REFUGEE APPEAL NO. 61/91

N.S.G

AT AUCKLAND

Before: B.O. Nicholson (Chairman)
J.M. Priestley (Member)
G. Lombard (UNHCR)

Counsel for the Appellant: Ms Robins

Representative of NZIS: Mr Addison

Date of Hearing: 12 December 1991

Date of Decision: 13 February 1992

DECISION

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 who is a national of the Islamic Republic of Iran.

The appellant's account of his history is as follows:

The appellant is a married man with one child. He was born in Teheran in 1954. In 1975 he joined the army of the Shah. In 1975 and 1977 he trained as a helicopter pilot and qualified as such. He was attached to the army helicopter service. In 1977 he married. In 1979 the Shah left Iran and the Ayotollah Khomeini came to power. During that same year his team was sent to areas of the country occupied by the Kurds and carried out operations which involved armed raids on the Kurds.

The helicopters which he customarily flew were not armed, but the passengers which he carried were armed and were able to use their arms from the helicopter on people on the ground. He said that these operations involved literally killing people and burning the countryside. He and his fellow pilots were brainwashed by the Mullahs and they were exhorted to destroy people who it was believed were supporters of the Mojahadin Party. He said that he was upset by these missions and that this was noticed by his team mates and as a result he was questioned by a civilian man who it appeared had some authority on behalf of the Komiteh.

He was accused of being sympathetic with the Mojahadin Party and after being questioned was sent to a temporary prison for three days and then transferred to a military prison in Tehran for a further eight days. Then he was moved to a further prison for 15 days in Esfahan. He was detained there and he was also deprived of one year's salary and suffered two years' loss of promotion. He said that many of his

fellow pilots were also taken to prison and two of them, to his knowledge, were condemned to death. Only one of them was in fact executed. The other pilots received varying terms of imprisonment, the reason being that they had apparently refused to carry out further missions against the Kurds.

After his imprisonment he returned to his job but he was constantly being sent to other places. He returned each time, he said, with bitter memories of the destruction and killing involved in those missions which he had flown. He often considered flying over the border, but he was afraid of the consequences to his family if he did that.

On one occasion, after a mission, one of his fellow pilots fled the country through the border of Turkey. The appellant expressed his happiness for the pilot concerned and the next day he was interviewed by his sergeant concerning the runaway pilot. Threats were made on his life.

He was then transferred to the prison at Tehran where he was imprisoned for 20 days. He was subjected to torture in the form of being wakened during the night. He was accused of creating disturbances, of belonging to the Mojahadin group, and forced to sign some form of confession. His wife was fired from her job as a teacher at a school at this time.

The outbreak of war against Iraq in October of 1980 and the shortage of pilots caused the administration to release all pilots in custody. They were pardoned and asked to come back to work. Their frozen salaries were reinstated. The appellant joined in this work. While he was flying missions he and his wife were subjected to further questioning concerning some Bahai neighbours.

In July of 1985 he volunteered to work for the Komiteh, in the specific task of flying missions to find and capture drug dealers. The appellant, because of previous drug involvement on the part of his father and other members of his family, was enthusiastic to do this work, but found that this was not the genuine purpose of the missions. He said that in fact that there was no attempt to catch major drug dealers at all. The few who were caught tended to be minor in the drug world, and there was a good deal of false accusation of people being involved in drug dealing.

On one occasion when they were flying over a cemetery for the purpose of dropping flowers over the graves of martyrs at Arak, the appellant, by mistake, dropped some flowers at a grave which it transpired was a Mojahadin grave and not one of the recognised martyrs. He was reported by his passengers on board for this and was questioned very severely and taken into custody for five days.

He sought permission to return to the army but instead he was required to carry on undertaking missions against Kurds and, in particular on one occasion, he was involved on a mission when in a short space of time they killed over 5,000 young people who were Mojahadin sympathisers. He again requested to be returned to the army.

He became involved in difficulties again because he would not co-operate in flying low over a particular area because of the danger. He was accused of being disobedient

and was threatened with death. His persistent requests to return to the army were refused because of the shortage of helicopter pilots.

He resolved to leave Iran. He applied for and was granted a month's leave and went into hiding during which time he attempted to find ways of getting across the border into Turkey without success. He applied for and obtained a passport using a false food coupon book, giving his correct name but a false occupation. After some 20 days his passport was issued. It was agreed between his wife and himself that his wife and child should remain with her parents. In March of 1990, with the passport issued, he flew to Singapore where he stayed for one week and then purchased a ticket to Tonga, arriving at Auckland Airport in April of 1990 where he claimed refugee status.

The appellant claims that he is absent without leave from the army, which is still responsible for his employment even though he had been engaged on specific work for the security section of the Komiteh.

The appellant fears that if he is returned to Iran he will suffer imprisonment, torture and possibly death because of his desertion from the army and from the work of the Komiteh, because his act of desertion will result in the Komiteh imputing to him a political opinion which is contrary to the interests of the present regime.

The appellant must show that he is a person, who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion 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 in order to establish his status as a refugee.

The first issue before the Authority is one of the credibility of the appellant. We note that the decision of the Refugee Status Section declined his application on the grounds of the lack of credibility on his part. We were therefore at considerable pains to examine his credibility. We note that there are a number of differences between the case as presented to the Refugee Status Section and the case presented to us. The Refugee Status Section's recommendations and decision point out certain discrepancies and reasons for doubts about the appellant's credibility. Such doubts we think are understandable, indeed the appellant's account before us of the manner in which he obtained his passport, which he had not detailed to the Refugee Status Section, caused us some doubts as to the truth of his account. We find it difficult to understand that having applied for a passport in his correct name and given his correct date of birth, the security authorities, did not check his application and detain him. After all, he had disappeared in October 1989 on his account at the expiration of his leave and his passport was applied for in January 1990 and did not issue until March 1990. Moreover, several days before he left he was required to go to his bank and make application for removal of funds. He did this. Again this was a further stage where one would expect that the security authorities would have detected his application to leave the country, but he was allowed to leave. This throws some doubt on whether or not he really was in a state of desertion from the army at the time he left the country.

Nevertheless we were impressed by his demeanour. It is clear from the file of the NZ Immigration Service that the appellant is a somewhat volatile character who expresses

a fear approaching paranoia on the subject of his being returned to Iran although before us he answered questions in a careful and controlled manner. Where there were discrepancies there were explanations which appeared to us to be reasonable. While we had doubts about his claim that he is in a state of desertion, we found ourselves unable to say that his account as a whole is not credible.

We accept unreservedly that he was in the army as a helicopter pilot and that he had worked for the Komiteh, as he described. Moreover, we accept that as a pilot engaged with the Komiteh, his leaving the country as he did would mean that, in the event of his return, he would be subjected to close attention by the security forces in Iran and would be likely to suffer severe consequences given the repressive nature of the present regime in Iran. The appellant's history of political imprisonment and torture, albeit of a comparatively minor degree of seriousness tends to strengthen our conclusions as to the treatment he is likely to suffer on return to Iran. In this respect we refer to an extract from the *Refugee Letter* published by the New Zealand section of Amnesty International in October 1991, in relation to Iran. It states:

"While many Iranian exiles are now returning voluntarily, and while AI would certainly accept that many Iranians would not be in danger if returned, AI would not agree that the situation has improved to the extent that asylum-seekers with a record of opposition to the government should be returned there against their will. AI should therefore continue to emphasize to governments dealing with the cases of such Iranian asylum-seekers that serious human rights violations continue to take place in Iran. AI continues to receive reports of torture and ill-treatment in Iran, and even the minimum safeguards against torture which are laid down in the International Covenant on Civil and Political Rights (which Iran has ratified) are not being applied. AI would therefore be concerned about anyone being returned to Iran who has a history of political imprisonment and torture, and where there are reasons to believe that this may recur."
In accordance with the guidelines of the United Nations High Commission for Refugees Handbook, we given the appellant the benefit of the doubt on the question of his credibility as to the precise reason and manner for leaving Iran.

We formulate the issues in this particular case as follows:

1. Is there a genuine fear?

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

3. Is there a real chance that persecution will occur?

4. Is the harm feared related to any of the five grounds recognised in the Convention or is it related to other factors?

5. Is the appellant justified in being unwilling to avail himself of the protection of the country of origin?

6. Do the exclusion clauses of the 1951 Convention apply to this appellant?

As to the first issue we find that there is a genuine fear harboured by the appellant.

On the second issue we find that the harm he fears is of imprisonment, torture and death and that these are matters of sufficient gravity to constitute persecution.

On the third issue we are satisfied that there is a real chance, given the nature of the present regime in Iran and given the nature of the work that the appellant was doing for the Komiteh, that persecution would occur if he returned to Iran.

On the fourth issue we consider that the harm feared relates to a political opinion imputed to the appellant. Because he has left the country rather than continue to do the work of the Komiteh as a helicopter pilot, the Komiteh will take the attitude that he is a sympathiser with the opposition elements within Iran to the present regime. We find therefore that the harm feared does relate to a ground recognised in the Convention.

On the fifth issue we find the appellant, for the reasons he has offered, is justified in taking the attitude that he is unwilling to avail himself of the protection of that country owing to the fear that he has.

On the final issue as to whether or not the exclusion clauses of the 1951 Convention should apply, Article 1F of the Convention provides:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reason for considering that:
(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations."
Ms Robins, on behalf of the appellant, has argued that the exclusion clause should not apply to this appellant even though he was involved in these missions, which on his own description she concedes clearly amount to crimes against humanity. She points out that there are two incidents described in the appellant's first statement where he took part in a mission against the Kurds in 1979. He submits that he was a pilot of an unarmed helicpter simply following orders, that he had no level of responsibility and no choice but to carry out the orders of his superiors. The appellant had an obligation to carry out the orders of the legitimate Iran government in furtherance of its objective to defend its borders. She submitted that the appellant's case shows that the consequences of his refusing to take part in such missions would result in very grave consequences for him and even death. She points to the other punishment that the appellant suffered for what were comparatively minor matters. Total refusal to take part in these operations would have had very serious consequences for him indeed.

She referred to the second major incident in May of 1988 when the Iranian government had initiated an offensive against the Mojahadin. She submitted that the Iranian government obviously felt it was necessary to protect itself against attacks by members of this opposition and deployed its forces accordingly in areas occupied by

the Kurds. She relied upon passages in *The Law of Refugee Status* by Professor Hathaway at pages 218, 219 and 220 as follows:

"Intention is a necessary element of such an offence, although some legal experts hold that it may be implied in the case of massive and systematic crimes, such as genocide or apartheid. Because of this *mens rea* requirement, the Commission's draft suggests that three limited exceptions to the general principle of responsibility are available. First, the leaders of a state may argue self-defence 'in respect of acts whose performance was ordered by them or which they carried out in response to an act of aggression directed against their State'. This exception should be construed to relate only to offences within the tradition crimes against peace' category, and recognises that there is no genuine design to violate the rules against use of force in the context of a strictly defensive engagement in conflict.

Second, it is possible to invoke coercion, state of necessity, or force majeure. Essentially, this exception recognises the absence of intent where an individual is motivated to perpetrate the act in question only in order to avoid grave and imminent peril. The danger must be such that 'a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong'. Moreover, the predicament must not be of the making or consistent with the will of the person seeking to invoke this exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion.

These constraints would suggest that the Immigration Appeal Board's exoneration of Chilean torturer Felix Salatiel Nunez Veloso may have been unwarranted. Under pain of execution, the claimant had participated in crimes against humanity which were 'totally opposed to his moral, religious and political convictions'. Because these actions were committed under duress, it was held that exclusion under Article 1(F) should not follow. Yet the Board failed to inquire whether the human suffering induced by Mr Nunez Veloso's actions outweighed the risk to his own well-being, an essential finding for exculpation under the doctrine of coercion..."

"In Zacarias Osorio Cruz the Immigration Appeal Board allowed the claim of a deserter from the Mexican army, who admitted active participation in approximately twenty politically motivated executions over a five year period. He eventually made a daring escape from his unit due to his 'awakening political and moral conscience', and claimed refugee status in Canada. In allowing his claim, the Board did not address the question of whether a crime of this sort could admit of a mistake of law, much less whether the claimant had genuinely 'exerted his conscience' prior to engagement in actions properly characterised by the Board as contrary to the most basic international rules of conduct'.

However, this case raises quite poignantly the issue of whether an addition form of exculpation rooted in utilitarianism is not warranted. The Board placed emphasis on the fact that Osorio Cruz was the first person to shed light on the crimes against humanity being committed by the Mexican army:

In deserting from the army and telling the whole world, as it had never been told before, the story of the atrocities committed by officers of the Government of Mexico, Mr Osorio Cruz betrayed his oath of obedience, became a traitor in the eyes of some Mexican authorities by displaying his strong political disagreement and, without a doubt, the worst punishment reserved for prisoners holding unpopular political opinions awaited him. This is the reason for his fear.

While Osorio Cruz’s protracted involvement with crimes against humanity may be too egregious to warrant exculpation on any basis, in the case of a less confirmed criminal one might reasonably consider whether the value of disclosure of previously covert inhumane conduct does not offset the general rule against sheltering an admitted criminal. Since the enforcement of international human rights law is dependent on publicity and moral probation, it may be wise judiciously to exonerate individuals who, though culpable themselves, make it possible to end or curtail crimes against peace and security. This position is not, however, thus far accepted in law.
The commentary which accompanies the International Law Commission draft also fails to suggest a specific 'superior order’ exception, although it notes that soldiers or others following commands may invoke the notions of coercion or error of law, as defined above. In contrast, the Immigration and Refugee Board accepted the claim of a member of a Ghanaian firing squad involved in politically motivated executions under colour of judicial authority, noting that 'the claimant is not a person described in Section F [of] Article 1, because he was a private in the Ghanaian Army and killed people in the line of duty’. Because criminal responsibility for actions against peace and security is intended to compel subordinates to question the illegitimate exercise of authority, a 'superior order’ defence would be counterproductive.
In sum, a crime against peace and security is defined by its seriousness, whether based on the nature of the act itself, the extent of its effects, or the motive of the perpetrator. A person who commits such an act is culpable unless a strictly construed exception based on self-defence, coercion, or error of law can be established. Moreover, all of the recognised exceptions to responsibility for crimes against peace and security are inoperative if the facts invoked constitute a breach of a peremptory norm of international law, originate in fault of the perpetrator, or result in the sacrifice of a great interest than that protected.
The last question to be addressed is the degree of involvement required to justify criminal liability. While mere presence at the scene of a crime may not be actionable, exclusion is warranted 'when the evidence establishes that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution. ...’ In Fernando Alfonso Naredo Arduengo, for example, the Immigration Appeal Board disqualified the Chilean applicants who had been employed by that country’s secret police:
Mr and Mrs Naredo were members of different four or five mean teams engaged in surveillance, arrests and interrogations, which involved torture and beatings. Both claimed to have been assigned to stand guard and take notes, deying that they personally beat or tortured their victims. Mr Naredo claims to have participated in eighteen to twenty such operations, ten leading to death. ...[T]heir actions so clearly an abuse of human rights, set them outside those who can properly seek asylum. The same holds true for those who make it possible for others to engage in crimes against peace and security.”
The two cases mentioned there decided by the Canadian Immigration Appeal Board that claimants for refugee status had under the threat of execution participated in crimes against humanity, against their person convictions. She submitted that the appellant was simply a soldier following orders, who had experience of the punishment likely to result from failing to follow orders and that the fear of death or long term imprisonment for disobedience to orders was reasonably held.

She further submitted that although he personally found the incidents abhorrent, they were committed as part of a war carried out by the legitimate government of Iran.

She submits therefore that the exclusion clause in Article 1F should not be applied to the appellant. We accept the first submission. The appellant was not in the position of someone who actually directed the killing of Kurds or that he himself carried out the killings. He was a pilot flying under directions to enable these killings to be carried out, and he was in the position where he had no choice but to follow directions given by his superiors. We consider his degree of involvement was minor and due to a degree of coercion. We find it would be unjust to apply the exclusion clause in this case.

The appeal is allowed.

“B O Nicholson”

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[Chairman]