathaway *op.cit* 136-137; Refugee Appeal No. 3/91 Re ZWD (20 October 1992) 70-71.

This theme is emphasised in Ward at 733-739 where it is explicitly recognised that underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination (733). This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates who negotiated the terms of the Convention. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. In distilling the contents of the head of "particular social group" therefore, it is appropriate to find inspiration in discrimination concepts. The manner in which groups are distinguished for the purposes of discrimination law can be appropriately imported into this area of refugee law (735). In short, the meaning assigned to "particular social group" should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative (739).

The approach adopted in Matter of Acosta (BIA Interim Decision

2986, March 1, 1985) 37-39 was to examine whether the group of persons share a characteristic which the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences:

> "Only when this is the case does the mere fact of membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change, or that is fundamental to his identity or conscience that it ought not be required to be changed. By construing "persecution on account of membership in a particular social group" in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.".

This approach was approvingly described in Ward at 736 as one which reflects "classic discrimination analysis". It is an approach which has been adopted also in New Zealand. See Refugee Appeal No. 3/91 Re ZWD (20 October 1992) 70-73.

As pointed out in Ward at 737:

> "What is excluded by this definition are 'groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights'; see Hathaway, *supra*, at p 161.".

The following cautionary observations are found in Ward at 738 with which we respectfully agree. In this passage, for "Canada" one should read "New Zealand":

> "Canada's obligation to offer a haven to those fleeing their

> homelands is not unlimited. Foreign governments should be accorded leeway in their definition of what constitutes anti-social behaviour of their nationals. Canada should not overstep its role in the international sphere by having its responsibility engaged whenever any group is targeted. Surely there are some groups, the affiliation in which is not so important to the individual that it would be more appropriate to have the person dissociate him or herself from it before Canada's responsibility should be engaged. Perhaps the most simplified way to draw the distinction is by posing what one is against what one does, at a particular time. For example, one could consider the facts in *Matter of Acosta* in which the claimant was targeted because he was a member of a taxi driver co-operative. Assuming no issues of political opinion or the right to earn some basic living are involved, the claimant was targeted for what he was doing and not for what he was in an immutable or fundamental way."

As will be seen, the distinction between what one is and what one does is distinctly recognised in both Australian and New Zealand jurisprudence: Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417 (FC:FC); Kashayev v Minister for Immigration & Ethnic Affairs (1994) 122 ALR 503 (FC: Northrop J); Refugee Appeal No. 702/92 Re GS (5 August 1994) 14.

Applying these principles, the Supreme Court in Ward at 739 identified three possible categories of particular social groups:

> "(1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.".

These general, but not exhaustive, observations having been made, it is now appropriate to focus more specifically on the phrase "membership of a particular social group".

ANALYSIS OF "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP"

While the meaning of the expression "membership of a particular social group" is a question of law, whether a claimant is a member of a particular social group is a question of fact. The nature and extent of the fact inquiry undertaken by the decision-maker in this regard will, in most cases, determine the outcome of the case. In this inquiry, each element of the phrase "membership of a particular social group" must be addressed. The group must be cognisable as such. Furthermore, it must be a ***social group***. More than that, it must be a ***particular*** social group. The ***membership*** element must be present. Additionally, the fear of persecution must be ***for reason of*** the claimant's membership of that particular social group. The approach to "particular social group" in this latter respect is no different to that for the other four Convention grounds.

Recent New Zealand and Australian case law has usefully emphasised these discreet issues.

"FOR REASON OF"

As will be clear from the points already made, Article 1A(2) of the Refugee Convention requires not only that the refugee claimant be a member of a particular social group, but also that the fear of persecution be ***for reason of*** such membership.

The only additional point to be made in the circumstances of the present case is that the required nexus may be established where membership in a particular social group is imputed (erroneously) to a claimant.

"GROUP"

Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417 (FC:FC) dealt with a claim that persons who have "turned Queen's evidence" are a social group. Black CJ (French J agreeing) at 421 emphasised that it is necessary to examine the characteristics of the supposed group to see whether the group is "sufficiently cognisable" for until it is so cognisable, it could not be said to have something that may sensibly be identified as membership. On the facts, it was found that persons who have assisted the police and have turned Queen's evidence have only one thing in common, namely that they have acted on an occasion or occasions in a particular way with respect to the enforcement of the criminal law. An act or acts done cannot alone define a group:

> "To say that all such people are members of a particular social group would be to make the definition of a refugee so wide in this respect as to be almost meaningless and as to have no necessary connection with the humanitarian objectives that select a particular category of persons, refugees, as deserving of special consideration by the international community. For if the approach suggested by the appellant is correct, any person who feared persecution in his or her country of nationality, for

> reason of an act done that would attract persecution in that country, could validly claim to be a refugee by doing no more than pointing to the existence of other persons who had done the same thing, whatever that thing was. This is because the approach for which the appellant contends relies *solely* on an act or acts done as defining the asserted social group.
>
> It may be doubted whether such an aggregation of persons could be called 'a group' within the usual meaning of that word as applied to people ...." (421-422)

Thus, in Ram v Minister for Immigration and Ethnic Affairs (1995) 128 ALR 705, 715 (FC: von Doussa J) it was held that whether in a particular case the attribute of wealth is alone a sufficient characteristic to define a particular social group depends on whether in the circumstances that attribute connotes a cognisable group in a society which has something which may be sensibly identified as membership.

***"SOCIAL* GROUP"**

As further emphasised in Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417, 422 (per Black CJ, French J agreeing) the word "social" is an essential part of the definition and cannot be ignored as mere surplusage.

Lockhart J at 431 was of the opinion that the words "social group" signify a cognisable or recognisable group within a society, a group that has some real common element.

Kashayev v Minister for Immigration and Ethnic Affairs (1994) 122 ALR 503 (FC: Northrop J) involved a claim that sailors in Russian ships sailing between the eastern seaboard of Russia and Japan engaged in the commerce of buying used cars in Japan and selling them in Russia

belonged to a particular social group. Northrop J at 508 recognised that difficulties arise from the word "social" appearing in the phrase and the effect it has of denoting a particular group:

> " Of necessity, the word 'social' has a limiting effect. Membership of a particular group, by itself, is not sufficient to come within the definition. The limits of the group are further denoted by the word 'social'. It may well be that there is overlap between the individual parts of the definition of refugee. For example, a particular social group may be defined by race, religion, nationality or political opinion, but this possible overlap should not limit the amplitude of the word 'social' and the phrase 'particular social group'.
>
> The word 'social' can have many different meanings. A reference to the *Shorter Oxford English Dictionary* illustrates this. In common use, the word 'social' connotes the composition of persons associated together in or for the purpose of friendly intercourse or the enjoying of companionship with others. One of the meanings given in the *Oxford Dictionary* is 'united by some common tie'. The meanings given to the word 'social' in the *Macquarie Dictionary* stress the friendly companionship connotation of the word."

"PARTICULAR"

In Sanchez-Trujillo v Immigration and Naturalisation Service 801 F.2d 1571, 1576 (2d Cir. 1986) the United States Ninth Circuit Court of Appeals expressed the view that the words "particular" and "social" which modify "group" indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some particular statistical relevance.

Contrast Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417, 432 (FC:FC) where Lockhart J was of the opinion that the word "particular" does not narrow the scope or meaning of the expression "particular social group". Rather it indicates that there must

be an identifiable social group to which one can point and say that there is a particular social group.

In Kashayev v Minister for Immigration and Ethnic Affairs (1994) 122 ALR 503, 508 (FC: Northrop J) it was said that the word "particular" implies that the group must be able to be identified.

"MEMBERSHIP"

There is a considerable measure of agreement that a particular social group connotes a cognisable group in a society, and cognisable to the extent that there may be a well-founded fear of persecution by reason of ***membership*** of such group. In this context, the emphasis is on what a person is, i.e. a **member** of a social group, not on what the person has done i.e. the acts or omissions of that person. See, for example, Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417, 422 per Black CJ (French J agreeing). In Canada (Attorney General) v Ward (1993) 2 SCR 689, 738, 745 (Can:SC) a distinction was specifically drawn between what one **is** against what one **does** at a particular time. Thus, Ward felt threatened because of what he did as an individual (betrayal of the group to which he belonged), and not specifically because of his association. That is, his fear was based on his action, not on his affiliation.

Some caution must, however, be exercised. As pointed out by Black CJ (French J agreeing) in Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417, 422 it must be acknowledged that the part played by acts done, or assumed to have been done, by those who are said to constitute a particular social group can give rise to difficult questions and the activities of the members of an asserted group are not necessarily irrelevant:

> "It may be, for example, that over a period of time and in particular circumstances, individuals who engage in similar actions can become a cognisable social group. The actions may, for example, bear upon an individual's identity to such an extent that they define the place in society of that individual and other individuals who engage in similar actions. There may be such an interaction in a particular society that a group of people becomes a cognisable element within the society by virtue of their common activity. Persecution may be part of that interaction and may contribute to the development of the social group. Thus, similar actions engaged in by people may be a factor to be considered when examining whether a particular social group in fact exists or whether a person is a member of such group. But all this is far removed from the present case where acts, without anything at all more, are said to define a particular social group."

In Kashayev v Minister for Immigration and Ethnic Affairs (1994) 122 ALR 503 (FC: Northrop J), a Russian seaman who, along with others, purchased second hand Japanese cars and imported them into Russia for subsequent re-sale at enormous profit, claimed to be in fear of the Russian mafia. He claimed to be a member of a social group defined as sailors in Russian ships sailing between the eastern seaboard of Russia and Japan engaged in the commerce of buying used cars in Japan and selling them in Russia. It was found, on the facts, that Kashayev's fear of harm at the hands of organised criminals who offered to "buy" such vehicles at a significantly below market price was for reason of his activities as an individual, not because of his membership of a particular social group. He, and each member of the group, was targeted for what the member was doing (importing cars) and not for what he was in an immutable or fundamental way. The court recognised, however (at p 511), that in appropriate circumstances, people engaged in a particular trade, profession or calling could be members of a particular social group within the meaning of the Convention.

Thus, the mere fact that a person fears persecution by reason of a

characteristic that he or she has in common with another person who also fears persecution, does not establish that the two are members of a particular social group: Minister for Immigration and Ethnic Affairs v Respondent A (1994) 127 ALR 383, 403 (FC: Sackville J) reversed on another point in Minister of Immigration & Ethnic Affairs v Respondent A (1995) 130 ALR 48 (FC:FC) (Beaumont, Hill and Heerey JJ).[1]

Membership of a group is the touchstone of the test of refugee status: Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417, 432 (per Lockhart J).

Membership of a particular social group on its own will not be sufficient to establish a claim under the Refugee Convention. The existence of the social group only becomes relevant in this context if the feared persecution is for reason of the claimant's membership of the group. In addition, in order to establish the required nexus to the claimant's civil or political status and resultant marginalisation, the group must be defined by an innate or unchangeable characteristic, or by a characteristic so fundamental to the identity of group members or to their conscience, that it ought not be required to be changed.

THE PRINCIPLE OF NON-DISCRIMINATION AND SEXUAL ORIENTATION

As to the issue of nexus, we will deal briefly with non-discrimination principles as they apply to sexual orientation.

The International Covenant on Civil and Political Rights (the ICCPR) and other international legal instruments make no specific provision for the

[1] We note that special leave to appeal to the High Court of Australia has been sought.

protection of the rights of homosexuals. See, for example, the analysis of the *travaux préparatoires* by Marc J Bossuyt in Guide to the "*Travaux Préparatoires"* of the International Covenant on Civil and Political Rights (1987) 49-56, 339-345, 479-492.

However, as will be seen from a recent decision of the Human Rights Committee of the United Nations, the anti-discrimination provisions of the ICCPR are sufficiently broad to apply to sexual orientation. Articles 2(1), 17 and 26 of the ICCPR provide:

Article 2

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 17

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

Article 26

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law

shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In Toonen v Australia (Communication no. 488/1992; CCPR/C/50/D/488/1992, 4 April 1994)[2] the United Nations Human Rights Committee, in the first communication concerning Australia under the First Optional Protocol to the ICCPR, was required to pronounce on Mr Toonen's complaint relating to Tasmanian laws criminalising sexual relations between consenting males. On 31 March 1994, the Committee unanimously found that Australia had violated Mr Toonen's rights under Articles 17(1) and 2(1) of the

ICCPR in that the prohibition by law of consensual homosexual acts in private was a violation of the right to privacy (Article 17). The prohibition could not be justified on the criteria of reasonableness and proportionality which conditioned the term "arbitrary" as applied to interference with privacy. In this connection, no link had been demonstrated between the continued criminalisation of homosexual acts in private, and the effective control of the spread of the HIV/AIDS virus. In view of this finding, the Committee found it unnecessary to decide whether the complaint was also justified on grounds of non-discrimination (Article 26). Certain observations were, however, made concerning the application of Article 26. The importance of the decision in the context of the present case lies in the fact that it illustrates that sexual orientation is a prohibited ground of discrimination under the ICCPR.

The decision is in several respects a controversial one. See, for example, Sarah Joseph, "Gay Rights under the ICCPR - Commentary on *Toonen v*

[2] The text of this decision is reproduced in I A Shearer, "United Nations: Human Rights Committee: The Toonen Case" (1995) 69 ALJ 600.

Australia" (1994) 13 University of Tasmania Law Review 392; Anna Funder, "The Toonen Case" (1994) 5 Public Law Review 156; Wayne Morgan, "Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations" (1994) 19 Melbourne University Law Review 740.

Two of the controversial aspects of the decision identified by Sarah Joseph in "Gay Rights Under the ICCPR - Commentary on *Toonen v Australia*" (1994) 13 University of Tasmania Law Review 392 are the Committee's view that "sex" in Articles 2(1) & 26 is to be taken as including sexual orientation and the degree to which Australian societal attitudes to homosexuality influenced the Committee's assessment of the case.

First, as to the non-discrimination provisions of Article 2(1) of the ICCPR, the Tasmanian government conceded that sexual orientation is an "other status" for the purposes of Article 2(1). The Australian government, while leaving this issue for the Committee to decide, argued that Articles 2(1) and 26 should be read so as to support an inclusive, not an exclusive definition of "other status". See para 6.9 of the decision. However, the Committee did not decide whether sexual orientation is an "other status" in respect of which discrimination is prohibited. Instead, it found that the reference to "sex" in Articles 2(1) and 26 is to be taken as including "sexual orientation". See para 8.7. Sarah Joseph argues at op.cit 398 that it does not seem logical to characterise "sexual orientation" as coming within the meaning of "sex" per se. Anna Funder in "The Toonen Case" (1994) 5 Public Law Review 156, 159 points out that there is no basis for the Committee's interpretation in the *travaux préparatoires* of the ICCPR. She continues:

> "It is possible that the Committee considered the views of one of its members, Mr Bertil Wennergren in this regard, who gave his views in an individual opinion annexed to those of the Committee. Mr Wennergren agreed with the Committee's view that 'sex' in Arts 2(1) and 26 is to be taken as including sexual orientation. He said 'I concur with this view, as

> the common denominator for the grounds 'race, colour and sex' are biological or genetic factors'.
>
> The prohibition in the ICCPR of discrimination on the grounds of sex was clearly intended to prohibit discrimination between men and women. It is not clear why the Committee refused to consider whether sexual orientation was an 'other status' under the ICCPR, on the grounds of which discrimination is prohibited. Arguably, the drafting of the Convention so as to include a prevention of discrimination on certain grounds, and then on an 'other status' as well was a way of allowing for the evolution of social mores precisely so as to include in the ICCPR certain other (then unforeseen) grounds of discrimination which might become repugnant."

The second controversial aspect of the Toonen decision is that evidence of general Australian tolerance of homosexual lifestyles influenced the Committee's finding of a violation. However, attitudes do vary markedly within Australian society: Sarah Joseph, "Gay Rights Under the ICCPR - Commentary on *Toonen v Australia*" (1994) 13 University of Tasmania Law Review 392, 404. Ms Joseph observes that these differences in attitude are amplified at the international level.[3] Therefore, one must ask how the Human Rights Committee is likely to deal with a complaint of persecution or discrimination by a gay man or woman against a State where, unlike Australia, cultural attitudes are indisputably hostile to homosexuals. She points out that:

> "While some human rights norms, such as freedom from torture, or a right not to be arbitrarily executed, are readily capable of universal interpretation, others, such as the determination of the legitimacy of alleged discrimination, are made much more difficult by the existence of divergent cultural attitudes."

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[3] Compare the decision of the European Court of Human Rights in Dudgeon (ECHR Series A No.98) and the commentary in Merrills, The Development of International Law by the European Court of Human Rights (1988) 133-134, 147-149 and 224.

Recognition of a right to gay sex would therefore entail the recognition by the Human Rights Committee of a controversial right. As the existence of this right is denied by a large number of State Parties to the ICCPR Sarah Joseph therefore postulates the question:

> "How then can one anticipate the HRC to deal with gay complainants from anti-gay societies? The *Toonen* decision indicated that local attitudes are capable of being decisive on the question of the 'reasonableness' of certain laws."
>
> [*op. cit* 406]

In addressing this question, she ventures the opinion (*op.cit* 407) that given that, in general, Islamic, Catholic and Caribbean States are intolerant of homosexuality, a decision by the Human Rights Committee in relation to one of these states is unlikely to be a unanimous one. It is possible, however, that the majority will take a universalist approach to the implementation of controversial rights such as the right to consensual homosexual sex; they would therefore follow the Toonen precedent regardless of the respondent State concerned.

Notwithstanding the difficulties which attend the Toonen decision, the appellant is entitled to rely upon it as part of his argument that there is a nexus between his civil and political rights and his fear of persecution.

The appellant also relies on New Zealand anti-discrimination law to reinforce his argument, reflecting as it does the provisions of the ICCPR[4].

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[4] See the long title of the Human Rights Act 1993:

> "An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights."

See also the long title of the New Zealand Bill of Rights Act 1990:

> "An Act -
> (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

In this regard, reference to domestic law was acknowledged as appropriate in Canada (Attorney General) v Ward [1993] 2 SCR 689, 738 though the justification for this approach is not explored. While the Authority has some reservations as to the relevance of domestic law when applying international human rights law in the refugee context, it proposes in this case to follow the Canadian example. The prohibited grounds of discrimination contained in s21 of the Human Rights Act 1993 have already been referred to. Section 21(1)(m) specifically prohibits discrimination on the grounds of sexual orientation in the fields of employment, access to places, vehicles and facilities, and in the provision of goods and services including land, housing, other accommodation and access to educational establishments. Section 19 of the New Zealand Bill of Rights Act 1990 reinforces the Human Rights Act 1993:

> **Freedom from Discrimination** - (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.

In these circumstances, it is probably unnecessary for us to refer by way of further support for the appellant's argument to the following passage from Veysey v Canada (Commissioner of the Correctional Service [1990] 1 FC 321, 329 (FC:TD) which is cited by Professor Hathaway in The Law of Refugee Status (1991) at 164 as exemplifying the application of the *ejusdem generis* test to define the scope of non-enumerated heads of equality:

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights."

> "Most of the grounds enumerated in section 15 of the Charter as prohibited grounds of discrimination connote the attribute of immutability, such as race, national or ethnic origin, colour, age. One's religion may be changed but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability. Another characteristic common to the enumerated grounds is that the individuals or groups involved have been victimized and stigmatized throughout history because of prejudice, mostly based on fear or ignorance, as most prejudices are. This characteristic would also clearly apply to sexual orientation, or more precisely to those who have deviated from accepted sexual norms, at least in the eyes of the majority."

The only qualification we find necessary to add in the circumstances is that, in the refugee context, it is not ultimately a question whether sexual orientation is "immutable" as a matter of fact.[5] First, it would seem beyond dispute that sexual orientation is fundamental to one's identity. Whether immutable or not, it is therefore a characteristic that ought not be required to be changed: Matter of Acosta 37-39. Second, in those cases where membership of a group has been imputed, the element of "immutability" falls to be determined not so much by whether the characteristic is in fact immutable, but rather by ascertaining whether it is within the power of the individual to remove himself or herself from the imputed membership. In sexual orientation cases, this may be difficult, for once an individual has been stigmatised (say) as a homosexual, that stigma may be ineradicable.

SEXUAL ORIENTATION AS A BASIS FOR FINDING A SOCIAL GROUP

The issue whether sexual orientation should be accepted as a basis for

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[5] The application of a test of immutability to sexual orientation (or other grounds of discrimination) is highly problematic. See, for example, Carl F Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada" (1995) 8 Canadian Journal of Law and Jurisprudence 49, 56, 60, 62.

finding a social group for the purposes of the Refugee Convention has been considered in several jurisdictions in recent times.

GERMANY

In 1983, the Verwaltungsgericht Weisbaden (Administrative Court in Weisbaden) in its judgment of Apr. 26, 1983, No.IV/I E 06244/81, reviewed a social group claim by an Iranian national who feared that as a homosexual he would be punished and perhaps executed. He conceded that the regime did not know he was a homosexual. The Authority has not had access to the full text of the decision. It has relied on the summary of the case provided by Maryellen Fullerton in "Persecution due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany" (1990) 4 Geo. Immigra.L.J. 381, 408. In her account of this case, Ms Fullerton first draws attention to the decision of the Federal Refugee Office at first instance which held that the applicant could conceal his homosexuality from the Iranian government and live peacefully in Iran, thereby avoiding persecution in the future. It was found that his fear of persecution was not well-founded and his claim for asylum should be denied. The Administrative Court emphatically disagreed with this assessment and reversed the Federal Refugee Office's denial of asylum:

(a) The Court objected to the view that the applicant should be told simply to refrain from homosexual activity and live inconspicuously in Iran. It stated that although conflicting theories about homosexuality exist, there is general agreement that homosexuality is not a mere preference that can be turned on or off at will. The Court believed that telling a homosexual asylum seeker that he can avoid persecution by being careful to live a hidden, inconspicuous life is as unacceptable as suggesting that someone deny and hide his religious

beliefs, or try to change his skin colour[6].

(b) Having concluded that homosexuals are severely persecuted in Iran and that the applicant, as a homosexual, would likely face persecution there, the Court then analysed whether homosexuals constitute a particular social group within the meaning of the Refugee Convention. The following summary is taken from Ms Fullerton's account at op.cit 409:

> "The court declared that it is irrelevant if group members know each other or are members of an organisation. Rather, the court said that for purposes of the Geneva Convention, the key to determining the existence of a particular social group is whether the general population views this collection of people as an unacceptable group. Thus, according to the court, it is useful to ask how an objective observer of society would assess the treatment of the group. The court ruled that the society in Iran treats homosexuals as an undesirable group. Based on the pejorative labels attached to homosexuals, the prejudice expressed against them, and the destructive treatment they are subject to in Iran and in many other societies, the court concluded that homosexuals constitute a particular social group within the Geneva Convention. As such they are entitled to protection from persecution. The court added that in many cases, it may be difficult to decide whether the mistreatment

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[6] To similar effect, but in the "political opinion" context, see the following statement by Professor Hathaway in The Law of Refugee Status (1989) 151:

> "Such political expression is a core human right, the claimant must enjoy a reasonable expectation of tolerance of peacefully articulated views. It is therefore inappropriate simply to discount the risk of harm on the ground that the claimant could avoid detection by keeping silent ...
>
> This reasoning [that a person could refrain from expressing their political views] is at odds with the human rights context within which refugee law was established, and is inexplicably unsympathetic to persons who demonstrate the courage to challenge the conformism of authoritarian states. Since the purpose of refugee law is to protect persons from abusive national authority, there is no reason to exclude persons who could avoid risk only by refraining from the exercise of their inalienable human rights."

As will be seen from the earlier section of this decision dealing with the Refugee Status Section Decision, the view advanced by Professor Hathaway has been accepted by this Authority as a correct statement of principle.

> of homosexuals constitutes discrimination or rises to the level of persecution, but that this distinction was easy to make in Iran where homosexuals are 'crushed like vermin'."

At op.cit 410, Ms Fullerton observes that this decision is a helpful addition to the jurisprudence of the Federal Republic of Germany because it attempts to analyse the social group term and to suggest ways of identifying other particular social groups. In her opinion, the "objective observer" approach to "undesirable groups" brings a realistic flexibility to the legal analysis. Persecution of newly emerging despised social groups can be recognised under this approach, as well as persecution of individuals who comprise traditional social groups.

A second case involving an Iranian national claiming fear of persecution on the grounds of his homosexuality was considered by the Bundesverwaltungsgericht (Federal Administrative Court) in Case Abstract **IJRL/004** (1989) 1 International Journal of Refugee Law 110. In a decision delivered in March 1988, the Court did not reach the issue whether homosexuals are a "particular social group" under the Refugee Convention as it was able to determine that the definition of "political persecution" under Article 16 of the Grundgesetz (the German Constitution) was wide enough to encompass the fact situation without having to rely on the "social group" category. The court nevertheless pointed to the persecution of homosexuals in the concentration camps of the Third Reich and observed that homosexuality can be considered as an attribute that could be a ground for asylum, if it is an irreversible personal characteristic. The court found as well that Iran treats homosexuals in the same way as "counter-revolutionary criminals". We note that this decision is cited with approval by Professor Hathaway in The Law of Refugee Status (1989) 163 fn. 193.

In 1993 the Higher Administrative Court, in an appeal lodged by a

Romanian homosexual, ruled that homosexuality as a ground for asylum "is only relevant in cases of non-reversibility": Hélène Lambert, Seeking Asylum: Comparative Law and Practice in Selected European Countries (1995) 82-83.

In summary, the Administrative Court in Weisbaden appears to have applied an "objective observer" approach whereas the 1988 and 1993 decisions have focused on the internal characteristics of the putative group.

THE NETHERLANDS

In Case Abstract **IJRL/010** (1989) 1 International Journal of Refugee Law 246, the Afdeling Rechtspraak van de Raad van State (Judicial Division of the Council of State), in a decision given in 1982, considered a "social group" claim by a homosexual Polish national. According to the Case Abstract, the Division, sharing the views of the spokesman of the Representative in the Netherlands of the UNHCR, stated first that persecution on account of membership of a particular social group, reasonably interpreted, can include persecution on account of sexual disposition. However, on the facts, the Division concluded that the evidence established discrimination, not persecution.

While it is possible to be granted refugee status in the Netherlands on the grounds of a justified fear of anti-homosexual persecution, as at 1993, no cases had succeeded on this ground: Kees Waaldijk "The Legal Situation in the Member States" in Waaldijk & Clapham (eds) Homosexuality, A European Community Issue (1993) 71, 126. So called "C-status" has been given to homosexual asylum seekers, allowing them to stay in the Netherlands for urgent humanitarian reasons: Waaldijk *op cit* 126-127.

SWEDEN & DENMARK

In Sweden, applicants who fear persecution, harassment or serious discrimination due to their sex or sexual tendancies, in other words gay men or lesbians, are usually granted residence permits for humanitarian reasons: Hélène Lambert, Seeking Asylum: Comparative Law and Practice in Selected European Countries (1995) 82.

In Denmark, persecution for reasons of sexual orientation is not considered to amount to persecution for the purpose of the Refugee Convention. However, a homosexual asylum seeker may be permitted to remain in Denmark when, for reasons similar to those listed in the Refugee Convention or for other weighty reasons, (he) ought not to be required to return to his home country; homosexual asylum seekers may also be permitted to stay for "exceptional reasons": Waaldijk *op cit* 126.

UNITED KINGDOM

The decisions in this jurisdiction are in disarray.

In Shewaish (Unreported, IAT No. 6091), a decision given in 1988, the appellant, an Iranian citizen who was not represented, raised the question of his homosexuality only when applying for leave to appeal to the Immigration Appeal Tribunal. The point was dismissed in a sentence.

In R v Secretary of State for the Home Department, Ex Parte Binbasi [1989] Imm AR 595 (QBD) a Turkish Cypriot who was a practising homosexual claimed refugee status as a member of a social group against which there was discrimination in Cyprus. The Secretary of State had expressed the view that homosexuals *per se* could not constitute a social group within the meaning of the Refugee Convention. Kennedy J at 559 was of the view that

it was unnecessary for the Secretary of State to decide whether homosexuals could be considered as a particular social group because it was clear that in Cyprus, there was no discrimination against homosexuals who are not active. So for there to be a well-founded fear of being persecuted, the social group would have to be restricted to active homosexuals. Although the judgment is not entirely clear, it can be read as suggesting that as Binbasi could avoid the risk of punishment by self-restraint (i.e. refraining from homosexual activity), the decision by the Secretary of State to refuse refugee status could not be struck down as unreasonable. In this regard, it is to be remembered that the Administrative Court in Weisbaden in 1983 took an entirely different view of the "self-restraint" argument.

In Golchin (IAT No. 7623, reported in (1991) 5 Immigration and Nationality Law and Practice 97), the Immigration Appeal Tribunal held that the concept of a social group involved some historical element pre-determining membership. It was not enough for association to arise merely by way of inclination. Nor could a social group be created merely by identifying the distinguishing characteristics of a set. Homosexuals were not, therefore, a social group for the purposes of the Refugee Convention. Cases to the opposite effect from Germany and Holland merely indicated that those countries "have a different approach to the parameters within which they are prepared to grant refugee status". The Tribunal stated that:

> "... there should be some historical element in a social group which predetermines membership of it 'capable of affiliating succeeding generations': it is not enough, in our view, for association to arise by way of inclination. Nor, as the Tribunal held in *Ahari* (Unreported, IAT No. 7333) can a social group be created merely by identifying the distinguishing characteristics of a set."

However, in Vraciu (Unreported, IAT No. 11559) decided in November

1994, the Tribunal held, for the first time that homosexuals are a social group. The appellant came from Romania, and the case is even noted in "Political Asylum for Homosexuals", *NZ Herald*, Thursday, December 15, 1994. The Tribunal stated:

> "... there is no doubt that there is both an external and internal recognition of those who are sexually orientated in such a way as to form a group so identified by that characteristic."

The Tribunal favoured the "immutable characteristic test" and expressly disagreed with the requirement of historical and cultural characteristics set out in Golchin. Whether a feature defining a group can be concealed goes to the fact of persecution, not to its existence.

However, in Jacques (Unreported, IAT No. 11580), a decision decided the day after Vraciu, a differently constituted Tribunal in a brief decision adhered to the conclusion that homosexuals do not constitute a social group. It did not accept that Golchin was wrongly decided. However, as noted in the article by Michael Haran, "'Social Group' For the Purposes of Asylum Claims" (1995) 9 Immigration & Nationality Law & Practice 66, Mr Jacques was not represented and did not appear. He has since been given exceptional leave. See further Mungo Bovey, "Out and Out: UK immigration law and the homosexual" (1994) 8 Immigration & Nationality Law & Practice 61, 62.

In view of the undeveloped, if not confused state of the "social group" jurisprudence in the United Kingdom, we find nothing in these decisions of any help.

CANADA

In Canada, the question whether sexual orientation can be a basis for

finding a social group has been unequivocally answered in the affirmative by Canada (Attorney General) v Ward (1993) 2 SCR 689, 739 (Can:SC), even though the facts of the case did not call for the issue to be determined. The relevant passage is as follows:

> "The meaning assigned to 'particular social group' in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers, Cheung* and *Matter of Acosta*, *supra*, provide a good working rule to achieve this result. They identify three possible categories:
>
> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.
>
> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person."

It is by no means certain that the Supreme Court of Canada intended the three enumerated categories to be exhaustive. For present purposes, it is to be noted that, without explanation or elaboration, the court was of the view that sexual orientation is "an innate or unchangeable characteristic".

Prior to the Supreme Court decision, the principal case was Re Inaudi,

indexed as N. (L.X.) Re [1992] C.R.D.D. No 47 QL; (T 91 - 04459) (April 9, 1992) E. Teitelbaum and L. Colle (dissenting). In a split decision, Mr Inaudi, an Argentine citizen, was granted refugee status on the grounds that he held a well-founded fear of persecution by reason of the fact that he was a homosexual and, as such, was a member of a particular social group. The following propositions emerge at pages 5 and 6 of the decision:

(a) Because homosexuals are attracted to persons of their own gender, they are members of a particular social group:

> "Social group is not defined in the Immigration Act. I believe, therefore, that the words should be given their ordinary and usual meaning. The Oxford Dictionary defines social as 'capable of being associated or united'. Clearly homosexuals are capable of being associated or united. The same dictionary defines group as 'a number of persons classed together on account of a certain degree of similarity'. Homosexuals are classed together on account of a certain degree of similarity, i.e. that they are attracted to persons of their own gender. I therefore find that homosexuals, be they male or female, are members of a particular social group."

(b) As homosexuality is an immutable characteristic, that alone suffices to place homosexuals in a particular social group (p 6).

(c) Even if homosexuality were a voluntary condition, it is one so fundamental to a person's identity that a claimant ought not to be compelled to change (p 5).

(d) What must be shown by the claimant is that he is at risk of persecution because he is a member of a particular social group, in this case the homosexual group (p 6).

The dissent was not on the sexual orientation point, but rather whether on the facts the harassment and discrimination encountered by homosexuals in

Argentina was sufficient to establish persecution and whether Mr Inaudi could avail himself of the protection of the authorities in Argentina.

With few exceptions, other Canadian cases on sexual orientation do not appear to advance the issue any further than Re Inaudi and Ward. See CRDD T 92-03949 (August 18, 1992) *Reflex* Issue 14 p 14 (December 1992) (Brazilian national refused refugee status on the basis of documentary evidence that male homosexuality in Brazil was both lawful and tolerated); CRDD M 91-12609 (June 2, 1992) *Reflex* Issue 17 p 15 (April 1993) (refugee status granted on evidence establishing that persecution of homosexuals in Russia was institutionalised); CRDD M 93-04717 (June 10, 1993) *Reflex* Issue 23 p 7 (January 1994) (Cuban homosexual granted refugee status after establishing past discrimination together with evidence that penalties for unlawful departure might be more severe for homosexuals than for others).

The one reported exception is Dykon v Canada (Minister of Employment & Immigration) (1994) 25 Imm.LR 193 (FC:TD). In this case, a Ukrainian citizen claimed refugee status on the basis of his **perceived** homosexuality. The claim failed at first instance because the Convention Refugee Determination Division of the Immigration and Refugee Board found that:

> "There was no evidence presented that the claimant was in fact a homosexual, only that he was perceived as one by some people..." (194)

On review, the Federal Court (McKeown J) held that the Board had erred. The persecutors were persecuting Dykon because they perceived he was a homosexual and it was "totally irrelevant" as to whether he was in fact a homosexual or not.

UNITED STATES OF AMERICA

The two decisions most often placed in opposition to each other are Matter of Acosta (BIA Interim Decision 2986, March 1, 1985) and Sanchez-Trujillo v Immigration and Naturalisation Service 801 F. 2d 1571 (9th Cir. 1986). The latter emphasises "a voluntary associational relationship", the former on a common immutable characteristic, one that members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or conscience. The decisions are discussed in Refugee Appeal No. 3/91 Re ZWD (20 October 1992) at 66-70.

The principal decision on homosexuals as a social group is Matter of Toboso-Alfonso (Interim Decision 3222, March 12, 1990). The Authority has accessed this decision on IRIS (Immigration Research Information Service) but notes that a further source is Deborah E Anker, The Law of Asylum in the United States: Administrative Decisions and Analysis (1994) 3rd ed. Vol III at p III - 124. We say "principal" decision by reason of the fact that by Order dated June 19, 1994, Attorney General Janet Reno designated this decision of the Board of Immigration Appeals (BIA) as "a precedent in all proceedings involving the same issue or issues". See "Reno designates gay case as precedent" 71 Interpreter Releases 859 (July 1, 1994).

Mr Toboso-Alfonso, a Cuban citizen, sought asylum on the basis that as a homosexual he had been persecuted in Cuba and would be persecuted again on account of that status should he return to his homeland. He argued that homosexuals form a particular social group in Cuba and suffer persecution by the Government as a result of that status. In a 3:2 decision, it was held that the facts established that Mr Toboso-Alfonso would face persecution if returned to Cuba. The two dissenting members of the BIA

disagreed with the majority only on the assessment of the risk of persecution. They did not dissent from the majority decision on the "social group" issue.

The Immigration and Naturalization Service (INS) had argued that "socially deviated behaviour", i.e. homosexual activity, could not be a basis for finding a social group within the contemplation of the Immigration and Nationality Act[7] and that such a conclusion "would be tantamount to awarding discretionary relief (the grant of asylum) to those involved in behaviour that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well".

In view of this argument, the majority decision was careful to emphasise that Toboso-Alfonso's case was not based on homosexual **activity**, rather it was based on his **status**
of being a homosexual:

> "The applicant's testimony and evidence, however, do not reflect that it was specific activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual."

Before the BIA, the INS did not challenge the decision made at first instance by the immigration judge that homosexuality is an "immutable" characteristic. Nor was there any evidence or argument that once Toboso-Alfonso was registered by the Cuban government as a homosexual, that that characterisation was subject to change. On this basis, the BIA

[7] In Boutilier v INS 387 U.S. 118 (1967) the Supreme Court held that a section in the Immigration and Nationality Act excluding aliens "afflicted with psychopathic personality" was intended by Congress to exclude homosexuals and that homosexuals could be so excluded because they indeed had psychopathic personalities. This exclusionary policy changed when this section of the Immigration and Nationality Act was repealed in 1990: Ellen Vagelos, "The Social Group that Dare not Speak its name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on *Re: Inaudi*" (1993) Fordham International Law Journal 229, 254-255. See also Brian J McGoldrick, "United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?" (1994) 8 Geo. Immigra. L.J. 201-205.

proceeded on the basis that a Convention ground had been established (social group) and that the only issue was whether the facts established (in the withholding of deportation circumstance) a "clear probability" that Toboso-Alfonso's life or freedom would be threatened on account of his membership of the social group if he returned to Cuba. In the circumstances, the social group issue did not receive any real consideration. However, it can be observed that the focus on the status of being a homosexual person rather than on homosexual activities was undoubtedly correct given that the feared persecution must be for reason of **membership of** the group, not activities. However, as noted, the decision does not address the issue in any great depth.

The next decision is that of In Re Tenorio No. A72 093 558 (EOIR Immigration Court, July 26, 1993) in which Tenorio, a gay Brazilian man, was granted asylum by an immigration judge on the grounds that he (Tenorio) would be subject to persecution because of his sexual orientation if he returned to Brazil. The claimed social group was "homosexuals" (decision p 12). The case is noted by Stuart Grider in "Sexual Orientation as Grounds for Asylum in the United States - *In Re Tenorio*" (1994) 35 Harvard International Law Journal 213. See also "IJ grants asylum to Brazilian homosexual" 70 Interpreter Releases 1100 (Aug. 23, 1993).

On the facts Mr Tenorio's claim was a strong one, and the principal issue was whether he had established that he was a member of a particular social group. The primary concern of the immigration judge was the issue of cognizibility i.e. the identification of the group. It is to be remembered that cognizibility is the first of the three-prong test developed by the 9th Circuit in Sanchez-Trujillo v INS 801 F 2d 1571 (9th Cir. 1986). After referring to Re Inaudi and to the Acosta formulation of "immutable characteristic" defined as a characteristic that members of the group either cannot change, or should not be required to change because it is fundamental to their

individual identities or conscience, the immigration judge applied the "fundamental to identity" phrase to sexual orientation. But in an apparent attempt to also satisfy the Sanchez-Trujillo approach which emphasises the "voluntary" association among the members of the group, the immigration judge also held that homosexuals have a voluntary associational relationship in which there exists a common characteristic fundamental to the member's identity:

> "There exists a voluntary associational relationship among the members, and a common characteristic that is fundamental to their identity as a member of the social group. Sexual orientation is arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change. Thus, homosexuals are considered to be members of a particular social group.".

While the decision has been criticised for attempting to satisfy both Acosta (immutable characteristic) and Sanchez-Trujillo (voluntary associational relationship),[8] we do not see these two tests as being necessarily irreconcilable in the context of sexual orientation. This is because sexual orientation is **either** an innate or unchangeable characteristic **or** a characteristic so fundamental to identity or human dignity that it ought not be required to be changed. As the social group argument will succeed under either head, little point would be served by preferring one to the other, particularly given that it may not ultimately be possible to prove one way or the other whether sexual orientation is in fact an immutable characteristic.

In subsequent developments, the INS granted asylum to a Mexican national because he established a well-founded fear of persecution on account of his sexual orientation: "INS Grants Asylum to Gay Mexican" 71 Interpreter Releases 490 (April 11, 1994). This decision was subsequently accepted

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[8] See Stuart Grider, "Sexual Orientation as Grounds for Asylum in the United States - *In Re Tenorio*" (1994) 35 Harvard International Law Journal 213, 219.

by the Immigration and Nationality Service as establishing that in certain circumstances “particular social group” can be defined by homosexual orientation: “INS provides guidance on persecution on the basis of sexual orientation” 71 Interpreter Releases 652 (May 16, 1994). As already noted, in June 1994, the case of Matter of Toboso-Alfonso was designated by the Attorney General as a precedent case: “Reno designates gay case as precedent” 71 Interpreter Releases 859 (July 1, 1994). Later in that year, the Immigration and Nationality Service granted asylum to a Turkish gay man, apparently relying on Matter of Toboso-Alfonso: “INS grants asylum to Turkish gay man” 71 Interpreter Releases 1515 (Nov. 14, 1994). More recently, the INS has granted asylum to a gay Venezuelan man: “INS grants political asylum to gay Venezuelan man” 72 Interpreter Releases 430 (March 27, 1995). Further discussion of the issues to be found in “Membership in a ‘Social Group’ as Grounds for Asylum Expanding - Somali Clans; Gays and Lesbians” (1994) XV *Refugee Reports* 11 (June 30, 1994); in Brian J McGoldrick, “United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?” (1994) 8 Geo. Immigra. L.J. 201 and in Julia Blanche Meister, "Orientation-Based Persecution as Grounds for Refugee Status: Policy Implications and Recommendations" (1995) 8 Notre Dame Journal of Law, Ethics & Public Policy 275.

AUSTRALIA

The Authority has found no reported decision dealing specifically with the issue of sexual orientation, though Lockhart J in Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 111 ALR 417, 432 (FC:FC) did observe that social groups may have interests in common as diverse as education, morality and sexual preference.

Refugee status has been granted to homosexuals in Australia. See

Shannon Minter, "Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity" (1993) 26 Cornell International Law Journal 771, 809 fn 270 and Ellen Vagelos, "The Social Group that Dare not Speak its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on *Re: Inaudi*" (1993) 17 Fordham International Law Journal 229, 230 fn 5.

Three decisions of the Refugee Review Tribunal are collected in Cronin *et al* (eds), Australian Immigration Law Vol 1 (1994) at para 16,095. In N93/00593 (1 February 1994, Sydney), a claim to refugee status by a homosexual from Fiji failed on the grounds that the treatment feared did not amount to persecution. However, in N93/2240 (21 February 1994, Sydney), an Iranian homosexual was granted refugee status after a finding that homosexuals constitute a particular social group for Refugee Convention purposes. In N93/00846 (8 March 1994, Sydney), a homosexual from the People's Republic of China was granted refugee status because his serious, monogamous, long-standing relationship placed him particularly at risk.

More recently, in V 94/02607 (4 April 1995, Melbourne) and V 95/02999 (22 April 1995, Melbourne), while it was held that homosexuals constitute a particular social group, both claimants ultimately failed on the basis that, on the facts, they would face discrimination, not persecution, in their country of origin (the People's Republic of China). There is no substantial examination of the social group issue in any of these decisions.

CONCLUSIONS ON SEXUAL ORIENTATION AS A BASIS FOR FINDING A SOCIAL GROUP

One issue emerging from the rather confused sexual orientation

jurisprudence is whether a social group should be identified by the internal characteristics of the group or whether the external perceptions of the group by society at large, or the agent of persecution in particular, should be determinative.

The first approach is most notably exemplified by Canada (Attorney-General) v Ward [1993] 2 SCR 689, while the "objective observer" approach is seen in the 1983 decision of the Administrative Court in Weisbaden.

The difficulty with the "objective observer" approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group. The Refugee Convention, however, was not intended to afford protection to every such persecuted group. The point is succinctly made in Ward at 732:

> "Although the delegates inserted the social group category in order to cover any possible lacuna left by the other four groups, this does not necessarily lead to the conclusion that any association bound by some common thread is included. If this were the case, the enumeration of the bases would have been superfluous; the definition of 'refugee' could have been limited to individuals who have a well-founded fear of persecution without more.".

The mere fact that a person fears persecution by reason of a characteristic that he or she has in common with another person who also fears persecution, does not establish that the two are members of a particular social group for the purpose of the Convention.

Herein lies the significance of the interpretative approach to the Refugee Convention discussed at length earlier in this decision and which recognises that the grounds of race, religion, nationality and political opinion focus on

the claimant's civil and political rights. The Acosta *ejusdem generis* interpretation of "particular social group" firmly weds the social group category to the principle of the avoidance of civil and political discrimination. In this way, the potential breadth of the social group category is purposefully restricted to claimants who can establish a nexus between who they are or what they believe and the risk of serious harm: Ward 738-739; Hathaway, The Law of Refugee Status (1989) 137. For the nexus criterion to be satisfied, there must be an internal defining characteristic shared by members of the particular social group. In the Acosta formulation, this occurs when the members of the group share a characteristic that is beyond their power to change, or when the shared characteristic is so fundamental to their identity or conscience that it ought not be required to be changed. In the very similar Ward formulation, the nexus criterion is satisfied where there is a shared defining characteristic that is either innate or unchangeable, or if voluntary association is involved, where that association is for reasons so fundamental to the human dignity of members of the group that they should not be forced to foresake the association.

In this way, recognition is given to the principle that refugee law ought to concern itself with actions which deny human dignity in any key way: Hathaway *op cit* 108 approved in Ward at 733.

On this interpretation, the issue of sexual orientation presents little difficulty. As we have earlier remarked, sexual orientation is a characteristic which is either innate or unchangeable **or** so fundamental to identity or to human dignity that the individual should not be forced to foresake or change the characteristic.

Sexual orientation can, therefore, in an appropriate fact situation, be accepted as a basis for finding a social group for the purposes of the Refugee Convention.

SEXUAL ORIENTATION: CONCLUSIONS ON THE FACTS

We are satisfied, on the evidence received, that homosexuals in Iran are a cognisable social group united by a shared internal characteristic namely, their sexual orientation. We also find that homosexuality is either an innate or unchangeable characteristic, or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed.

As to whether in terms of Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 (HCA), there is a real chance of persecution were the appellant to return to Iran, the expert evidence establishes that the situation for homosexuals in Iran is a particularly dangerous one. They have been singled out by Khomeini and others as a corrupt and dangerous manifestation of "Westification". The pervasive influence of Ayatollah Khomeini's writings coupled with the express provisions of the Iranian Penal Code lead almost inevitably to the conclusion that the agents of state in Iran perceive homosexuals as persons who must be eliminated because they are parasites and corruptors of the nation. The real chance test is accordingly satisfied.

It might be said that the appellant could avoid persecution by being careful to live a hidden, inconspicuous life, never revealing his sexual orientation. Having seen and heard the appellant, we are of the conclusion that to expect of him the total denial of an essential part of his identity would be both inappropriate and unacceptable.[9] His good faith in advancing his case on sexual orientation grounds is not in issue cf. Refugee Appeal No. 2254/94 Re HB (21 September 1994).

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[9] See further Eric Heinze, Sexual Orientation: A Human Right (1995) 157-162.

OVERALL CONCLUSION

In summary, our conclusions are as follows:

1. The appellant holds a bona fide subjective fear of returning to Iran.

2. The harm feared by him for reason of his political opinion and for reason of his membership of a particular social group is of sufficient gravity to constitute persecution.

3. His fear of persecution is well-founded in relation to both limbs of his case.

4. The persecution he fears is persecution for a Convention reason, namely his political opinion and, in the alternative, his membership of a particular social group.

5. For these reasons, we find that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.