

Heard at: Field House
On 29 November 2004

AL [Azeris and Mixed Marriages]
Armenia [2005] UKIAT 00087

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

21 April 2005

Before:

Mr P R Moulden (Vice President)
Mr R A McKee
Mr C P O'Brian

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant is the Secretary of State. The Respondent is a citizen of Armenia. The Appellant has been given permission to appeal the determination of an Adjudicator, Mr F Pieri, allowing the Respondent's appeal on both Refugee Convention and human rights grounds against the Appellant's decision to give directions for his removal from the United Kingdom, following the refusal of asylum.
2. Miss R Brown, a Senior Home Office Presenting Officer, represented the Appellant. Mr S Winter, a Solicitor from Hamilton, Burns & Co, appeared for the Respondent.
3. The Respondent arrived in the United Kingdom on 11 July 2001 and claimed asylum. His wife and two sons are his dependants for the purpose of the appeal, although Mr Winter thought that one son might have made a separate claim which had not been decided by the Secretary of State. The notice containing the decision against which the Respondent appeals is dated 17 October 2001. The appeal was heard and determined by an Adjudicator but, following the grant of permission to appeal to the Tribunal, was remitted for hearing afresh by a different Adjudicator. It was in these circumstances that it came before Mr Pieri in Glasgow on 10

February 2004. His determination was promulgated on 13 February 2004 and permission to appeal granted on 10 May 2004.

4. The Adjudicator set out the facts of the case in paragraphs 8 to 17 of the determination in the following terms,

"8. He is an Assuri. He married his wife in 1980. They lived in Yerevan in Armenia. At that time Armenia was still part of the Soviet Union. His wife has Azeri origins. She is a Muslim. He is an Orthodox Christian.

9. In 1988 the conflict between Azerbaijan and Armenia over Nagorny Karabakh began. His wife's ethnic origins were discovered in 1995 when she and the Appellant applied for new passports. Their old Soviet passports showed their ethnic origins. The authorities delayed in issuing new passports when they noticed his wife's ethnic origins and to this day they have not received new passports. His wife's ethnic origins became known to their neighbours and to her employers. She lost her employment and began to suffer at the hands of her neighbours.

10. The Appellant's children were attacked by neighbours and at school because they came from a mixed marriage. One son was stabbed in the thigh in 1996. He was also chased onto a roof by a group of children. He was saved from being pushed off the roof by a man who was working there.

11. The Armenian police failed to take action to protect the Appellant and his family although the Appellant did complain to the police about what was happening.

12. In 1997 a neighbour, Hovik, who is a powerful man and involved in the military, took the Appellant to a forest and beat him up. Hovik was helped in this by three policemen and two civilians. The Appellant was so badly beaten he remained in hospital for three months.

13. The Appellant's wife was attacked. In 1997, during an assault, she lost her front teeth. She was subjected to an acid attack by female neighbours in 1997. In 1998 Hovik attacked her in the flat she and the Appellant lived in and stabbed her. The Appellant succeeded in pushing him away and he fell from the balcony to the street.

14. In 1998 the Appellant heard that Hovik was planning to steal a ballot box to assist in an election fraud. The Appellant reported this to the authorities. Hovik suspected the Appellant and the Appellant (sic) of informing on him. The Appellant and his family relocated to Zangilan. He went there to hide.

15. Hardly anybody lived in the Zangilan area when the Appellant and his family went there. It was an area that had been taken by force by Armenia from Azerbaijan. There were army units there but hardly any civilians. The civilian population gradually increased however and the army introduced passport checks. The Appellant and his wife did not have passports and so they feared that they might be killed.

16. Hovik began looking for the Appellant and his wife. He began visiting military units. The Appellant saw him from a distance one day. The Appellant and his wife then gathered together their valuables and went with their family to Goris, a town about 70 kilometres from Zangilan. From there, with the help

of a friend, they soon secured the services of an agent and left Armenia on 30 June 2001. They made their way to the United Kingdom and claimed asylum on arrival.

17. In his oral evidence the Appellant said this. His father was an Assyrian and his mother Armenian. His wife was born in Armenia and has never been to Azerbaijan. His wife's grandparents died in Azerbaijan. During the time of the Soviet Union passports contained the holders' ethnic origins. His neighbours had found out that his wife was an Azeri in 1995. Many of his neighbours had children and relatives who were killed in the war between Armenia and Azerbaijan. Feelings ran high because of this. Hovik had been involved in that conflict. When the Appellant had moved with his wife and family to Zangilan he had acquired some livestock and a piece of land and had found an abandoned house which they had managed to make habitable. The whole area had been abandoned by the previous population. The Appellant had some money. His parents had brought some gold to Armenia when they had moved there from Iran. He and his brother had sold his parents' former home and he had divided the sale proceeds equally between them. In addition up to 1992 when he was paid off he had held a good job. He and his wife could not have gone to Azerbaijan as he is a Christian and he would have encountered problems there. He could not find safety anywhere in Armenia. In Zangilan his neighbours had suspected that his wife might be an Azeri. Had their suspicions been confirmed they would have harassed the Appellant and his wife. The Appellant and his wife were afraid of what might happen should his wife's ethnicity be discovered."

5. The Adjudicator found that the Respondent and his wife had given a true account of the events except when they said that Hovik was still looking for them in 2001 and that the Respondent saw him in the area of Zangilan in 2001. In this respect they had embroidered their account of the events. He went on to say,

"In these circumstances, my summary of the account given by the Appellant and his wife at paragraph 8 to 17 and paragraph 20 of the determination, with the exception of the claim that Hovik was still looking for the Appellant and his wife in 2001 and was seen by the Appellant in 2001, can be taken as findings in fact."

6. At paragraph 20 of the determination, the Adjudicator said,

"Before giving evidence at this appeal the Appellant's wife, Anush Mikhilova set out her account in a statement provided for the purposes of this appeal. She adopted the terms of that statement as her evidence in chief. In that statement she generally corroborates the evidence of the Appellant. In her oral evidence she also said this. The situation had become so bad in Yerevan that she was frightened to leave the house to go to the shops. Although her parents were born in Armenia, her grandparents were born in Azerbaijan and she and her parents were regarded as Azeri. She and her husband had lived in Zangilan from 1998 to 2001."

7. The Adjudicator listed the country material before him in paragraph 24 of the determination and, in paragraphs 26 to 28, made more detailed reference to the US Department of State Report (for 2002), a UNHCR Report on international protection considerations regarding Armenian asylum seekers and refugees dated September 2003 and the UNHCR position paper on mixed Azeri – Armenian

couples from Azerbaijan. The Adjudicator reached the following conclusions in paragraphs 37 – 42 of the determination,

"37. The question is whether there is a real risk of the Appellant and his wife and children again suffering ill-treatment should they return to Armenia now. I have mentioned the document from the UNHCR which tells me that in the past years the UNHCR has not been made aware of any mistreatment of ethnic Azeris. That document says that Azeris feel relatively safe and secure so long as they remain in their own community. It also says that their neighbours are aware of their ethnic background but this does not normally pose any problems. It however also says that it is believed that the remaining Azeris keep a low profile. As I have mentioned, there must be a reason for this. Then there is the US Department of State Report. That tells me that anti Muslim feeling persists among the populace and that the few remaining Muslims in the country keep a low profile. It seems to be a reasonable inference that they keep a low profile as they fear what might happen to them if they do not. The US Department of State Report also repeats the point that the few Azeris still remaining in Armenia maintain a low profile. It says this is done in the face of societal discrimination. Again, as I have mentioned, the catalyst for racial hatred remains in that skirmishes continue between Armenia and Azerbaijan and those misguided enough to harbour feelings of racial hatred tend not to lose those feelings quickly._

38. When I come to consider all the evidence in the round and place the Appellant's past experiences in the context of the background material I reach the conclusion that there is a real risk of the Appellant and his family suffering ill treatment of the sort they suffered in the past should they return now to Armenia. There is a real risk of that ill-treatment amounting to persecution. It would be on account of the Appellant's wife's ethnic origins. It would be on account of membership of a particular social group, namely the Appellant's family. There is also a real risk of this ill-treatment reaching the threshold required to breach Article 3 of the Human Rights Convention.

39. It is true that were the Appellant and his wife and family to return to Armenia and keep the Appellant's wife's ethnic origins secret they would have nothing to fear. It seems to me, however, that there can be no better indicator of persecution than a requirement of secrecy.

40. The risk to this Appellant and his wife and family, as I read the background material, exists throughout Armenia. Internal relocation is not the answer.

41. The background material supports the proposition that in the past the Armenian authorities have been complicit in the ill-treatment of Azeris. In the past therefore there cannot have been any question of a sufficiency of State protection. If it is suggested that the situation has changed since then the background material, as I read it, does not support that. It does not really address any possible change. The closest the background material gets is the assertion in the report from the UNHCR that there is no evidence of systematic discrimination by the Armenian government against the few remaining ethnic Azeris. In the context of a situation where apart from a few hundred, all ethnic Azeris have left the country nothing can be made of this. The opportunity for ill-treatment in those circumstances is greatly diminished. The absence of cogent evidence of change is enough to undermine any question of sufficiency of protection.

42. In the whole circumstances, therefore this Appellant succeeds."

8. There are two grounds of appeal but permission was granted only in respect of the second which is;

"It is submitted that the Adjudicator's finding at paragraph 37 is that Azeris keep a low profile because there is a general risk of persecution is speculative."

9. At the hearing, Ms Brown did not hesitate to grasp the nettle of having to establish a material error of law in the light of the Judgement of the Court of Appeal in **CA v Secretary of State for the Home Department [2004] EWCA Civ 1165**. She submits that on the country information it was perverse for the Adjudicator to come to the conclusion that the Respondent would be at risk on return because of his wife's ethnicity.

10. Miss Brown has provided us with the US Department of State Report for 2003. We note that the 2002 Report was before the Adjudicator. Many but not all of the passages are identical. She also provided the UNHCR position paper on mixed Azeri/Armenian couples dated April 2003 (which was before the Adjudicator), the report from the Research Directorate of the Immigration and Refugee Board in Ottawa, Canada, dated May 2002 (which was before the Adjudicator) and the "Report on Roving Attaché Mission to Azerbaijan, Armenia and Russia" prepared by the Research Directorate of the Immigration and Refugee Board in Ottawa, following a visit during June to July 2000 (which was not before the Adjudicator). We also have the UNHCR CDR background paper on Refugees and Asylum Seekers from Armenia dated August 1995, although neither representative made any reference to this. Mr Winter provided us with a copy of the Respondent's bundle which was before the Adjudicator. When it was discovered that the witness statements of the Respondent and his wife had been removed he provided us with copies of these. He also submitted a skeleton argument and an expert report from Dr Balekjian with his CV, which were not before the Adjudicator.

11. Miss Brown argued that, on the information before the Adjudicator, there was an error of law. We can only consider information not before the Adjudicator if there is a material error of law.

12. The US Department of State Report for 2003 shows that Armenia is a country with a population of approximately three million people and that,

"The government's human rights record remains poor, although there were some improvements in a few areas, serious problems remained."

13. It is said that most cases of police brutality go unreported because of fear of police retribution.

14. The same report states,

"As a result of the Nagorno-Karabakh conflict with Azerbaijan, most of the country's Muslim population was forced to leave the country by 1991, and the few remaining Muslims in the country kept a low profile. There was no formally operating Mosque, although Yerevan's one surviving 18th Century Mosque was in practice open for regular Friday prayers on a tenuous legal

basis. Although the Mosque was not registered as a religious facility, the government did not create any obstacles for Muslims who wished to pray there."

15. The important difference between this passage and the similar passage in the earlier report is the inclusion in the earlier but not the later of the words, "Anti-Muslim feeling persisted among the populace".

16. The 2003 State Department report goes on to say,

"The population was approximately 95 percent ethnic Armenian. The Government did not discriminate against the small, officially recognised "national" communities although the economic and social situation of such groups has deteriorated substantially since independence in 1991. The Government included Russians, Ukrainians, Belarusians, Jews, Kurds, Yezidis, Assyrians, Georgians, Greeks, and Germans in the category of "national" communities. Several hundred Azeris or persons of mixed Azeris heritage still living in the country maintained a low profile in the face of societal discrimination.

17. The UNHCR position paper of April 2003 states,

"Today, it is widely believed that most of the remaining Azeris are of mixed marriage background and/or elderly. The number is not known. It is also believed that the remaining Azeris keep a low profile. According to NGO's they feel relatively safe and secure as long as they remain in their own community. Their neighbours are aware of their ethnic background but this does not normally pose any problem. The key issue is that they have never left Armenia since the conflict started and are simply accepted as part of the community. There is no guarantee, however, that the same level of acceptance would be there if an Azeri individual should return after several years of absence or arrive there having never been in Armenia. In the past years, UNHCR has not been made aware of any mistreatment of ethnic Azeris. However, this does not categorically assert that there is no security risk for ethnic Azeris. Precisely because of their ethnicity, remaining Azeris maintain a discrete posture. They may not wish to unnecessarily expose themselves by reporting mis/maltreatment by Armenians. Therefore, in comparison with ethnic Azeris who have remained in Armenia, one cannot exclude the possibility of the higher risk for ethnic Azeris – even with Armenian spouses returning to Armenia after many years of absence or sent there having never been in Armenia."

18. The same report also states,

"As for ethnics Azeris who were married to ethnic Armenians originally from Azerbaijan, there is no reasonable ground to categorically conclude that mixed marriage couples from Azerbaijan can find effective protection and a durable solution, especially if they have never been present in Armenia in the past. Against this background, UNHCR strongly recommends not to reject claims for asylum submitted by Azeri citizens of mixed origin and mixed couples from Azerbaijan on the sole basis that they have a possibility to settle in Armenia.

19. The May 2002 report from the Research Directorate of the Immigration and Refugee Board in Ottawa states,

"According to the UNHCR and the Centre for Democracy and Human Rights in Armenia (CDHR) the [Armenian] authorities do not interfere in mixed marriages. However, harassment by neighbours in cases where the husband is of Azerbaijani origin cannot be ruled out (Jan. 1999).

The United States Immigration and Naturalization Service, citing an interview with a staff advisor for the Commission on Security and Cooperation in Europe, noted that the interviewee was unaware of "Any instances of mistreatment by Armenians of mixed ethnic heritage" (20 July 2000) the Research Directorate was unable to find reports of police advising Azerbaijanis to leave Armenia because local authorities could not protect them among sources consulted for this Response.

The HRCA representative highlighted the Fund Against Violation of Law and the Helsinki Association of Armenia, both in Yerevan as "NGO's which help, or could help... local Azeris" (12 May 2002). The Research Directorate's attempts to contact representatives of these organisations were unsuccessful.

20. The report from the Research Directorate of the Immigration and Refugee Board in Ottawa following the visit between June and July 2000, (which was not before the Adjudicator), states,

"4.4 The general human rights situation for Azeris in Armenia.

At the 1989 census the population of Armenia was 3,287,677 of whom 2.6% were Azeris, i.e. about 85,000 people. No sources could give accurate information on the number of Azeris nowadays. The UNHCR believed that there were perhaps a few hundred, and that there were more Armenians in Baku than there were Azeris in the whole of Armenia. The UNHCR also reported that the Azeris were mainly women who were or had been married to Armenian men, and that there were no Azeri men in Armenia. The Norwegian Refugee Council stated that there were Azeris in Armenia but they were very few, and were mainly people living in mixed Armenian/Azeri marriages. The Sakharov Armenian Human Rights Foundation believed that there were a few Azeris, most frequently Azeri women married to Armenian men.

The President's advisor on ethnic minorities, Razmik Davojan, and the OSCE said that Azeris were not registered as a minority group.

The Department for Migration and Refugees did not believe that Azeris had security problems in Armenia, or that they were persecuted or discriminated against. Minor problems might arise with neighbours but these would not lead to physical violence. The Department considered that if Azeris were afraid this was for psychological reasons and not because of security problems.

The UNHCR commented that Azeris in Armenia were tolerated but that they kept a low profile. The OSCE shared this opinion. The UNHCR were not aware of attacks by the authorities.

The UNHCR felt that the Azeris did not really have any problems but might do so if they actively expressed their ethnic identity.

The Norwegian Refugee Council was not aware of any persecution of Azeris in Armenia although Azeris did not conceal their ethnic identity. The Council

considered that Azeris who had fled during the conflict would be able to return without particular difficulties. The Armenians showed no animosity towards Azeris.

The Helsinki Association had no information about Azeris in the country and no knowledge of any difficulties they might have.

The Sakharov Armenian Human Rights Foundation did not believe the Azeris had problems in Armenia. The same applied to the Iranian Azeris, many of whom were Azeris from Azerbaijan who had emigrated to Iran and then came to Armenia to do business in the free trade zone on the border with Georgia. They bought goods and sold them on in Yerevan. They spoke Azeri, without that causing any problems. There was no hatred of Azeris in the country. Any antagonism came from the political establishment. However, the situation between Azeris and Kurds was tense, despite their having the same religious background.

The representative of the Russian minority did not believe that Azeris were discriminated against. He himself had an Azeri neighbour.

The UNHCR did not know the number of children from mixed marriages. The UNHCR believed that the situation was perhaps better for the children of mixed marriages but could not be sure as the organisation did not have knowledge of them.

It was common for Armenian asylum applicants in Western Europe to claim to be persecuted ethnic Azeris from Armenia."

21. The Adjudicator seeks to set the problems encountered by the Respondent and his family in context in paragraph 26 and 27 of the determination in the following terms,

"26. Armenia is certainly a country with problems. The US Department of State Report tells me this:

The Constitution provides for an independent judiciary; however, in practice judges are subject to pressure from the Executive branch and some are corrupt.

Members of the security forces routinely beat detainees during arrest and interrogation. Arbitrary arrest and detention is a problem. The government rarely investigates abuses by members of the security forces.

As a result of the Nagorno Karabakh conflict with Azerbaijan most of the country's Muslim population has been forced to leave. Anti-Muslim feeling persists among the populace and the few remaining Muslims in the country keep a low profile. There is no formally operating Mosque although Yerevan's one surviving eighteenth century Mosque in practice opens for regular Friday prayers on a tenuous legal basis.

As a result of the Nagorno Karabakh conflict, and particularly in the period from 1988 to 1994, ethnic minorities on both sides have frequently been subjected to societal and governmental discrimination and intimidation often accompanied by violence intended to drive them from the country. Almost all ethnic Azeris living in Armenia have fled to

Azerbaijan. Several hundred Azeris or persons with mixed Azeri heritage still live in the country maintaining a low profile in the face of societal discrimination.

27. The report from the UNHCR on International Protection Considerations regarding Armenian Asylum Seekers and Refugees of September 2003 tells me this:

From 1988 to 1992 ethnic Azeris and couples of mixed ethnic origin, when not expelled, were systematically subjected to harassment and acts of violence such as physical and psychological violence, threats to life, abductions, deprivation of property, and social benefits. These acts were either perpetrated by the local authorities themselves or by certain circles of society, encouraged and tolerated by the local authorities themselves or by certain circles of society, encouraged and tolerated by the local authorities.

Only a few hundred Azeris (mixed couples, elderly and sick) have remained in Armenia. Most ethnic Azeris have changed their names to conceal their ethnic origin and/or keep a low profile in society. Currently, there is no evidence of systematic discrimination by the Armenian government against the few remaining ethnic Azeris or mixed couples. It is reported that they are mostly living in rural areas. Their neighbours are aware of their identity but are tolerant.

28. The UNHCR report on mixed Azeri-Armenian couples tells me this. It is believed that the remaining Azeris keep a low profile. According to NGO's they feel relatively safe and secure as long as they remain in their own community. Their neighbours are aware of their ethnic background but this does not normally pose any problems. In the past years UNHCR has not been made aware of any mistreatment of Azeris."

22. The expert report from Dr Balekjian dated 27 October 2004 which was not before the Adjudicator, states, in its conclusion,

"The safety and security for the life, property and human rights of ethnically mixed (Armenian/Azderi) couples or families is not and cannot be yet guaranteed with reference to official declarations or good intentions by the State authorities of Armenia or Azerbaijan. Lacking resources and effectiveness, state authorities in Armenia and Azerbaijan is (sic) not yet sufficiently effective to control the deep-rooted, irrational, mutual hatred which motivates citizens in both countries and which makes them not hesitant to take the law into their hands and act criminally, ruthlessly."

23. Unfortunately, Dr Balekjian asks himself the wrong question. In the second paragraph of his report he states,

"The question to be evaluated is whether a married couple, where the husband is Armenian and the wife Azerbaijani (Azeri), would enjoy security and peace as an ethnically mixed couple if they were to live in Armenia or Azerbaijan."

24. Leaving aside the point that we do not have to decide whether the couple could live in Azerbaijan, this is not the correct test.

25. We need to determine whether the Respondent is at risk of persecution or infringement of his Article 3 human rights on return to Armenia. We gain little assistance from Dr Balekjian's report. Although there is broad reference to some sources, particular conclusions are not sourced. It is not clear when Dr Balekjian was last in Armenia. We are not persuaded that the way in which Armenian Officers were treated on a visit to Azerbaijan is likely to be mirrored if Azeris visit Armenia. Dr Balekjian puts this no higher than "It is not excluded". We are not persuaded by the comparison with Jehovah's Witnesses in Armenia. Furthermore, his conclusions are not at all clear.
26. We find that the Adjudicator erred in law in a number of respects.
27. Firstly, he concluded from the country information that Azeris, who are likely to be Muslims, keep a low profile because "they fear what might happen to them if they do not". Whilst this is described as a reasonable inference it is in fact speculation based on the out of date as opposed to the up-to-date country information before him. The up-to-date country information showed that if Azeris keep a low profile it is more likely to be the result of caution and habit inculcated in more difficult times. In any event, even if some Azeris have a subjective fear, this does not necessarily equate to a well founded objective fear.
28. Secondly, in paragraph 37 the Adjudicator reached a perverse conclusion not open to him on the evidence. The country information shows that Armenians married to Azeris are not likely to be at risk, as opposed to the opposite conclusion. Whilst the US State Department report before the Adjudicator refers to anti-Muslim feeling it does not refer to persecution of Muslims. The UNHCR report says that in recent years they have not been made aware of any mistreatment of ethnic Azeris
29. Thirdly, the statement that "those misguided enough to harbour feelings of racial hatred tend not to lose those feelings quickly" is speculative and no substitute for a careful assessment of up-to-date country material.
30. Fourthly, there is a lack of clear reasons for the statements in paragraph 38 of the determination that "there is a real risk of that ill-treatment amounting to persecution" and "there is also a real risk of this ill-treatment reaching the threshold required to breach Article 3 of the Human Rights Convention".
31. Fifthly, the Adjudicator sets too low a threshold for both persecution and infringement of Article 3 human rights. The country information before him showed that ethnic Azeri women in mixed marriages with Armenian men faced, at worst, discrimination and harassment.
32. Sixthly, he failed to apply the country information to his findings of fact. It is clear that if the claimant and his family are at risk it is not because his wife's Azeri ethnicity is readily apparent. The conflict started in 1988 and, during a period of greater tension, her ethnicity was not discovered until 1995 when they applied for new passports and her old Soviet passport revealed her ethnic origins. After they moved to Zangilan her ethnic origins were not discovered. It has not been suggested that any aspect of her appearance, speech, dress, religious observance or anything else is likely to reveal her ethnic origins. It has not been suggested that she has any wish to assert her ethnic origins.
33. On the information before us we find that Azeris who are settled in their local community in Armenia are not likely to be at risk. Those Azeris who have left

Armenia but have settled family or community to return to are not likely to be at risk. Azeri women married to Armenian men are not likely to be at risk. The situation might be different for Azeri men, or Armenian women married to Azeri men. In all cases the particular circumstances will need to be assessed to see whether there are factors which increase or reduce potential risk.

34. The Respondent's wife has always lived in Armenia. There is no indication that she practices the Muslim faith, at least publicly. We have no evidence of the faith in which their children have been brought up. Neither the Respondent nor his wife has ever been to Azerbaijan.
35. The Respondent is not likely to be at risk of persecution or infringement of his Article 3 human rights because of his own nationality, religion or ethnicity. He is an Armenian national and a Christian whose father was Assyrian and mother Armenian. He, his wife and children are not likely to be at risk because of her Azeri ethnicity.
36. We allow the Secretary of State's appeal.

Mr P. R. Moulden
Vice President