FEDERAL COURT OF AUSTRALIA

Marshood v Minister for Immigration & Multicultural Affairs [2000] FCA 1536

IMMIGRATION – Refugees – application for protection visa – whether applicant had well-founded fear of persecution on the ground of religion – determination of what constitutes persecution under the Geneva Convention – whether well-founded fear of religious persecution where Islam is the religion of Jordan under its constitution – under Shari'a (ie Islamic) law apostasy is a crime punishable by death – where there is no statute under the criminal or municipal law of Jordan which renders apostasy a crime – whether Shari'a law for apostasy needs to be enforceable at Government level and is enforced – evidence indicates that Shari'a law for apostasy is not enforced officially nor privately – *Migration Act 1958* (Cth) s 476(1)(e) – whether application is a re-agitation of facts.

Migration Act 1958 (Cth) s 476(1)(e)

Applicant A & Anor v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225
Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379
Guo v Minister for Immigration and Ethnic Affairs (1996) 64 FCR 151
McDonald v Director-General of Social Security (1984) 1 FCR 354
Munkayilar v Minister for Immigration and Multicultural Affairs (1997) 49 ALD 588
Minister for Immigration and Multicultural Affairs v Epeabaka (1999) 84 FCR 411
Minister for Immigration and Ethnic Affairs v Guo & Anor (1997) 191 CLR 559
Minister for Immigration and Multicultural Affairs v Prathapan (1998) 86 FCR 95
Minister for Immigration and Ethnic Affairs v Rajalingam (1999) 93 FCR 220
Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543
Minister *for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259
Nagalingam v Minister for Immigration and Ethnic Affairs (unreported, Federal Court, Olney J, 22 September 1992)
Ntideo v Minister for Immigration and Multicultural Affairs (1997) 50 ALD 78
Randhawa v Minister for Immigration and Ethnic Affairs (1994) 124 ALR 265
Selvadurai v Minister for Immigration and Ethnic Affairs (1994) 34 ALD 347

WALID ABU MARSHOOD AND KADIJEH WALID ABDALLA MARSHOOD
v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

N304 OF 2000

CONTI J
30 OCTOBER 2000
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 304 OF 2000**

BETWEEN:	**WALID ABU MARSHOOD AND KADIJEH WALID ABDALLA MARSHOOD** **APPLICANTS**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **RESPONDENT**

JUDGE: **CONTI J**

DATE OF ORDER: **30 OCTOBER 2000**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The Application be dismissed.

2. The Applicants pay the costs of the Respondent of the proceedings.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 304 OF 2000**

BETWEEN:	**WALID ABU MARSHOOD AND KADIJEH WALID ABDALLA MARSHOOD** **APPLICANTS**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **RESPONDENT**

JUDGE:	**CONTI J**
DATE:	**30 OCTOBER 2000**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This Application for Review is brought against the Decision of Dr Peter Nygh, a member of the Refugee Review Tribunal ("RRT"), which was made on 7 March 2000, whereby he affirmed the decision of the Delegate of the Minister not to grant the applications of the Applicants for protection visas. This is the second occasion when these applications for protection visas have been before the Federal Court for judicial review. On the first occasion, Kiefel J remitted the applications to the Tribunal for further consideration according to law upon two bases under s476(1)(e) of the Migration Act 1958 (Cth), the first being that the RRT did not apply the question whether there was a real chance of persecution to the evidence available, and secondly, that the RRT did not ask the question whether the protection of Jordan was available with respect to the persecution which the Applicants feared. The basis for the Applicants' claim to refugee status, as defined by Article 1A(2) of the Geneva Convention relating to the Status of Refugees (as amended by the 1967 Protocol relating to the Status of Refugees), is their fear of persecution by reason of their conversion from Muslim to Christian beliefs. Section 36(2) of the Migration Act 1958 provides as follows:

"(2) A criterion for a protection visa is that the application for the visa is a non-citizen of Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

2 Section 476(1)(e) of the Act provides so far as is material as follows:

"(1) ...application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

...

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;"

3 In *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, the joint judgment of Brennan CJ and Dawson, Toohey, Gaudron, McHugh and Gummow JJ stipulated the elements of the definition of "refugee" in Article 1A(2) as fourfold, namely:

"(1) the applicant must be outside his or her country of nationality;

(2) the applicant must fear 'persecution';

(3) the applicant must fear such persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; and

(4) the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons."

It is only the fourth element that arises here for consideration. As already indicated, the relevant fear of persecution is claimed by the Application to be for reasons of religion.

4 As only the male Applicant has made substantive claims, and the application of the female Applicant as the wife of the male Applicant depended on his application as a member of his family unit (see *Munkayilar v Minister for Immigration and Multicultural Affairs (1997) 49 ALD 588)*, it suffices to pay regard to the application of the male Applicant on the basis that the outcome should apply to both Applicants, and hence where appropriate to refer to the Applicants together as "Applicant".

5 The circumstances concerning the Applicant are comprehensively recorded over

many pages of the Decision. I summarise the same as found by the Tribunal by way of the following outline:

(i) The Applicant was born in the West Bank in what was then the British Mandate of Palestine. He is ethnically a Palestinian Arab and has Jordanian citizenship; he has two brothers and a sister living in the West Bank and one brother, four sons and two daughters living in Amman, Jordan.

(ii) The Applicant's entire family are Muslim by birth. Though the Applicant was born into the Muslim faith, he had been interested in Christianity since his school days. He lived in Amman, Jordan in 1967-1968 and then in Saudi Arabia from 1969 to 1991, and thereafter returned to Jordan and lived there from 1991 to 1997, after which he has lived in Australia. His return to Jordan was compelled by Saudi Arabian authorities in the context of the Gulf War hostilities. After leaving school, he lived and worked in Kuwait until 1953, and then in Iraq until 1956, and then in Germany until 1961, after which he returned to the West Bank and later married.

(iii) Prior to coming to Australia, indeed from his youth, the Applicant has been interested in Christianity. He had attended a Christian Church whilst living in Germany as a single man. The Applicant's wife and her family had attended a Christian church and convent nearby on the West Bank. After his marriage, the Applicant lived for five years on the West Bank, before moving to Amman in Jordan as above stated. The Applicant had a longstanding friendship with a person who attended a Christian Church in Zarqa, Jordan. The Applicant from time to time attended that Church when visiting this friend. After arrival in Australia, the Applicant commenced attending the Penrith Christian Life Centre and was baptised there (along with his wife), and they are now regular churchgoers. There is no suggestion that their present devotion to the Christian religion is otherwise than genuine.

(iv) The Applicant fears that if he and his wife are compelled to return to their country of citizenship, namely Jordan, they will be punished as apostates by reason of their conversion from the Muslim religion to Christianity. The Tribunal does not appear to have recorded any specific finding as to whether such fear is held subjectively by the Applicant for reasons of religion. What the Tribunal has found, after a comprehensive

review of the material placed before it, is that any such fear is not well-founded.

(v) A substantial basis for such expression of fear is a letter bearing date 1 April 2000 obtained from the Grand Mufti, being the highest authority on Shari'a law (which is Islamic law or at least the manifestation of it prevailing in Jordan, where Islam is the State Religion), being the letter referred to in [7(i)] below. Such letter was obtained by the Applicant's daughter in Jordan and forwarded to the Applicant, and the letter was placed before this Court on the first occasion referred to in [1] above.

6 The two grounds for review are framed in the Application for an Order for Review as follows:

> *"2. S476(1)(e) of the Migration Act 1958*
>
> *- the decision of the RRT involved an error of law constituted by an incorrect application of the law to the facts as found*
> *- in particular, the RRT incorrectly applied the law as to meaning of persecution in failing to acknowledge Shari'a law, re executing apostates, as constituting persecution.*
>
> *3. S476(1)(e) of the Migration Act 1958*
>
> *- the decision of the RRT involved an error of law constituted by an incorrect application of the law to the facts as found*
> *- in particular, the RRT incorrectly applied the law as to whether there was a "real chance" of persecution by failing, in relation to the death threat being made in the context of Shari'a law, to address the question "what if I'm wrong?"*
> *- in that context, the RRT failed to apply the law to the issue of whether the authorities could protect the applicants' from persecution."*

Such grounds for review are paraphrased in Counsel's written submissions before me in essence as follows:

> *"16. The RRT erred in applying the law to the facts as found by not considering, and finding, that the Shari'a Law constituted persecution per se.*
>
> *21. The RRT erred in applying the law to the facts in relation to Jordan being able to provide effective protection to the applicant."*

7 Before addressing each of these two grounds for review, it is appropriate to identify below the written documentary material the subject of Dr Nygh's consideration as to Jordanian policies and practices which have prevailed and/or are still prevailing in Jordan concerning freedom to practice religion, and in particular Christianity. This documentary material appears sequentially under the heading "Claims and Evidence" commencing on page 3 of the RRT's Decision as follows (all page references are to the Decision):

(i) The letter dated 1 April 1999 obtained by the Applicant's daughter from the Grand Mufti, being the highest authority on Shari'a law in Jordan, concerning the consequences that befall apostates in Jordan, being consequences which include death (page 6);

(ii) The Penal Law of Islam page 109 (page 6);

(iii) An otherwise unidentified report dated 15 December 1998 concerning Muslim extremists reportedly plotting to destabilise Jordan, and which speaks of Muslim extremists in Jordan seeking to institute Shari'a laws, but having no friends of Jordanian royalty (page 7);

(iv) The United Stated Department of State "Annual Report on Religious Freedom for 1999 : Jordan" (CISNET CX37698) as to the absence of any Jordanian national law equivalent to Shari'a's law; this Report also speaks of a Muslim population in Jordan of over 90% and a Christian population of about 6%, and of non-interference by the Government with public worship by that minority (page 7);

(v) US Department of State 1998 "Country Reports on Human Rights Practices for 1998 – Jordan", 26 February 1999 (Refugee Review Tribunal Library), which makes reference to Islamic or Shari'a courts in Jordan having jurisdiction over property matters in relation to marriage, divorce and inheritance; reference is also made to Muslims who convert to other faiths complaining of social and government discrimination; no reference is made however to Shari'a courts applying Shari'a law in respect of apostasy (page 7);

(vi) A letter dated 7 June 1999 sent by the Applicant's son to the Applicant which warned of Jordan being "intolerable hell", and that the Applicant could "in no way live here" (page 8);

(vii) An Article "The Wounded Church" written by Patrick Sookhdeo for "On Being" (October 1993), which referred to Saudi Arabia, Iran, Sudan and Pakistan as the "currently four Islamic states", and to Afghanistan as an addition to be made to that list, but which also stated "Shari'a punishments are not applied in Jordan," and that "The state itself will not punish a person for converting from Islam to Christianity", something which the subject Decision asserted to have been "…confirmed in numerous other reports such as Unit States Dept of State Country Reports on Jordan" (pages 8-9);

(viii) A repeated reference again to the US Dept of State "Annual Report on Religious Freedom for 1999": Jordan, 2 September 1999 (CISNET CX37698), which further reported on "mostly Christian" "predominantly Christian" and "significant Christian" populations in cities or towns in Jordan (page 9);

(ix) Southam Inc, 21 October 1994, "Enemies of Peace – Hamas" (The Ottawa Citizen) containing the founding charter of the Hamas, and Associated Press 1996, A.P. Worldstream, 12 March 1996 which speaks of "Hamas' disparate elements derailing the peace process" (page 10);

(x) The Research Directorate, Immigration and Refugee Board, Ottawa, 1997, "Information on Christians in Jordan", Canadian Report JOR28169.E, 26 November 1997 (CISNET CX 38503), which states that "Jordan has a liberal and modernist tradition with regard to Islam, and the regime does not tolerate any deviation of the good relations between Christians and Muslims", and further that although Christians are less than 10% of the total population, "they have disproportionately large representation in the Jordanian parliament and hold important government portfolios, ambassadorial appointments abroad and positions of military rank" (pages 10-11);

(xi) Letter sent by fax to the Applicant by his brother Adeeb after the Tribunal's first Decision in March 1999 containing threats against the Applicant (pages 11-12);

(xii) Country Information Report No 114/96 – Jordan : Freedom of Religion – CIS Request JOR03199, 30 April 1996 which stated that the Applicant could face death from the community and from his own family if he returned to Jordan as a convert to Christianity and would not be protected by the government of Jordan, though Christian Arabs could freely practise their religion so long as they had not converted to Christianity (CISNET CX 15826) (pages 11-12);

(xiii) Canadian Research Directorate, Immigration and Refugee Board 1999 "The treatment of persons who have converted to Christianity from Islam", which states an unawareness of mistreatment of Muslims who converted to Christianity (page 13);

(xiv) "Conversion from Islam to Christianity, and whether a person who converted would be legally liable to prosecution in a Shari'a's Court", Canadian Report JOR20250,E, 13 April 1995 – Documentation, Information and Research Branch, Immigration and Refugee Board which speaks of converts to Christianity from Islam as liable to prosecution in Shari'a courts(page 13);

(xv) Country Reports 1994, which indicated that Muslims who converted to other faiths complained of social and government discrimination and that the government of Jordan did not recognise the legality of such conversions; this was incorporated into document (xiv) above, and in context may have been speaking of Islamic law and not State law (page 13).

In addition, Dr Nygh reviewed Affidavit and statutory declaration evidence, and a written statement, provided to the RRT by the Applicant.

8 In Dr Nygh's ensuing "Findings and Reasons", he referred to certain additional written material as follows:

(i) Islam and Human Rights, Westview Press, London by A. Mayer (1991) pages 169-170 (page 16);

(ii) The British Broadcasting Corporation 1996 : "Minister welcomes Israel's President's visit, replies to Hamas charges", 6 November 1996 (pages 17);

(iii) Country Information Service, 1999 Country Information Report No. 388/99 – Jordan : Contemporary politics (sourced from DFAT advice of 31 October 1999) (also CISNET CS 38503) (page 17);

(iv) Reuters Business Briefing 1999, "Jordan Government Reportedly Faces Legal Action over Hamas Deportations", 27 November 1999, BBC Monitoring Service, Middle East) (page 18);

(v) Mews S, 1989, Religion in Politics, Longman, Harlow, Essex (page 18);

(vi) Krieger J & Others, 1993, The Oxford Companion to Politics of the World, Oxford University Press, Oxford (page 18);

(vii) Banks, Day and Muller, 1995, Political Handbook of the World : 1995-1996, CSA Publications, New York, p.491 (page 18);

(viii) A further extract from the abovementioned CX15826 (page 19);

(ix) Country Information Service, Country Information Report 146/97 : Jordan 22 May 1997 (ie a sequel to [12(xi)] above) (page 19);

(x) Canadian Reports of 19 August 1999 (JOR32509.E) and 13 April 1995 (JOR20250.E) 13 April 1995.

9 Largely in the context of referring to the foregoing documentary materials in [8] above, as well as those in [7] above, Dr Nygh made the following preliminary findings:

(i) "… the Applicant's most adverse experiences in relation to the Islamic faith occurred during his period of time in Saudi Arabia" (page 15);

(ii) "I accept that Shari'a law punishes apostasy and I accept that the letter of the Grand Mufti, submitted by the Applicant, correctly states the position of Shari'a law. However, one of the issues I must determine is whether apostasy is a crime under the law of the Kingdom of Jordan. The Applicant's claim that under the law in Jordan apostasy is a crime is clearly wrong". (page 16);

(iii) "…the Applicant claims to fear persecution by the government. His claim in this regard is unclear, but is based it seems on the case of the public servant Fazal who converted to Christianity and was forced to divorce his wife. He lost his job, and later he disappeared. This occurred on the West Bank some time before 1967. I am not satisfied that this incident, which took place over 30 years ago in a territory no longer part of Jordan, establishes that the government pursues apostates today, if it ever did. Nor am I satisfied that it indicates that the applicant is likely to disappear if he returns to Jordan today. To the contrary, his own evidence establishes that the Government of Jordan considers the killing of apostates to be a crime and actively pursues offenders." (pages 16-17);

10 Thereafter on page 17 of the Decision, Dr Nygh framed the issues which he considered he was required to address as follows:

> "The Applicant…claims to fear persecution from Hamas, the Muslim Brotherhood, the Islamic Liberation Party, and finally from his brother Adeeb and the latter's family. The issues are: (a) whether there exists a real chance of persecution on the part of these organisations or persons, and (b) if so, whether the Jordanian authorities can and will provide effective protection."

11 In addressing the two foregoing issues in the sequence so stated, Dr Nygh first made the following specific findings as to each of such sources of apprehension on the Applicant's part:

(i) "Hamas is an illegal organisation in Jordan…The independent evidence indicates that members of Hamas are fundamentalist Muslims. However, the purpose of the organisation is to establish a Palestinian state in place of Israel. The Applicant can point to no examples of Hamas having pursued or punished a person for apostasy, or

indeed of the organisation pursuing any individual or domestic agenda in relation to the implementation of Shari'a law. The Applicant could think of only one incident, which involved Hamas having pursued an individual, and this occurred in 1991. He does not know what the basis of the killing was. It is therefore difficult to accept that Hamas poses a threat to a man such as the Applicant. Furthermore, as indicated above, the organisation does not have a legitimate presence in Jordan, and moves have been taken by the authorities as far back as 1996 to remove its members from Jordan. The independent evidence indicates that the authorities take action against members of Hamas who are found to have broken the law, or threaten to breach it." (pages 17-18).

(ii) "The Applicant says that he also fears punishment from the Muslim Brotherhood, and he has witnessed how they talk and the way they act in Saudi Arabia and Jordan. However, the behaviour of the Muslim Brotherhood in Saudi Arabia would differ markedly from that in Jordan where they are a legal organisation and have members who are elected to the Jordanian parliament. Once again, the Applicant is comparing what occurs in a fundamentalist Islamic State which applies Shari'a law, and what take place in a more tolerant Islamic country where Shari'a law is not applied outside issues of marriage, divorce and inheritance" (page 18).

"the Muslim Brotherhood, which is represented in Parliament, is not permitted to disrupt the goals of the monarchy, which include keeping fundamentalism under control and pursuing the peace process…There is no dispute that the Muslim Brotherhood pursues fundamentalist goals, including the introduction of Shari'a law in Jordan. However, the Applicant does not know of any examples of the Brotherhood's members having sought out or punished apostates. Furthermore the independent evidence indicates (see CX38503) that the Jordanian authorities have arrested members of the Brotherhood." (pages 18-19).

(iii) "There is no evidence to suggest that the Islamic Liberation Party have any goals other than political ones. When the Applicant was asked whether there were any cases of individuals being punished by the Party for breaches of Shari'a law, the applicant recalled the case of a man who murdered his sister in 1988 because she had converted to Christianity. It was not certain whether the man belonged to any fundamentalist

organisation. This man was sought by the police and eventually had to flee Jordan. This account does not support the Applicant's case. Rather, it indicates that where an apostate is murdered, the police will intervene and hunt down the murderer. It indicates that the authorities in Jordan prosecute crimes committed against apostates" (page 19).

(iv) "…the weight of independent evidence that exists on the subject, in relation to Jordan, indicates that apostates are not at risk of being punished" (page 19), and in that context Dr Nygh cited *Applicant A & Anor v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233 (per Brennan J):

> *"A person ordinarily looks to the 'country of his nationality' for protection of his fundamental rights and freedoms…the definition of 'refugee' must be speaking of a fear of persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality." (pages 19-20)*

(v) As to the Applicant's own family, Dr Nygh reviewed the Applicant's evidence in some detail concerning what had been communicated to him orally by his daughter and in writing by his son concerning contemporary life for apostates generally and as to what might befall him if he returned to Jordan, but re-affirmed his earlier conclusions inter alia as to the law of Shari'a being inapplicable as the national law or part of the national law of Jordan. He found that he could not rely on the son's letter as credible evidence, and that the sending of the Applicant's brother's letter had probably been arranged by the Applicant's daughter to assist the previous case before the Federal Court" (pages 21-22).

12 In selecting the extracts in [9] and [11] above, I am conscious of the risk of not affording adequate recognition to the full extent of Dr Nygh's impressive research and re-capitulation of pertinent contemporary life in Jordan and of the regulation thereof by the Jordanian government, and also of relevant practices of public administration. Dr Nygh expressed the following conclusions at page 20 of the Decision in relation to persecution of apostates stemming from Islamic organisations and authorities:

> *"The evidence before the Tribunal clearly establishes to my satisfaction that the authorities in Jordan do not tolerate the imposition of Shari'a law in*

> *relation to the punishment of crimes whether civil or religious. The Jordanian Constitution provides for freedom of religion, and this is upheld in practice… There is no evidence that the police in Jordan would not protect an apostate; quite the opposite. I am satisfied on the basis of the available evidence that persecution of apostates is not officially tolerated or uncontrollable by the authorities, in Jordan.*
>
> …
>
> *Having regard to the independent evidence and more particularly, the applicant's oral evidence, about the treatment of apostates in Jordan and the known activities of the members of the Hamas, the Muslim Brotherhood and the Islamic Liberation Party, I find that the Applicant does not face a real chance of persecution from members of these organisations in Jordan. There is no evidence which indicates that members of any of these organisations have ever pursued or killed apostates in Jordan. I note the observation of Dawson J in the High Court decision of Applicant A (ante) at 396…Whilst there must be a fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear." (The above reference to "Applicant A" is to Applicant A & Anor v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225).*

It is apparent from Dr Nygh's reasons for decision that the Applicant's fears were essentially in the Applicant's mind alone and not objectively demonstrated. Indeed in the light of the contrast between Jordan and Saudi Arabia (see [7](vii)] above, it is not entirely without significance that the Applicant appears to have tolerated life in Saudi Arabia and only returned to Jordan because he was given no choice.

13 Dr Nygh was conscious of the difficulties of proof experienced by applicants for refugee status, and of the rarity of the appropriateness of speaking in terms of onus of proof: see *Nagalingam v Minister for Immigration and Ethnic Affairs*, unreported, Federal Court, Olney J at 18, 22 September 1992 and *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 357, but that such difficulties should not lead to an uncritical acceptance of any and all of the allegations made by applicants: *Randhawa v Minister for Immigration and Ethnic Affairs* (1994) 124 ALR 265 at 278. Nor does it mean, Dr Nygh further observed, that the Tribunal must have rebutting evidence available before it can find a particular factual assertion by an applicant is not made out: *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347 at 348.

14 Following his findings adverse to the Applicant concerning persecution from Jordanian official or public authorities or from sectarian or religious authorities, Dr Nygh

addressed the contentions advanced by the Applicant as to persecution by his own family members, and in particular persecution by his brother Adeeb, who was said to be a fundamentalist Muslim, and found as follows:

> *"I do not accept that the applicant faces death at the hands of Adeeb or his family. I find it more probable that the applicant's daughter arranged for a suitably threatening letter to be sent to the applicant under the hand of Adeeb. The applicant was vague about its date and could not recall if he ever received the original. In his statement of 29 January the applicant described how he requested his daughter to approach the Grand Mufti to write an opinion on apostasy while his application in the Federal Court was pending. I have already referred to his son's letter. The purpose of all these letters was to assist her father in his application before the Federal Court. While I respect the opinion of the Grand Mufti as a correct expression of a religious law that binds all Muslims whether in Australia or Jordan, I do not accept the other two letters as genuinely representing the feelings and experiences of their authors. I find that the chance of the applicant and his wife suffering persecution in Jordan from relatives, on account of their apostasy, is remote."*

In the result, Dr Nygh concluded to the following effect (page 23):

> *"I find that the chance of the applicant and his wife facing discrimination in the sense of a serious detriment or disadvantage is remote, particularly when I take into account his age and the social and economic support system in Amman that exists by virtue of his children who reside there. A degree of social ostracism from former Muslim friends and acquaintances is well possible, but this is not, in the circumstances, of such seriousness as to amount to discrimination. There may be economic discrimination against him on the part of Muslims, but there is no evidence to indicate that he would be seriously affected. There is a substantial Christian minority in Jordan. The applicant may choose to reside in towns close to Amman such as Fuheis, which is predominantly Christian. Other predominantly Christian towns in Jordan include Husn, and Madaba and Karak that have significant Christian populations. I do not suggest these towns as a means of relocation in the sense discussed in cases such as Randawa v MILGEA (1994) 52 FCR 457, as I have decided that the chance of the Applicant and his wife suffering a significant detriment or disadvantage amounting to persecution in Jordan is remote."*

15 Having so concluded as set out in [12-14] above as to the absence of any real chance of persecution, it became unnecessary to consider the further question as to the effectiveness of protection of the Applicants upon their return to Jordan. Nevertheless Dr Nygh added the following finding in that regard (on page 23):

> *"Since I have concluded that the applicant does not face any real chance of persecution on the part of his brother or others should he return to Jordan, it is not necessary to consider whether the authorities in Jordan are able to give*

> *effective protection against any such threat. However, I have referred to the applicant's own evidence about the police pursuing a man who killed his sister for apostasy as an indication that the police in Jordan will not simply sit by and watch, as the applicant has submitted. Of course, as the applicant pointed out, the police prosecution of the murderer did not assist the victim. But, as it was stated in the decision of the Federal Court of Thiyagarajah v MIMA (1997) 143 ALR 118 at 121 "'protection by no means implies that the authorities must, or can, provide absolute guarantees against harm'."*

16 Returning to the first ground for review which has been propounded (extracted as ground 2 and paraphrased in [6] above), the implicit predication or assumption underpinning the same is that apostasy is a crime under Jordanian law and has been so established before the RRT, and that such crime will be enforced accordingly. Such predication or assumption is contrary to the RRT's findings recorded in [11] and [12] above, being findings to the effect that Shari'a law has a limited role in Jordan, being confined essentially to family law divorce and inheritance issues, and is not incorporated into or otherwise treated as part of the criminal law of Jordan or enforced as such. Dr Nygh's bases for those propositions are contained in the materials cited particularly in paragraphs (iv), (vii), (viii), (x) and (xiii) of [7] above, and virtually all of the materials cited in paragraph [8] above. It is true that some support for the contrary view may be found in some other materials which Dr Nygh cited in [7] above but these seem to have mainly preceded in point of time reports upon which Dr Nygh has relied. As the decision-maker, Dr Nygh was entitled to determine which of any conflicting research material should be given the most weight as postulating the more likely, realistic and authentic circumstances prevailing at the time of the application before the RRT. Dr Nygh clearly was entitled, upon the basis of material before him, that the killing of a person in Jordan is a crime in Jordan, including the killing of an apostate, in contrast to merely committing apostasy (see [9(iii)] above. The proposition advanced by the Applicant before me to the effect that Shari'a law is part of the law of Jordan because Islam is the State religion of Jordan is a non sequitur. So is the alleged corollary to such proposition, namely that apostasy is a "persecutory act per se".

17 Counsel for the Minister thus rightly submitted that the findings of fact which Dr Nygh made and the ensuing conclusions which he reached were reasonably open upon the bases and for the reasons Dr Nygh has given (*Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at [20-26]. Dr Nygh was entitled to prefer independent country information and commentaries etc concerning Jordanian affairs,

policies, conduct, practices and conditions to the applicant's accounts and those of his family concerning the same or similar matters. Significantly in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 428, McHugh J said:

> *"It was unlikely… that a State party was expected to grant refugee status to a person whose account, although plausible and coherent, was inconsistent with the State's understanding of conditions in his or her country of nationality."*

The first submission of the Applicant does not purport to address the basis of the RRT's rejection of the Applicant's claims that apostasy is a crime under Jordanian law, namely that Shari'a law is limited in scope and enforcement to family divorce and inheritance issues, and has no recognition or implementation in Jordan beyond the same. There was a clearly available basis for Dr Nygh's rejection of such claims: see in particular the materials identified in sub-paragraphs (iv), (v), (vii), (x), (xiii) of [7] above, which Dr Nygh was entitled to prefer to that identified in (xii) and (xiv) of [7] above: *Guo,* supra at 574-576. The Applicant's first submission seems to proceed upon the basis that the Applicant and his family must be taken to be portraying the realities relevantly of Jordanian life both accurately and truthfully, but no such presumption can be so advanced (see [13] above, and see also *Ntideo v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 78 at 81). I do not think that there is any substance in this first ground.

18 As to the second ground for the Application set out in [6] above, no complaint is advanced by the Applicant for the adoption by the RRT of the "real chance" test. Though the leading judgment of the High Court in *Guo* expressed the view that Tribunals would be on safer ground to use the precise words of the Convention, namely "well founded" (571-573), it is clear enough that the "real chance" test remains valid. The first difficulty with the formulation of the Applicant's second ground for review (see again [6] above) is the inclusion of reference to the notion "what if I'm wrong". Such notion was used in the following passage in the judgment of Sackville J in *Minister for Immigration and Multicultural Affairs v Rajalingham* (1999) 93 FCR 220 at 241 as follows:

> *"… the question of whether the RRT should have considered the possibility that its findings of fact might not have been correct is to be determined by reference to the RRT's own reasons. If a fair reading of the reasons as a whole shows that the RRT itself had "no real doubt" (to use the language in Guo) claimed events had not occurred, there is no warrant for holding that it should have considered the possibility that its findings were wrong. Reasonable speculation as to whether the applicant had a well-founded fear*

> *of persecution does not require a possibility inconsistent with the RRT's own findings to be pursued. A "fair reading" of the reasons incorporates the principle that the RRT's reasons should receive a "beneficial construction" and should not be "construed minutely and finely with an eye keenly attuned to the perception of error" Wu Shan Liang at 271-272, quoting Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 at 287."*

(See also Sackville J at 249, and Kenny J to similar effect at 257 and 259). The reasoning and conclusions of Dr Nygh at [9-12] above portrays no harbouring of any reservation or "real doubt", to adopt his Honour's expression .

19 As elaborated in the Applicant's written submissions, the Applicant thereafter seeks to build upon the unchallenged circumstance that Islam is the State religion of Jordan by virtue of the Jordanian Constitution, and thereafter places reliance upon Country Information Report dated 31 March 1997 CX22577 for the proposition that there is an "acknowledged lack of judicial and police independence in Jordan" and "a lack of effective police protection". The Applicant contends that whilst executions for apostasy may be rare, so too is the occurrence of apostasy which calls for execution by death under Shari'a Law.

20 CX22577 was not referred to by Dr Nygh in his Decision. The whole of the page of CX22577 to which reference is specifically made by the Applicant is reproduced below:

> *"Jordan's human rights record is better than that of many other countries in the region, and in some respects it continues to improve. However, concerns remain regarding freedom of expression, Palestinian rights, access to justice, economic-based patronage and exclusion, women's issues, and treatment of prisoners and foreign guest workers.*
>
> *Civil and Political Rights*
> *Jordan is party to the principal international human rights treaties the ICCPR, the ICESCR, CEDAW, the convention against torture, the convention on the rights of the child and the racial discrimination convention. However, a prominent Amman-based international lawyers noted that these have not been locally ratified in accordance with the constitution. Many of the rights accorded by these treaties are not recognised in local practice. While Jordan's constitution prohibits, for example, racial discrimination, it does occur, sometimes sanctioned by laws and regulations."*

However on the following page, reference is made to the independence of Jordan's judiciary in the following terms:

> *"Although judges are appointed by Royal Decree, Jordan's Judiciary has considerable political independence and has made rulings unfavourable to the Government."*

And on the fourth page the following more relevantly for present purposes appears:

> *"Freedom of worship is recognised in Jordan. Jordan's well-established Christian community freely practices its religion and in 1996, Christmas Day was made a public holiday for the first time. There are some restrictions on proselytising and lesser-known sects, but no major discrimination. While religious conversion from Islam constitutes the crime of apostasy under Islamic law, this precept is not enforced in Jordan. Converts may face social and economic discrimination, the degree of which will vary according to the circumstances and the coverts social/economic class.*
>
> *Personal status matter for Jordanian Muslims are heard in Islamic Shari'a Law Courts…."*

And on the final page the following conclusion:

> *"Human Rights in Jordan*
>
> *Jordan has a superior human rights record than probably any other Arab country. Few regional countries have a comparable level of freedom of expression, association, movement and religion. Widespread disappearances; extra-judicial executions; arbitrary indefinite detentions; extreme religious, political, racial or gender persecution; and absolute dictatorship and political personality cults are substantially absent in Jordan. The average citizen does not live in terror of the security forces."*

It follows that CX22577 does not materially assist this second ground for review propounded by the Applicant.

21 There remains the contention of the second ground for review that there would be a lack of effective police protection for the Applicant, particularly given the evidence before the RRT to the effect that it is very rare for Muslims to convert to Christianity. I have already extracted in [15] above Dr Nygh's discussion of the subject of effective protection of the Applicant from threats of persecution of the Applicant on the part of his brother "or others" should the Applicant return to Jordan, and Dr Nygh's reference to *Thiyagarajah v Minister for Immigration and Multicultural Affairs* (1997) 143 ALR 118 at 121, where Emmett J referred with implicit approval to the view of the Tribunal below him that "'protection' by no means implies that the authorities must, or can, provide absolute guarantees against harm."

That view was not disturbed by the Full Federal Court in *Thiyagarajah* in the course of its rejection of what was subsequently said by His Honour at first instance to be a presumption, in the absence of evidence on the subject, of a State's ability to protect is citizens: see *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1998) 80 FCR 543 at 568-9. In *Applicant A v Minister for Immigration and Multicultural Affairs* (1998-1999) 53 ALD 545 at [42-43], the Full Federal Court further held that "…there must be information or material available to the decision-maker from some source or sources on the issue of effective protection." Evidence was before the RRT to such effect; as Dr Nygh observed on page 22 of the Decision below, "The applicant's own evidence indicates that the police do prosecute those who harm apostates", apparently a reference to what is recorded in [15] above.

22 In the result, the second ground for review propounded by the Applicant has also not been substantiated. I agree with the submission of the Respondent that this ground involves an attempt "to re-agitate questions of fact": *Prothapan*, supra at 105.

23 The Application should therefore be dismissed and the Decision of the Tribunal of 7 March 2000 affirmed. The Applicants should pay the Respondent's costs of the proceedings.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Conti.

Associate:

Dated: 30 October 2000

Counsel for the Applicant:	Mr R.T. Killalea
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Counsel for the Respondent:	Mr T. Reilly
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	31 August 2000
Date of Judgment:	30 October 2000