

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76355

AT AUCKLAND

Before: J Baddeley (Member)
Counsel for the Appellant: D Mansouri-Rad
Appearing for the Department of Labour: No Appearance
Date of Hearing: 6 & 7 July 2009
Date of Decision: 5 November 2009

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) declining the grant of refugee status to the appellant, a national of Afghanistan.

INTRODUCTION

[2] The appellant arrived in New Zealand in January 2009. He made a claim for asylum on arrival. He was interviewed by a refugee status officer on 13 March 2009. By a decision dated 6 May 2009 his claim for refugee status was declined. The appellant now appeals to this Authority from that decision.

THE APPELLANT'S CASE

[3] The appellant is a 25 year old single male Tajik. Both his mother and his father originate from the X district, near Kabul. The family moved to Kabul City for a more modern lifestyle when the appellant was very young. He went to school in Kabul including primary and secondary school from 1991 until 2003. His education was interrupted from time to time by the fighting which occurred in

Kabul. His father was arrested once for four days by the Taliban and he himself was beaten. Their home was destroyed by a missile.

[4] After completing his secondary schooling the appellant enrolled in a private institute where he studied English and computer programming. When he completed his studies he began work as an interpreter for a security company. His English was rudimentary and his job only involved interpreting for people as they arrived at the entrance to the company's premises. His contract expired after a year. He then began working in a school as an English tutor. His salary was low and the fact that they taught both male and female students brought the school to the attention of the Taliban. The appellant feared that there may be recriminations for him because the institute accepted students of either sex. He left the school and began work at a spare parts shop for about a year and a half.

[5] The appellant's father was a self-employed mechanic. He retired from this job and now has a shop. The family is of middle socioeconomic status in Kabul. The appellant has a brother who sells cars. He lives at home with his parents and the appellant's two sisters. The appellant's family in Kabul consists of his immediate family, his mother's brother and three paternal cousins and various cousins on his mother's side. In X village the appellant has a paternal aunt and her son. He has no other family in Afghanistan. The only places he has been to in Afghanistan are Kabul and X. The reason he gives for this is the lack of security when moving around the country. In Afghanistan the appellant changed his surname from that of his father to DD to reflect his village of origin.

[6] The appellant also has an older sister in New Zealand. She is about 10 years older than him. She left Afghanistan at least 10 years ago. She returned only once and the appellant was unaware that she was living in New Zealand until his arrival here.

[7] In 2007, the appellant met AA a Pashtun girl who lived on his street. He knew her brothers but only distantly because they were Pashtun. He was aware of the hostility between Pashtun and Tajik. He saw AA on the street and they began to contact each other via their mobile phones. They met in shopping malls where they would go walking together. This was the only way they could meet and have conversations. They could not stop and converse in a coffee shop because people would notice them and be curious about them. This would draw attention to their relationship. It was unacceptable for an unrelated young man and woman to consort in public.

[8] Their friendship continued in this fashion for eight or nine months. The appellant was very attracted to AA and his feelings were reciprocated. They decided that they would marry. At the time the appellant did not think that it was dangerous to have a Pashtun girlfriend; the government had told people to give up their tribal rivalries. After the fall of the Taliban he had not experienced problems with Pashtun in his neighbourhood.

[9] The appellant decided to ask his mother to approach AA's family with a proposal of marriage. After her initial resistance his mother agreed to the idea. AA thought that her parents would also eventually agree.

[10] The appellant's mother and sister, in accordance with custom, went to AA's mother with the betrothal proposal. Her mother replied that she would have to consult the men in the family. The appellant's mother and sister made a second visit. AA's mother told them that the men in her family would not agree to the marriage because the appellant was Tajik.

[11] The appellant thought this would be the end of the matter but AA said she would continue to put pressure on her mother to persuade her father to agree to the marriage.

[12] It was then AA told her mother the truth, namely that AA and the appellant knew each other and wished to marry because of their love for each other; it was not a proposal that had come from the appellant's parents but as a result of AA's friendship with the appellant. Once she had told her mother this, AA advised the appellant that it was dangerous for them to continue meeting because they might be watched. They only met on another three or four occasions. After he had ceased to see her, the appellant thought that their relationship was probably at an end, and believed that they would not be able to marry.

[13] In June 2008, he was told that AA had committed suicide. At her funeral he was approached by AA's brothers who threatened that they would kill the appellant because he had been the cause of her death. Although he remonstrated with them that this was not the case they had decided that their family honour could only be restored by seeking revenge against the appellant.

[14] Initially the appellant and his family did not take these threats seriously.

[15] A short time later, he was followed on the street by AA's brothers who again accused him of being the cause of her death and threatened to kill him. Thereafter they followed him in the street on several occasions.

[16] One evening he was walking home from work when a car drew up beside him on the street. There was nobody else around and AA's brother and his associates got out of the car and attacked the appellant. They hit him on the head with the butt of a handgun. The appellant fell to the ground unconscious. When he awoke he was in hospital. He had stitches in his head and pain all over his body. After five days he was released from the hospital.

[17] The appellant was very afraid of further attacks. However he believed it was futile to approach the police because they would demand bribes and then go to AA's family and demand larger bribes from them. Her family were far wealthier than the appellant's and were therefore likely to pay higher bribes to the police which would result in no prosecution being taken against them. Furthermore, at the current time the government is dominated by Pashtuns. He, a Tajik, would not receive help if he appealed to those of higher rank than the local police. Formerly there were many Tajik policemen in Kabul but now only the lower-ranking police are Tajik. Their superiors are Pashtuns.

[18] The appellant also did not consider going away to stay with any friends in Kabul. He knew that he would soon be discovered by AA's brothers.

[19] After discussing the matter with his family they decided he should go to live with his mother's sister in Pakistan. Only his family and his two close friends knew where he was going to stay.

[20] The appellant went to stay with his aunt in Peshawar. After he had been there a few days his aunt's son BB told him that he had been advised by a friend in the neighbourhood that someone was asking about CC from X who had left Kabul about 10 to 15 days earlier. This description fitted the appellant exactly and he became very alarmed. He knew that this person was sent by AA's brothers to look for him. If it had been a friend enquiring after him, the friend would have given his name but no name was given. He also did not know anyone other than his aunt's family in Pakistan so he realised that the enquiries must have come from Afghanistan.

[21] The appellant decided to return to Kabul. He didn't discuss this decision with his aunt, his cousin or anyone else.

[22] The appellant went straight home to Kabul after being in Pakistan only about two weeks. He stayed hiding in his home but did go out to see colleagues at his workplace when he knew that none of AA's family was about.

[23] In discussing the situation with his family they agreed that the only solution was for him to leave Afghanistan. In December 2008, the family sold their home and moved to live with his maternal grandmother in a different part of Kabul. She was old and lonely and probably, the appellant believes, the family will remain living with her there. His father contacted a people smuggler and arranged to pay him US\$8,000 of the proceeds from the sale of the house in return for getting the appellant to a safe country. The appellant and his parents did not think there was any point in approaching AA's family again because their minds were made up.

[24] His father had earlier approached Tajik elders with a view to persuading them to approach Pashtun elders so that the matter could be discussed at the tribal level and resolved without any further violence. The Tajik elders refused to do this. They did not want to go begging to the Pashtuns. The appellant and his family did not think there was anywhere safe for him to stay in Afghanistan. He knows that the Pashtuns have very extensive social networks and once anyone moves to a new place in Afghanistan, people are very curious and find out about their origins.

[25] The appellant had tried to go to Iran but when he went to the embassy and saw a large crowd lined up and that most of them had been rejected, he gave up this attempt. He did not know of any countries where he could travel without a visa in his Afghani passport.

[26] The agent eventually told the appellant's family that he would be taken to New Zealand as a safe country. None of the family commented on this. They did not appreciate the significance of it being the same country as where his sister was living. The appellant says that his illiterate family know nothing about a small place like New Zealand.

[27] The appellant left Kabul in January 2009. He travelled via Dubai and Brunei to New Zealand.

[28] In New Zealand the appellant met up with his sister. He sees her once a week but does not have further contact with her because he does not get on well with her husband.

[29] As a result of enquiries by Immigration New Zealand it was revealed that the Afghani passport on which the appellant travelled to New Zealand belonged to the appellant's sister's husband's brother who has residence in New Zealand. He has not told his brother-in-law's brother that he used his passport. The appellant believes that it is not necessary to do so and it would make him worried and insecure to know this.

[30] Since coming to New Zealand the appellant has been in contact with his family by telephone three or four times. The telephone system in Afghanistan is unreliable. He once sent an email to his brother who occasionally uses an Internet café. He does not believe that the email was received and has had no reply to it. His family advised the appellant about two months prior to the appeal hearing that AA's brothers had visited them at his grandmother's home in Kabul, where they are now living. His mother told AA's brothers that the appellant was a fugitive who had lost his home and family because of them. AA's brothers replied that as far as they were concerned the appellant was dead; they never want to see him again. They had told people in their neighbourhood that they had killed the appellant. This was in order to satisfy their family honour. It was far more important than actually killing the appellant. Provided he was not seen again by anyone who knew the circumstances of AA's death, their honour would remain satisfied and no further recriminations would be made against the appellant or his family.

[31] The appellant believes that if he returned to Afghanistan AA's family would inevitably discover him and would pursue him and kill him or avenge themselves on one of his family members. He could easily be found in Kabul or X and there is nowhere else where he could relocate without eventually being discovered by them.

[32] At the conclusion of the appeal hearing the appellant's counsel sought leave to file an affidavit from an expert witness providing further country information concerning the prevalence and character of blood feuds in contemporary Afghan society. This information was received on 3 August 2009 in the form of an affidavit by Dr Slaimankhel, an Afghani who is the liaison officer for the Afghan Association of New Zealand. He is Pashtun and lived in Afghanistan until the late 1980s. He describes how matters of honour are very much to the

forefront of every Pashtun family. If family honour has been violated (or even if such a violation is suspected) it must be remedied. This cannot be done by payment of money. When he was living in Afghanistan a blood feud had been triggered in his neighbourhood by suspicion of an extramarital affair. This eventuated in the woman's family having to leave the village and the man involved being killed by the woman's family some nine years later.

[33] Suicide brings great shame to the deceased's family who have to remedy the stain on their honour. In circumstances such as the present case, the dead girl's family would be expected to take remedial action by laying the blame for their daughter's death on someone outside the family. They would be relentless in their pursuit of the offender. A man and woman whose proposed betrothal has been refused by their families may not have any contact again with each other.

Documents received

[34] The following documents were received from the appellant's counsel:

- (a) Opening submissions dated 2 July 2009;
- (b) Letter from Dr Grant Galpin, psychiatrist, dated 1 April 2009;
- (c) Affidavit of Dr Slaimankhel date 3 August 2009.

All these documents have been taken into consideration in reaching this decision.

THE ISSUES

[35] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

[36] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant

being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[37] The appellant's counsel, on 1 July 2009, indicated to the Secretariat that his client preferred a Dari interpreter rather than a Farsi interpreter. Prior to this in response to enquiries by the Authority's Secretariat, counsel had on three occasions indicated that a Farsi interpreter was preferred and accordingly a Farsi interpreter was arranged for the hearing. Despite last minute efforts to arrange a Dari interpreter none was available. The hearing therefore proceeded with a Farsi interpreter. The Authority regularly checked whether the appellant was having any difficulties using the Farsi interpreter. On every occasion throughout the hearing the appellant assured the Authority that he was experiencing no difficulties in understanding the interpreter.

[38] Counsel indicated to the Authority where translation mistakes had occurred in documents previously provided (the appellant's statement and the interview report). The Authority was prepared to accept these as translation errors and amended them accordingly.

[39] The Authority was made aware that the appellant was taking medication for a major depressive disorder and post-traumatic stress disorder. A psychiatrist's report noted that the appellant's condition could result in poor concentration and memory. The Authority also checked with the appellant throughout the hearing as to his ability to continue and whether he was experiencing concentration or memory difficulties. The appellant, although somewhat weary and at times upset, responded appropriately and spontaneously throughout the hearing. He was regularly made aware that if he required a break during the course of the hearing his request would be accommodated. In view of his memory difficulties allowances have been made for some minor inconsistencies in his evidence.

[40] The Authority has reservations concerning the appellant's evidence as to how his passport was obtained and his professed ignorance that New Zealand was where his sister was already living at the time he decided to flee Afghanistan.

However, these matters are not relevant to the predicament he faced in Afghanistan on which his claim is based. In respect of that his account was consistent, forthright and credible.

[41] The Authority accepts the appellant's account of the way Afghan cultural norms severely restrict interaction between men and women who are unrelated. According to Hafizullah Emadi in *"Cultures and Customs of Afghanistan"* (Greenwood Press, Westport, Connecticut, 2005):

"Prevailing cultural traditions in Afghanistan support gender segregation and seclusion of women in the public arena.

...

Women are not allowed to leave their homes without a legitimate reason, and they must secure permission from their husbands or other male members of the family.

...

Women are not permitted to socialize with or entertain a guest who is not immediately related to the family or speak to a stranger."

This is consistent with the appellant's account of the difficulties he and AA experienced in meeting each other.

[42] The Authority notes the evidence of Dr Slaimankhel regarding blood feuds in so far as it is consistent with a generalised description and account provided by the United Nations High Commissioner for Refugees in *"UNHCR Eligibility Guidelines for Assessing the International Protection needs of Asylum Seekers from Afghanistan"* UNHCR (July 2009) www.refworld.org which reports that:

"Blood feuds in Afghanistan can be long-running conflicts, with a cycle of retaliatory violence between parties. This violence often targets individuals by association with the family or tribe of the person seen as wrongdoer. In such situations, the victim's tribe or family members seek revenge by killing, physically injuring or publically shaming the perpetrator or persons related by family or tribe. 'This is a practice well recognized as part of the traditional moral code of the Pashtuns or Pashtunwali'. In the context of blood feuds several factors should be taken into consideration in determining the risk upon return, including the nature of the blood feud, the experiences of other members of the family or clan engaged in the feud (eg whether any family members have been killed or injured by the opposing family or clan), and the cultural context."

This description of the pervasive and enduring nature of blood feuds, particularly for Pashtun, is consistent with the appellant's description of AA's family's conduct and his belief that they will continue to pursue him.

[43] The Authority accepts the appellant's account of events in Afghanistan as truthful.

Country information

[44] Armed conflict has been waged in Afghanistan since 1979. Since the launch of Operation Enduring Freedom by the United States and United Kingdom in 2001, the security situation has not improved. The current situation in Afghanistan can be characterised as one of intensifying armed conflict accompanied by serious and widespread targeted human rights violations. As reported by UNHCR (*supra* July 2009):

“The Afghani government and the International Security Assistance Force and Operation Enduring Freedom are fighting groups of insurgents including the Taliban the Hezbollah and al-Qaeda. There is also an array of legal and illegal armed groups and organised criminal groups involved in the conflict. Against such a background, human rights violations are rarely addressed or remedied by the authorities, be it the justice system or the police force”.

[45] The same source reports a significant increase in civilian casualties and instability spreading throughout the country:

“Civilian casualties in 2008 increased almost 40 per cent more than in 2007. Armed clashes frequently occurred near or in inhabited areas ... and have led to extensive loss of civilian life.

...

“The south and south-east continue to bear the brunt of combat. In the southern region the provinces of Helmand and Kandahar where the Taliban mostly operated have seen fierce hostilities. The conflict in the southern south-east and eastern regions of the country has caused population displacements and a number of civilian casualties.

...

The most dramatic change in the armed conflict has occurred in the central provinces surrounding Kabul. ... in Wardak, Logar and Kapisa. The number of security incidents in this central region has increased from 485 in the period to August 2007 to 806 in the same period in 2008. Attacks are on the rise in Kabul as well. [...] Insurgents are increasingly able to hold ground, stage attacks on international forces, infiltrate and disrupt travel in and out of the capital.

...

The north has experienced a deteriorating security and progressive infiltration by Taleban and Hezb-e-Eslami.

...

In the western region, insurgent activities and conflict have progressively increased during the last year fuelled by a close relationship with powerful organised criminal groups, particularly those involved in the drug trade through Iran and a certain level of support from local communities.”

[46] The appellant’s claim must be assessed against the background of continued and increasing instability and insecurity in the country.

[47] Counsel drew to the Authority's attention the following country information as being supportive of the appellant's claim that the police force is so corrupt that state protection would not be available to the appellant against AA's brothers. Counsel cited "Afghanistan: Transition under Threat" Geoffrey Hayes and Mark Sedra (eds) (Wilfred Laurier University Press, Canada, 2008):

"The Afghan National Police (ANP) is one of the most corrupt and dysfunctional institutions in the government, yet it is only in the past two years that serious effort and resources have been invested in remaking the force.

...

A significant portion of Afghans view the police with fear and resentment. The only exposure many Afghans have to the police is to pay them bribes or illegal taxes. Police increasingly commit crimes, from kidnappings for ransom to bank robberies which have fuelled a rising crime rate across the country ... corruption is rampant throughout the police, with up to 80 per cent of the force allegedly involved in the drug trade."

[48] Further country information is provided by A Cordsman and A Burke, Centre for Strategic and International Studies "*Winning in Afghanistan: Creating Effective Afghan Security Forces*" (11 March 2009):

"After the fall of the Taliban government, the X Tajik – dominated Shura-ye-nazar-I Shamali, dominated the police forces, producing ethnic tensions that required the emergency installation of a succession of Pashtun heads of police in 2002 and 2003; however most medium and low ranking officers remained in their jobs, skewing the ethnic balance of the force ... In 2003 Amnesty International estimated 90 per cent of police academy students the future leadership of the police force were ethnic Tajiks ... the UN reported in the 2007 Afghanistan Human Development report that the ANP with 49.55 per cent Tajik, 42.9 per cent Pashtun, 4.25 Uzbek and 1.93 per cent Hazar substantially over representing the Tajik population compared to other ethnicities though this is more balanced compared to years past."

This country information also confirms the appellant's claim that although the lower ranks of the police in Kabul are Tajik it is the higher ranks which are Pashtun dominated and therefore AA's Pashtun family are assured of state protection from high ranking officials whereas Tajiks are not. Whereas previously Tajiks did dominate the police force the balance of power has now shifted in favour of Pashtuns.

[49] In these particular circumstances the appellant's persecutor (AA's family) may well, through bribery, be able to enlist the support of the police. However, this does not establish that state protection is unavailable to the appellant solely because of his ethnicity (Tajik). Rather, it is the general unreliability of state protection for those who are accused of violation of social or religious norms, which is relevant here. The appellant's belief that state protection would be

unavailable to him is consistent with the UNHCR's assessment of the predicament facing those (such as the appellant) who are accused of violations of social or religious norms and are victimised by non-state agents. The UNHCR, *supra*, reports at p53:

“Finally in cases of persons suffering from the application of legal, social or religious norms of a persecutory nature (such as victims of forced marriage, homosexuals, or persons accused of committing religious crimes), it must be considered that the existence and applicability of these norms is endorsed by large segments of society and by powerful conservative sectors in the public administration and Parliament.

To the extent that the harm feared is from non-State actors, State protection is on the whole not available in Afghanistan. Moreover, State agents are themselves accused of carrying out violence and other forms of human rights transgressions. Consequently an Afghan asylum seeker should not be expected to seek the protection of the authorities, and failure to do so should not be the sole reason for doubting credibility or rejecting the claim.”

Convention ground and nexus

[50] In *Refugee Appeal No 72635* (6 September 2002) at [173] it is held that the Convention ground must contribute (although not necessarily be the sole cause) to the appellant's risk of being persecuted. In this case the appellant is at risk from AA's Pashtun family because of his perceived violation of their family honour. They refused to allow the betrothal because he is Tajik and this is a contributing factor to their pursuit of him. As such the Convention ground of a particular social group (Tajik) contributes to his predicament.

Conclusions as to well-foundedness

[51] While the appellant remains out of sight of AA's family, or anyone who knows of the feud between the appellant and AA's family, their honour is apparently satisfied. However, were he to return to areas where he will come to their attention, the breach to the family honour will be revived and he will again be targeted to satisfy this. His name, CC, is a recognisably Tajik name. He will be easily traced through the extensive Pashtun networks to which AA's family has access if he returns to Kabul or X. Because of the corruption and ineffectiveness of the police force state protection will not be available to him.

[52] The Authority concludes that the appellant has a well-founded fear of being persecuted on return to Kabul. The first issue is therefore answered in the affirmative. It is now necessary to consider whether the appellant has a viable internal protection alternative.

Internal protection alternative

[53] On the facts of the present case, there is a live issue as to whether there is an “internal protection alternative”. For the reasons more fully explained in *Refugee Appeal No 76044* [2008] NZAR 719 (NZRSAA) and *Refugee Appeal No 71684/99* [2000] INLR 165 (NZRSAA), once a refugee claimant has established a well-founded fear of being persecuted for a Convention reason, recognition of that person as a Convention refugee can only be withheld if that person can genuinely access in his or her home country domestic protection which is meaningful. Such protection is to be understood as requiring:

- (a) That the proposed internal protection alternative is accessible to the individual. This requires that the access be practical, safe and legal.
- (b) That in the proposed site of internal protection there is no well-founded risk of being persecuted for a Convention reason.
- (c) That in the proposed site of internal protection there are no new well-founded risks of being persecuted or of being exposed to other forms of serious harm or of *refoulement*.
- (d) That in the proposed site of internal protection basic norms of civil, political and socio-economic rights will be provided by the State. In this inquiry reference is to be made to the human rights standards suggested by the Refugee Convention itself.

Only if an affirmative answer is given to each of these four elements of the inquiry can recognition of refugee status be withheld.

[54] The appellant was seriously harmed by AA’s brothers. AA’s family know that his family has relocated to his grandmother’s home in Kabul. They were able to have him followed to Pakistan. Given their acquaintance with his family, his name and thereby their knowledge that he is from X, near Kabul, they would readily find him there which is the only other place in Afghanistan familiar to him or with which he has any family ties.

[55] It must therefore be determined whether an internal protection alternative is available to the appellant elsewhere in Afghanistan. Both the appellant’s parents are from X. It is relevant to note that the appellant has no family ties (including

extended family) outside Kabul or X. The availability of kin networks are an important feature in the ability of an individual to relocate within what is essentially still a tribal kin-based society. The UNHCR report 2009, *supra*, characterises the conditions amenable to relocation in Afghanistan as follows:

“The traditional extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism. Afghans rely on these structures and links for their safety and economic survival, including access to accommodation and an adequate level of subsistence. Furthermore, the protection provided by families and tribes is limited to areas where family or community links exist. As documented in studies on urban vulnerability, the household and the extended family remain the basic social network in Afghanistan and there are indications that existing traditional systems of sharing and redistribution are less effective in the extended urban family. It is therefore unlikely that Afghans will be able to lead a relatively normal life without undue hardship upon relocation to an area to which he or she is not fully protected by his/her family, community or tribe, including urban areas of the country.”

[56] The appellant has no family connections outside X and Kabul. There are no other supporting familial or tribal networks available to him and as such there is nowhere he could settle where he will be protected from the persecution he would suffer on return to Kabul or X. Given these factors the Authority is satisfied that no internal protection is available to him.

Conclusion on internal protection alternative

[57] The Authority has answered the first and second issue in the affirmative and found that there is no internal protection available to the appellant in Afghanistan.

CONCLUSION

[58] For the reasons mentioned above, the Authority finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

“J Baddeley”

J Baddeley
Member