NOTE: you might recognise a case or two!

Email Request: Current Document: 11
Time Of Request: Wednesday, April 13, 2016 14:26:07
Send To:

Pidgeon, Richard
RICHARD PIDGEON
PO BOX 106366
CITY CENTRE

Terms: chong

Source: All Subscribed (NZ) Journals Sources
Project ID: None

1 of 1 DOCUMENT: New Zealand Law Journal/2016/No 3 -- April 2016/Testing Damascene change in refugee law

[2016] NZLJ 89

Testing Damascene change in refugee law

Richard Pidgeon, Barrister and Danyon Chong, Law Clerk, Auckland, with a way forward

Our beliefs are central to who we are -- whether they have a religious, secular, atheistic or agnostic content (see *Refugee Appeal Nos 75186 and 75187* (30 November 2005)). The right to exercise freedom of religion includes the right not to hold religious views at all (*Buscarini v San Marino (24645/94)* (1999) 6 BHRC 638, (2000) 30 EHRR 208 and see generally *Bowman v Secular Society Limited* [1917] AC 406. See also *DS (Iran)* [2016] NZIPT 800788 for a comprehensive review on this point). In this article, we focus on the somewhat controversial process of assessing religious conversion or religious intensification ("*sur place*") in the refugee law context. The reference to "Damascene change" reflects the dramatic conversion of the apostle Paul on the road to Damascus (Acts 9) and also connects to refugee law by alluding to the presently overwhelming Syrian refugee crisis. In the refugee context, dramatic (or Damascene) awakenings or conversions often occur and beg thorough assessment from adjudicators to ensure the change is not simply opportunistic.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status at [94], explains what is meant by "*sur place*":

> The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "sur place".

As France J held, at [21], in *BV v IPT* [2015] NZAR 139, the Tribunal is tasked with:

> ... determining the genuineness of a claim in circumstances where that claim is the source of the application for refugee status. The Tribunal cannot be deterred from that task merely because it is a claim of membership of a particular religion or faith. That is not to say that the matter does not need to be assessed with sensitivity, and a recognition that people give effect to their beliefs in many different ways.

The manifestation of religious belief is a non-derogable and fundamental legal right from which other fundamental freedoms arise, as recognised in the International Convention on Civil and Political Rights, art 18 (see also NZ Bill of Rights Act 1990, ss 13, 15 and 20). People should be free to change or renounce their faith (see *BT (Iran)* [2012] NZIPT 800188 (9 November 2012) at [91]: a citizen of a country like Iran who rejects Islam, whether or not he or she adopts another religion, is put at risk if required to return to Iran. See also *Okere v Minister for Immigration and Multicultural Affairs* (1998) 157 ALR 678 (HCA) and *Prashar v MIMA* [2001] FCA 57 at [19] where the Court stated: "if persons are persecuted because they do not hold religious beliefs, that is as much persecution for reasons of religion as if somebody were persecuting them for holding a positive religious belief. The Convention protects people in relation to the subject matter of religious belief. It does not protect believers and leave nonbelievers to the wolves").

The right to manifest one's religion has a strong link to the right of freedom of expression and other civil rights. American academic and human rights lawyer, Terence Halliday (who recently lectured in New Zealand), suggests that the house church movement in China is the nascent organisation for society change in that country ("The work and oppression of Christian human rights lawyers in China" (3 March 2016) University of

Auckland). As noted by Paul Rishworth in ch 6 of "Rights and Freedoms" (Brookers, Wellington, 1995), even New Zealand has had its blemishes with religious suppression, including the treatment of Jehovah's Witnesses during the second world war (see *Watch Tower Bible and Tract Society v Mount Roskill Borough* [1959] NZLR 1236) and the Tohunga Suppression Act 1907.

The assessment as to whether a claimant fits the definition of refugee (or protected person) under the Immigration Act 2009, ss 129-131, is often based solely on the testimony of the claimant. The adjudicator is called upon to make a judgement as to whether the narrative is credible and there is a well-founded fear of persecution. The Refugee Convention (see Immigration Act, s 129 and sch 1) records the definition of a refugee at art 1(A)(2):

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

The Damascene change this article focuses on (ironically with a "good faith" component) can occur when a claimant may subscribe to a religious belief in the country of origin but very much of an 'underground' variety, to have it ignited in the country in which refuge is sought due to the greater freedoms available there to manifest one's beliefs. The other type of change might occur solely in the country where refuge is sought and is wholly a *sur place* change. Actually, either way one looks at either phenomenon, they are *sur place* changes.

Internationally acclaimed refugee law expert, Professor James Hathaway, notes that the general international test for refugee status requires simply objective evidence of forward-looking risk for a fear to be well-founded, noting that a fear may be no less genuine despite the artifice by which the circumstances which gave rise to it have been engineered. In Hathaway's view "the best approach to sur place claims grounded in disingenuous and self serving actions abroad ... should be [to assess] on the basis of the usual criteria, in the usual way, with no special substantive limitation or procedural posture" (James C Hathaway and Michelle Foster *Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge, 2014) at 88).

Section 134(3) of the Immigration Act represents a codified statutory "good faith" exclusion for *sur place* claims:

> A refugee and protection officer must decline to accept for consideration a claim for recognition as a refugee if the officer is satisfied that 1 or more of the circumstances relating to the claim were brought about by the claimant--
>
> (a) acting otherwise than in good faith; and
> (b) for a purpose of creating grounds for recognition under section 129.

Judicial perception can also be an issue. At a 2002 conference of the International Association of Refugee Law Judges, Sir Stephen Sedley (Lord Justice of the EWCA) noted in his speech, "Judicial Independence and Asylum Law" (at 325):

> In an exercise which is typically one of testing assertions, not of choosing between two stories, the form which impartiality most typically takes for the judge is abstention from pre-ordained or conditioned reactions to what one is being told.

As Whata J (a Refugee Status Appeals Authority (RSAA) member prior to sitting as a High Court Judge, as Priestley J also was) said in *BZ (Sri Lanka) v IPT* [2015] NZHC 2883 at [52], when considering a s 247 and 249 application:

> I have also examined whether the potential for substantive unfairness is such that general public interest considerations demand intervention. The starting point for this evaluation is that refugee status claims involve claimants at the highest end of vulnerability and potentially at risk of gross human rights violation. The tolerance for procedural unfairness in such cases must be small.

THOU SHALT NOT PASS: THE KIWI HARDLINE ON GOOD FAITH

There is a focus on the "good faith" element in the Immigration Act (Johanna Commins "Good faith in the Immigration Act" [2011] NZLJ 103; see also Suzanne Corcoran "Good faith as a principle of Interpretation: What is the Positive Content of Good Faith?" (2012) 36 Aust Bar Rev 1; R Driver "Asylum Claims made in Bad Faith Under the Refugees Convention -- The Australian Experience" (2011) Refugee Quarterly Survey 59). The law in New Zealand is set out in *Refugee Appeal No 2254/94 Re HB* [1995] IJRL 332 at [9] (*Re HB*): the "... good faith principle must be applied with caution, not zeal, on a case by case basis". The express reference to good faith in the Immigration Act occurs in ss 134, 140 and 200. Section 200(1)(b) of the Act requires the Immigration and Protection Tribunal to first consider whether the change "in one or more of the circumstances" was brought about by the appellant "acting otherwise than in good faith". Under s 200(2), it must dismiss the appeal if it determines that the change in one or more of the circumstances was brought about by the appellant acting otherwise than in good faith. There is a slight difference in the wording of s 140 where the Refugee and Protection Officer must be "satisfied" the change in one or more of the circumstances was not brought about by the claimant acting otherwise than in good faith (see Asher J in *AL v IPT* [2014] NZAR 1079).

Professor Grahl-Madsen (in *The Status of Refugees in International Law* (A W Sijthoff, Leyden, Netherlands, 1966) vol 1 at 94) has devised a three-part classification for good faith *sur place* actions, namely:

> (1) Actions undertaken out of genuine political motives;
> (2) Actions committed unwittingly, or unwillingly (for example, as a result of provocation), but which nevertheless may lead to persecution "for reasons of" (alleged or implied) political opinion; and
> (3) Actions undertaken for the sole purpose of creating a pretext for invoking fear or persecution.

The Australian response is recognised in Migration Act 1958 (Cth), s 91R(3), which is to have no regard to any conduct by the claimant which is calculated to give rise to a claim (see *MIAC v SZJGV, MIAC v SZJXO* [2009] HCA 40, (2009) 259 ALR 595). The claim is determined on the evidence which is left after the excision for bad faith.

In the United Kingdom, *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000 reached the position that the Refugee Convention does not contain a "good faith" requirement and it is irrelevant whether the activities relied on in the establishment of a claim are self-serving, unreasonable or undertaken in bad faith. However, such factors will be relevant to the assessment of credibility and such claims will be rigorously scrutinised. In *Danian,* the Immigration Appeal Tribunal held that it was open to ultimately hold that an asylum-seeker who had engaged in activity in bad faith but nonetheless genuinely held a well-founded fear of persecution was still a refugee. According to *Danian,* it does not matter how unreasonable or cynical the refugee claim is. The only question that should be asked is whether, on return to their home country, the applicant would be persecuted for a Convention reason? Hathaway discusses this further in his book (referenced by Brooke LJ in *Danian* at 3014) where he argues that the preoccupation with fraud might lead to conflict with basic human rights and with the rights of self-expression and the freedom of association.

Brooke LJ, having mentioned the summary of the law in *Re HB* (above)), said a similar conclusion to his was reached by the United States Court of Appeals, Seventh Circuit, in *Bastanipour v INS* 980 F 2d (1992). In that case the Court held that (at 3022, emphasis added):

> *... the central question was not whether an Iranian national's conversion (while in prison) from Islam to Christianity was sincere or genuine: rather, it was a question of how the purported conversion would be viewed by the authorities in Iran ...*

The New Zealand approach to good faith is (in general refugee claims) essentially to refuse a claim, if the evidence supporting the claim was procured with the goal of establishing a refugee or protected person claim. This runs at odds to the obligation of non-refoulement (see Refugee Convention, art 33 and Convention Against Torture, art 7) but does reflect a desire to maintain the integrity of the system. Perhaps a blended ANZAC

approach close to s 91R(3) achieves a better balance: (a) refer to *sur place* conduct (New Zealand approach) but (b) rather than the New Zealand one-strike exclusion of the entire claim for bad faith, exclude the offending evidence (a nod to the Australian model) but consider the claim regardless.

CONVERSION V INTENSIFICATION

It may be that the seeds of apostasy or assumption of faith were sown in the country of origin. This is the position taken by the apostate Iranian in *BV v IPT* [2015] NZAR 139. This article focuses on the type of dramatic change needed to support *sur place* grounds based on fear of persecution on religious grounds. It is the type of change undertaken by the apostle Paul from being a zealous persecutor of Christians (and Pharisee) within Jerusalem and the surrounding Roman provinces to a zealous Christian missionary.

In either instance (intensification or conversion) the adjudicator must ask, "was there a conversion to the new faith?" In reply, (especially for intensification cases), several metaphorical questions arise: when is an oak tree an oak tree? When the acorn is beneath the soil or when a shoot issues forth? When the tree trunk is wider than a finger or wrist in diameter? Using a further Biblical analogy, the thief on the cross with Christ on Calvary who recognised Christ as Christ was, on that utterance, a Christian. It would be reasonable to assume the thief/murderer's level of Biblical knowledge and resume of 'Christian' conduct (if such a thing existed) was light. However, with a decision and desire and intent he was from that moment a Christian. This is a case in point highlighting the perils of knowledge-based questioning.

While the veracity of the tenets and doctrines of one's faith are non-justiciable, the person claiming to hold those beliefs must honestly hold them and this should be properly tested, whether that is in the context of intensification (which begins in the home country) or conversion *sur place* which might occur entirely in the country of origin. In assessing all refugee claims the adjudicator needs to recognise the evidential difficulties facing claimants, and claimants should, where relevant, be given the benefit of the doubt(*Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA)); but there should be internal consistency and external consistency with known facts about the country of origin.

Rodger Haines QC in "Country Information and Evidence Assessment In New Zealand" (Conference paper, COI in Judicial Practice Conference, Budapest, 13-15 April 2011) notes in terms of credibility, at [21]:

> Credibility cannot, however, be pursued as an end in itself. The decision making cannot allow the pursuit of credibility issues to divert him or her from those considerations which are primarily relevant to the claim to refugee or protection status. Even if the decision maker concludes that nothing which the claimant has said is true other evidence may establish that the person is a refugee or protected person ...

The "Hathaway" approach (above), picks up on this, to the effect that the Tribunal must still be satisfied that the applicant is not at risk, based on corroboration of evidence and country information irrespective of credibility findings (James C Hathaway and Michelle Foster *The Law of Refugee Status* (above, at 159-160). Justice William Young in *Sakran v Minister of Immigration* (HC Christchurch CIV-2003-409-001876, 22 December 2003)) felt there was an undue emphasis on credibility in the RSAA decision in that case.

INTERNATIONAL GUIDANCE ON HOW TO TEST CLAIMS TO PERSECUTION ON FAITH-BASED GROUNDS

The definition of "religion" has shifted slightly, with the current definition in *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77; [2014] 1 All ER 737 widely recognised as being appropriate (aside from criticism that secularism is excluded from the definition. See Zucca "A New Legal Definition of Religion" (2014) 25 KLJ 5). See also Lord Toulson's definition at [57]:

> I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with that belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science ... Such a belief system may or may not involve belief in a supreme being, but it does involve

> a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science.

Aside from the UNHCR Guidelines On International Protection: Religion-Based Refugee Claims Under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, there is a significant body of academic writing which considers the common pitfalls of credibility testing and suggests an appropriate methodology to utilise. Included in this are M Kagan "Refugee Credibility Assessment and the 'Religious Impostor' Problem: case study of the Eritrean Pentecostal claims in Egypt" (2010) Vanderbilt Journal of Transnational Law 1179; U Berlit, H H Doerig & Storey "Credibility Assessment in Claims Based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach" (2015) International Journal of Refugee Law 649; K Musalo "Claims for protection based on religion or belief" Int J Refugee Law (2004) 16(2):165-226; B Frantz, "Proving Persecution: the Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms" (2007) Ave Maria Law Review 499; AC Helton & J Munker, "Religion and Persecution Should the United States Provide Refuge to German Scientologists?" (1999) IJRL 310; JA Sweeney *Credibility, Proof and Refugee Law* International Journal of Refugee Law (2009) 21 (4): 700-726); HE Cameron, "Refugee Status Determinations and Limits on Memory" (2010) International Journal of Refugee Law (2010) 22(4) 469-511; Professor A Macklin "Truth and Consequences: Credibility Determination in the Refugee Context" Conference paper -- Association Internationale Des Juges Aux Affairs Des Refugies (1998) at 134.

Justice Nicholson of the Federal Court of Australia held in *WALT v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 42 at [9] that:

> I agree with the respondents' submission that the Tribunal did not assess the applicant's claim on the basis of what the Tribunal thought was expected understandings and beliefs from a Christian convert. It was relevant in assessing the credibility of the applicant for the Tribunal to weigh up the applicant's commitment as a child to Christianity and in that regard his lack of the most basic knowledge of the Christian religion was relevant. The Tribunal was entitled to look at evidence arising after the alleged fact of conversion to cast light on the existence of that fact.

Here, the Judge felt the claimant could not show he converted from Islam to Christianity as an 11-year-old, when he was now 17 years of age. At the date of that judgment, there was no imputed basis at law in Australia for religious belief, noting Nicholson J held that the religion ground under the Refugee Convention requires a manifestation or practice of personal faith or doctrine in a like-minded community and does not extend to the perception of religious belief or imputed religious belief.

In New Zealand imputed or perceived religious belief can properly found a claim for refugee or protected person status based on religious grounds. Therefore, *Bastianpour v INS* (above) is essentially followed (see *Re HB* (above) and *Refugee Appeal No 76204* (16 February 2009)). In *Re HB* (above) the Authority fully discussed the good faith requirement in *sur place* claims (at [116]):

> ... whether a person may become a refugee sur place as a result of his or her own actions and whether there is any requirement that those actions be carried out in good faith; or is it possible for refugee status to be granted to an individual who, having no well-founded fear of persecution, deliberately creates circumstances exclusively for the purpose of subsequently justifying a claim for refugee status. Put another way, are issues of good and bad faith relevant to determining whether a refugee claimant in a sur place situation is eligible for refugee status. It is an important issue given the limitless potential for non-refugees to manipulate circumstances to their advantage in order to secure a status to which they would not otherwise be entitled.

Later in *Re HB* the Authority noted (at [164]):

> Our decision to interpret the Refugee Convention as requiring, implicitly, good faith on the part of the asylum seeker turns on a value judgment that the Refugee Convention was intended to protect only those in genuine need of surrogate international protection and that the system must be protected from those who would seek, in a sur place situation, to deliberately manipulate circumstances merely to achieve the advantages which recognition as a refugee confers. The sooner abuses of this kind are detected and eliminated, the longer the integrity of the refugee status determination procedures and the protection afforded by the Convention will enable the bona fide asylum seeker to

> escape persecution. Clearly this is the underlying assumption of the Convention. However, the good faith principle must be applied with caution, not zeal. The precise application of Grahl-Madsen's third category must be determined on a case-by-case basis. It may be that a balancing exercise is called for and a careful assessment made of all the circumstances, including the degree of bad faith, the nature of the harm feared and the degree of risk. See, for example, the earlier discussion of Bastanipour and the passage cited from Hathaway, The Law of Refugee Status. We anticipate that only in clear cases (and the present case is undoubtedly one) will an asylum seeker fall outside of the Refugee Convention by reason of an absence of good faith.

The Netherlands, Belgium and Norway have utilised comprehensive checklists of questions to assess the legitimacy of conversion (Berlit, Doerig & Storey, above, at 654). New Zealand does not currently have one but a range of topics for use in New Zealand might include (with a strong preference for open questions and parenthetical comment and clarification provided):

- Personal background (see Tennet "Immigration and Refugee Law" (2nd ed, LexisNexis NZ Ltd, Wellington, 2014) at 6.6.2(c) "Religion". For example, Malaysia and Iran have a rigid attitude towards apostasy as there is no provision in Shar'ia Law for renunciation of Islam).
- A focus on when conversion was first raised in the refugee claim.
- Country of origin assessment -- extent of persecution (country information).
- How did the conversion process unfold (and how quickly, what level of personal preparation, that is, is there evidence of growing familiar with doctrines and tenets? See *Refugee Appeal No 70283/96* (10 April 1997) where the RSAA exhibited a disinclination to grant refugee status to Iranians who committed *sur place* apostasy)?
- Claimant's attitude to his or her prior religion if any (reason for change).
- Precise details of actual conversion (for example baptism or similar: "crossing the Rubicon".If it occurs too close to the first refusal it is problematic: see *Refugee Appeal No 75907* (28 June 2007) where the appellant in a subsequent claim, the first claim being based on a political belief, failed to mention his conversion).
- Familial reaction to the conversion.
- External manifestation and knowledge of the new faith (for example, place of worship, attendance at services, knowledge of basic tenets and doctrines of the new faith, possessing relevant certificates, involvement in local faith community and how the faith is manifested. In *Germany v Y; Germany v Z* [2013] 1 CMLR 175, [2012] All ER (D) 51 (Sep), ECJ interference with external manifestation of freedom of religion might amount to act of persecution).
- Well-foundedness of the fear: the congruence of New Zealand refugee law on well-founded fear and the Michigan Guidelines on Well-Founded Fear (2004) means that those guidelines properly identify the principles to be applied in New Zealand when issues of well-foundedness are determined: *Refugee Appeal 75692* [2007] NZAR 307 Any aspect which may give rise to questions about the genuineness of the claim, particularly in *sur place* matters: *Wang v MIMA* (2000) 105 FCR 548; [2000] FCA 1599; *Bastianpour v INS* (above).

Rodger Haines QC with A N Molloy as the Tribunal in *Refugee Appeal 76204* (16 February 2009) held in respect to the claimant's record for truthfulness that (at [115]):

> We find the distinction between 'internal' and 'external' artificial. Truthfulness spans both aspects of human existence and it must surely be relevant for the Authority to enquire into both aspects not only because the one relates to the other, but also because the one can shed light on the other. While it is possible for a person to be untruthful about external matters but truthful about matters spiritual, sight must not be lost of the fact that belief in Christ means acceptance of a set of values, one of which is honesty in both the internal and external worlds. We cannot accept that in assessing the genuineness of the appellant's claimed conversion it is irrelevant to take into account his evidence as to the 'external' factors and the circumstances which preceded, accompanied and followed the claimed conversion.

The key methods of testing the veracity of a refugee applicant's claim to (a) faith and (b) membership of a particular faith group in common law jurisdictions are (see M Kagan "Eritrean Pentecostal claims in Egypt" (above):

(1) **The sincerity test** (Kagan at 1206): this tester holds to the logic that if all members of *X* religion hold a well-founded fear of being persecuted it therefore follows, if *A* is sincere in her belief in X, she has a

well-founded fear of being persecuted. If *A* is not a sincere believer in *X*, she is not a refugee. This test has the weakness that an abstract description of practices and beliefs can be learned.

(2) **Religious knowledge quiz** (Kagan at 1210): this again has similar drawbacks as the sincerity test and would suit a claimant capable of finding and using abstract information and doing well in a test situation. That said, a prima facie baseline of knowledge is necessary.

(3) **Theological clarification or dispute** (Kagan at 1214): this line of questioning can cross over into religious disputation and create a hostile environment where a claimant can be reluctant to speak. It can betray a lack of neutrality in the adjudicator.

(4) **Neutral questions on religious beliefs and practices** (Kagan at 1208): questioning pursued in this type of assessment focuses on testing religious sincerity through what a person believes or how he or she practises their religion. An insincere person can of course learn the 'right' answers prior to the interview (see *Refugee Appeals 74862-74865* (19 February 2004); *Refugee Appeal No 72323/2000* (25 September 2001)).

(5) **The eye of the Persecutor**: this test (see Kagan at 1221) proposes that refugee status does not depend on the genuine religiosity of refugee claimants and considers the likelihood of persecution based on imputed religious beliefs. In *United States v Bastanipour*, an asylum seeker claimed that he had converted from Islam to Christianity in prison in the United States, and he feared execution as an apostate if returned to his native Iran. The Board of Immigration Appeals rejected his asylum request noting he was not baptised, had not formally joined a church and continued to eat pork-free meals. The Court of Appeals vacated the decision because the BIA ignored "what would count as conversion in the eyes of an Iranian religious judge, which is the only thing that would count so far as the danger to Bastanipour is concerned" (at 1132). The art 1A(2) definition of "refugee" in the Refugee Convention comes from a "eye of the persecutor" perspective.

(6) **Narrative focus** (Kagan at 1224): this test maintains that the adjudicator should focus on the observable act as a trigger for persecution, such as actual attendance at church. Narrative questions do not involve an element of pre-judgement and allow the adjudicator to apply to ordinary legal fact-finding. Open-ended questions allow the claimant to explain the significance of the religion to him or her and this method is endorsed by the UNHCR.

THE QUIET BELIEVER CONCEPT -- AND WHY IT IS WRONG

It is key to note that a claimant need not have openly expressed his or her religion in order to obtain protection as a Convention refugee. A person has the right to practise his or her religion. This is a fundamental human right. As a result, if the evidence indicates that a person will suffer persecution were he or she to practise his or her religion openly, then this is a sufficient basis to sustain a claim to refugee status. It is not open to the Refugee and Protection Officer (RPO) or Tribunal to reject the claim by holding that the person will not face any risk if he or she maintains silence about his or her religious beliefs (see *Ahmed v Secretary of State for the Home Department* [1999] EWJ No 5882 (CA)).

This "quiet believer" analysis is flawed because religious persecution exists where a claimant is prevented from practising his religion due to fear.

ANALOGOUS AREA OF LAW: DE FACTO RELATIONSHIPS

The question of whether someone is in a de facto relationship requires nuanced assessment and there are similarities to the assessment of whether one is a bona fide member of a religious group, that is, whether they have converted.

The Property (Relationships) Act 1976 (PRA), s 2D provides statutory guidance in the relationship property model:

> (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
>
> (a) the duration of the relationship:
>
> (b) the nature and extent of common residence:
>
> (c) whether or not a sexual relationship exists:
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
>
> (e) the ownership, use, and acquisition of property:

(f) the degree of mutual commitment to a shared life:
(g) the care and support of children:
(h) the performance of household duties:
(i) the reputation and public aspects of the relationship.

In a sense, the analogy asks whether one is married to one's faith -- with de facto status apt because of the need to dig deeper in the absence of de jure marriage.

Simon Jefferson QC's article which discusses the challenges of the judicial assessment as to whether a de facto relationship exists ("De facto or "Friends with Benefits?" (2007) 5 NZFLJ 304) is of distinct relevance (by analogy) in the religious conversion area. Jefferson notes, at 306 (footnotes omitted):

> What is obvious is that a prescriptive approach is not likely to be helpful. Establishing the existence of a de facto relationship involves more than merely ticking off the statutory indicia. What is required is a rigorous exercise of intensive examination of the conduct of the parties and their expectations, to establish when the relationship can be said to have assumed a significant degree of mutual commitment and permanency.

This may be particularly relevant when timing is an issue (such as in an intensification case or when the time of actual conversion is an issue.

As the majority in *Ruka v DSW* [1997] 1 NZLR 154 found in assessing whether a de facto relationship existed in the shadow of social welfare fraud and domestic violence, the statutory context was of great importance in determining what is a relationship in the nature of marriage. Richardson P with Blanchard and Thomas JJ found that although checklists could give assistance in deciding some cases, it was more appropriate to begin an examination as to whether a relationship in the nature of marriage existed in relation to a beneficiary by considering the purpose of the social welfare legislation. A circumstance which could be seen to be directly related to that purpose was to be given particular weight in determining whether a relationship was one in the nature of marriage.

FACTORS IN A POSSIBLE TEST FOR RELIGIOUS CONVERSION

Based on s 2D of the PRA, a test in the religious conversion context might be (see Berlit et al (above) at 655-660):

> In determining whether a person has converted to a faith, all the circumstances of the person's commitment are to be taken into account, including any of the following matters that are relevant in a particular case:
>
> (a) the date, time and place of the conversion
> (b) the religious faith the claimant has converted to and which group within that faith has been joined
> (c) the country of origin and what is that country's attitude to the claimed faith?
> (d) the nature and extent of the claimant's manifestation of the religious faith; (for example, is the claimant's manifestation of the faith public or private? Has he or she been baptised or have any documentary proof of conversion?)
> (e) the claimant's knowledge of the core creed, dogma, doctrines and tenets of the faith?
> (f) the claimant's degree of commitment to the faith presently (and prospectively)
> (g) whether the claimant is a truthful witness
> (h) whether there are any external clues of his or her inner attitude (see Berlit et al at 653 and MN and Ors (Ahmadis country conditions -- risk) Pakistan CG [2012] UKUT 389 (IAC))
> (i) whether s 134(3) concerns exist
> (j) whether there are *Bastianpour* grounds (with reference to the Hathaway Procedure in *BZ (Sri Lanka)* (above)) notwithstanding a lack of credibility and/or bad faith.

Until (if ever) statutory indicia were enacted in the religious conversion area, a soft list of factors might be useful to adjudicators and the Bar. The CREDO study undertaken by the International Association of Refugee Law Judges (see Berlit et al at 652) created a checklist and noted in terms of the claimant's credibility:

> The applicant's basic story should meet the following requirements in order to be regarded as credible: It should be sufficiently detailed and internally consistent throughout the proceedings; numerous major inconsistencies and alterations in statements count against credibility); the story should be consistent with country information; it should be brought forward in a timely manner; late submissions of statements may affect the general credibility negatively, in particular if no sound reason is given for it (where relevant); the core he flight narrative should be corroborated with evidence.

CONCLUSION

As can be seen, the need to assess and determine the conversion or intensification of one's faith is problematic. The nuances to one's belief make the assessment near impossible. However, the Refugee Status Branch, Immigration and Protection Tribunal and the courts are tasked with this on a regular basis. Drawing analogy from the PRA, s 2D, a list of factors (whether statutory or a soft list in a Practice Note) could serve as a guide to help adjudicators determine the genuineness of a conversion or intensification. However, as with the s 2D guidelines, establishing the credibility of a person's conversion involves more than merely ticking off a list of factors. There is a requirement for rigorous exercise of intensive examination of the conduct of the applicant, as in accordance with the need for non-refoulement.

On a practical note, any application for leave to appeal under s 245 of the Immigration Act needs to focus on an error of law. In limited circumstances, cumulative serious errors of fact may amount to an error of law (*Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 145-149; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA); *Southern Ocean Trawlers Ltd v Director-General of Agriculture & Fisheries* [1993] 2 NZLR 53 (CA). See Graham Taylor *Judicial Review A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at 15.12 et seq).

The likely fertile areas for appeal or review would be the *Bastianpour* imputed grounds, attacking pronouncements of bad faith or the well-foundedness of fear. Appellate reviewers (tribunal or the courts) will likely continue to consider factual issues relating to credibility.

Testing the genuineness of Damascene change will be forever a challenge.[ ]