

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76249

AT AUCKLAND

<u>Before:</u>	J Baddeley (Member)
<u>Counsel for the Appellant:</u>	I Anand
<u>Appearing for Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	16 & 17 July 2008
<u>Date of Decision:</u>	9 September 2008

DECISION

INTRODUCTION

[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.

THE APPELLANT'S CASE

[2] The appellant was born in Afghanistan in 1978. He is a Shi'a Muslim and a member of the Sadaat minority. His family moved to Afshar Silouy in Kabul city when he was very young and remained there until the collapse of the Najibullah government in 1992. His father had been a high-ranking officer in the Najibullah regime and was well known in the Sadaat community. He was a member of the Islamic Unity Party (IUP). After the defeat of Najibullah there was a power struggle between the IUP on the one hand and the Islamic Unity Force Party (IUFP) and its ally the Islamic Party (IP) on the other. The IUP was defeated. The appellant's family had to leave their home for the safety of Pol-e-Soukhta in West Kabul. Many thousands of Hazari were killed in the fighting. The Hazari blamed

the Sadaat minority for the defeat in Afshar accusing them of selling out and thus began the enmity between the Hazari and the Sadaat community which continues to the present time.

[3] The present Vice President of Afghanistan Khalili and his brother Haj Nabi, prominent Hazaris, were to the forefront in the killing of Sadaats because of their defeat in Afshar in 1992.

[4] In early 1993 the appellant's father and the appellant's eldest brother were taken from their home and killed by a group of armed Hazari under the command of Haj Nabi. They also shot and killed the appellant's mother when she tried to prevent them pursuing her husband and son. The appellant was now the oldest in the family and had to support his five remaining siblings (two sisters and three brothers). They decided that it was unsafe to remain in Afghanistan and so joined the large community of Afghani refugees in Peshawar. The appellant and his brother supported the family by working as labourers in the market for six or seven years. Their financial circumstances were very difficult. Once in Peshawar the appellant saved enough money to attend an English language institute. He believed that learning English would help his employment prospects. He had previously had little formal education and could read and write only basic Dari.

[5] The appellant's paternal cousin was a partner (along with his three brothers) in a vehicle importing business in the United Arab Emirates (UAE). This cousin arranged for the appellant to obtain an Afghani passport and a visa for UAE so that he could go to work for the company (XX Company) in Y, in the UAE. The appellant began work as a labourer cleaning cars and loading containers in October 2000 in Y. XX Company imported Japanese car parts into UAE and exported them to other countries.

[6] The appellant was treated "like a slave" by XX Company. He worked seven days a week from 8am to 10pm. He had very little time off. In an attempt to improve his situation, the appellant applied unsuccessfully for a visa at the Spanish Embassy in August 2003. He had to do this secretly without bringing it to the attention of XX Company who would have prevented his application proceeding.

[7] In December 2003, XX Company allowed the appellant to travel to Afghanistan. He wanted to find out whether conditions there had improved sufficiently for his family to return from Pakistan. He stayed with his friend AA in

West Kabul. AA lived there with his family. They were also Sadaat and AA's father was a friend of the appellant's father. AA's brother owned an ice cream shop where AA worked. The appellant did not socialise with anyone outside AA's family. He walked around the city to see what was happening, watched television and listened to the radio. He came to the conclusion that Afghanistan had not changed; there was a lot of racism, animosity between Hazari and Sadaats and religious prejudice between Shi'a and Sunni. The government was not in control; people carried weapons in public.

[8] He did not go to visit his family in Peshawar while in Kabul because he did not want to see the difficulties they were experiencing. He was regularly sending them money from UAE.

[9] In January 2004, the appellant returned to UAE. In October 2005, he applied for a visitor's visa at the New Zealand Embassy in Dubai. The application was completed for him by an agent, EE. It had to be kept secret from XX Company which would have prevented his attempt to leave their employment and to travel to New Zealand. He managed to obtain a sponsorship letter containing false information about himself from a vehicle importing company in New Zealand. EE advised the appellant on how to complete the visa application including false details concerning his siblings' identity, whereabouts and his own salary.

[10] XX Company required the appellant to travel to Kabul in late 2005 in order to obtain a visa for Japan. The company wanted the appellant to work for them at their operation in Japan and told him that it was impossible to obtain a visa from the Japanese Embassy in Dubai so he would have to travel to Kabul to do this. He did not want to return to Afghanistan but was forced to do so. Once again he stayed with his friend AA in Kabul for a month. He was issued a visa and directly returned to UAE and from there left for Japan about a month later.

[11] XX Company wanted him to work for them in Japan because he was a valued, long-term, experienced employee. He undertook the same labouring job as in UAE and the working conditions were equally onerous. After about four months working in Japan he returned to UAE in April 2006.

[12] In May 2006, XX Company again required him to travel to Afghanistan to obtain another visa for Japan. They did not consider extending his visa while he was still in Japan. He simply followed the company's instructions although he believed that returning to Afghanistan would place him at risk of harm from hostile

Hazari. He arrived in Kabul from UAE in May 2006 and again stayed with AA. While walking around the city he came across the premises of the Z organisation. He walked inside and met the president of Z organisation Mr BB and offered to work there as a volunteer, in return for being able to use the organisation's library and do his own research there. He wanted to improve his education. He worked as a cleaner and a driver for BB. BB, himself a Hazari, knew the appellant was a Sadaat but was sympathetic to him. The appellant had no problems while working in the institute as a cleaner and driver for BB.

[13] The appellant returned to UAE after a month in Afghanistan with his visa for Japan. He left UAE for Japan approximately one week later and resumed the same job as before with XX Company. He contacted his family in Pakistan and learnt that they would have to leave their home because the government was going to destroy the area where they lived. They had decided to return to Kabul. The appellant does not know why they did not try to relocate within Pakistan and did not discuss this possibility with his brothers.

[14] The appellant received his New Zealand visitor's visa and left Japan legally arriving in New Zealand on 18 November 2006 without XX Company knowing of his departure. He used his savings and money he borrowed from a friend to finance his trip, pay fees at an English language college in New Zealand and support himself here.

[15] In early 2007, the appellant contacted BB by email to discover whether he had received news of his family with whom he had earlier discussed his association with BB and the Z organisation. He asked BB to find a job for his brothers at the Z organisation which BB subsequently did. In late 2007, he heard from BB that his brothers, together with other employees of Z organisation, had left the organisation because some of them had been threatened by opponents of the government. BB himself had also been the subject of an assassination attempt by the same group.

[16] After arriving in New Zealand, the appellant was not able to work because he did not have a work permit. In December 2007, his friend CC, who had been helping him for the previous year, advised the appellant to apply for refugee status because this would mean that the government would help him. It was only days before he lodged his claim that he discovered he could apply for refugee status in New Zealand. He had not done so in Japan or the UAE because he did not have

the opportunity and would not have been able to keep this a secret from XX Company.

[17] The appellant fears serious harm or death on return to Afghanistan at the hands of Hazari who are enemies of Sadaats, in particular, because of his father's involvement in the events of 1992. Also he will be the object of racism and prejudice because he is a Sadaat. He claims that Sadaats in Afghanistan are hiding to protect themselves. As a Shi'a he believes he is also at risk of persecution from Sunni.

The witness's evidence

[18] The appellant's witness, CC, first met the appellant in early 2007. He himself is a refugee who came to New Zealand as one of the UNHCR quota refugees in 2002. They discussed the appellant's situation in Afghanistan and this continues to be the main topic of conversation with them. He has supplied the appellant with accommodation and support most of the time he has been in New Zealand. CC knows a number of Afghanis such as the "Tampa people" who were granted refugee status here in New Zealand. He himself is not sure why the appellant did not apply for refugee status on arrival but speculated that maybe his circumstances changed in December 2007 prompting this late application for refugee status.

[19] CC's sister-in-law and her family and his mother's brother are living in Maza-e Sharif. He is in contact with them. They are all Sadaats. His mother's brother is a well known carpenter in Maza-e Sharif and his sister-in-law is supported by her father who works as a welder. They tell him life is difficult; there is no work and CC confirms that hostility between Hazari and Sadaats is widespread particularly on the part of Hazari who have lost family in the Asfhar incident in 1992, however, he concedes that not all Hazari have the same prejudice against Sadaats. He had heard of Sadaats being targeted in a car bombing in Kabul. CC believes that the appellant will be affected on return to Afghanistan in the way that other Sadaats are affected but could not specifically say what this would amount to.

Documents produced

[20] The Authority received and has taken into consideration in this decision the following documents supplied by the appellant:

- (a) Submissions dated 10 July 2008.
- (b) A statement from the HH organisation of New Zealand.
- (c) Submissions dated 25 July 2008 and an attached statement from the appellant.
- (d) A DVD and CD provided subsequent to the hearing.
- (e) A copy of the RSB decision annotated with the appellant's comments.
- (f) Further country information and an accompanying statement from the appellant supplied to the Authority on 13 August 2008.

[21] The Authority notes that the appellant claims to have had some difficulties with the interpreter at the RSB interview. His problems were stated in a letter dated 10 May 2008 and also referred to in his lawyer's written response to the RSB interview report. These were considered and taken into account by the refugee status officer in reaching his decision and by the Authority. In addition the Authority has received the appellant's own corrections to the RSB decision and these have been taken into account in this decision.

THE ISSUES

[22] 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."

[23] 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

[24] Before making any determination as to the abovementioned issues the Authority must decide whether the appellant's account is credible. The Authority accepts that the appellant is Afghani and that he has travelled to the UAE, Pakistan and Japan on the dates he claims to have done. This travel is recorded in his passport. We also accept that he is a Sadaat. However, beyond that the Authority does not accept that the appellant fears being persecuted or that he was forced to return on two occasions to Kabul against his will. In particular, the Authority finds that the appellant made arrangements to apply for a visa to Spain and to New Zealand in the knowledge of or without any fear of this coming to the knowledge of XX Company. Although he knew about making an application for refugee status he did not do so on arrival in New Zealand because he did not fear being persecuted then and does not currently hold such a fear.

[25] The principal ground on which the appellant seeks refugee status is the need to seek protection from Hazari because he is a Sadaat. The Authority accepts the appellant's account of the fighting in 1992 which engendered lasting hostility and distrust by Hazari against Sadaats. However, from his own evidence, it became apparent that this hostility is not universal. BB, who was the principal source of assistance to him and his brothers in Kabul is Hazari and knows that the appellant is Sadaat. The appellant also filed a reference from the president of a Hazari organisation which spoke of him as a "very nice" and "hardworking young man" of whom the community is proud.

[26] The Authority advised the appellant, as had the RSB, that its researches had not revealed reports of the claimed persecution of Sadaats by Hazari. He was given leave at the conclusion of the hearing to provide country information to support his claim in this regard.

[27] Subsequent to the hearing the appellant provided the Authority with a CD and DVD showing the body of a man who apparently died of gunshot wounds. The film is dated 18 June 2005 and appears to have been taken in Pakistan or Afghanistan. No English commentary accompanied the CD or DVD.

[28] In a written statement the appellant explains that the CD and DVD depict the death of a Sadaat man who on return to Jaghori in Afghanistan, where many Shi'a people live, was killed by the same group of people the appellant fears. He claims that this demonstrates that even in places where many Shi'a live Sadaats

are at risk. There is no explanation, however of the circumstances of this killing, nor, beyond the assertion that he was Sadaat, how the death three years ago of one individual returning to Jaghori is relevant to the appellant's circumstances on return to Kabul.

[29] The appellant also provided to the Authority on 13 August 2008 country information concerning the death of KK in November 2007 in a bomb blast in Baghlan 95 kilometres north of Kabul. KK was a Member of Parliament. He was a friend of the appellant's father and was also related (in an unspecified way) to the appellant. The appellant also provided additional country information concerning the massacre in Asfhar in 1992 and ongoing recriminations.

[30] The Authority asked the appellant whether he had personally experienced any problems from Hazari during his visits to Kabul in 2003, 2005 and 2006. He had not. The appellant was asked what he had seen and how he had felt during his stay in Kabul in 2003. He replied that he had seen a lot of hatred, prejudice and racism. When asked to give examples of this conduct he replied "nothing specific".

[31] During his time in Kabul in 2003, 2005 and 2006 he stayed with his friend AA (also a Sadaat) who worked at his brother's ice cream shop. He did not socialise outside AA's family but walked around the city without encountering any harm. In 2006 he worked as a cleaner at the Z organisation office which was open to the public and patronised by Hazari. Although there had been some other Sadaats working for the Z organisation, the appellant knew nothing else about them. BB did not give the appellant any advice about what (as a Sadaat) he should do to ensure his safety while in Kabul. People would come in off the street. He had no problems there. He also worked as BB's driver transporting him around Kabul and had no problems from Hazari or anyone else.

[32] CC, his witness, claimed that he believed the appellant would be at risk from Hazari on return. CC's brother had been killed by the Taliban in 1998. He was questioned about his personal knowledge of the current situation. His contact with his family in Maza-e Sharif revealed that although their circumstances were difficult, they were able to support themselves. Both his uncle and his sister-in-law's father worked. The cost of living was high and work hard to get. CC sent them money to help with unusual expenses such as his nephew's tonsillectomy. Beyond this he gave no evidence of his family facing serious harm because they are Sadaat.

[33] The appellant cited the examples of assassination of well known Sadaats: various commanders of the Wahdat Party and in 2007 the assassination of KK (a Member of Parliament) and four of his comrades. These are all well known and influential Sadaats. The risk of serious harm faced by such individuals is not comparable to that for someone such as the appellant who is neither well known nor influential and has no political profile.

[34] Both the RSB and the Authority had advised the appellant that their research had failed to find any country information which confirmed the appellant's assertion that Sadaats had a well-founded fear of being persecuted. The appellant was given the opportunity by both the RSB and this Authority to address this issue but he failed to provide any country information demonstrating that Sadaats have a well-founded fear of being persecuted by Hazari or anyone else.

[35] The appellant also claims that as a Shi'a he feared persecution from Sunni in Afghanistan. As to this, he had received no harm or threats of harm from Sunni while in Kabul nor had he observed anything specific which caused him to be fearful.

[36] Leave was given to the appellant to supply relevant country information concerning Shi'a persecution by Sunnis. On 13 August 2008 the Authority received from the appellant two articles in Dari (untranslated) which the appellant states described the recent killing by Sunni of some Shi'a and five Sadaats. The Authority cannot verify this report but, in any event this isolated incident, even if accepted, does not support the appellant's assertion that Shi'a in general (or Sadaats) face a well-founded fear of being persecuted by Sunni.

[37] Country information states that although relationships between Sunni and Shi'a continue to be difficult, the discrimination against Shi'a which previously existed has now diminished. Shi'a are increasingly represented in government. United States Department of State *International Religious Freedom Report: Afghanistan (2007)* states:

"Historically the minority Shi'a faced discrimination from the Sunni population. However, since Shi'a representation has increased in government, there was a decrease in hostility from Sunnis. Most Shi'a were members of the Hazari ethnic group, which traditionally has been segregated from the rest of society for a combination of political, ethnic, and religious reasons [...] the treatment of the Shi'a community varied by locality. Although some discrimination continued at the local level, Shi'a generally were free to participate fully in public life. The rigid policies adopted by the Taliban and by certain opposition groups adversely affected adherence of other branches of Islam and other religious groups. The active

persecution of the Shi'a minority, including Ismalis, which existed under the Taliban regime has ended."

[38] The Authority concludes that as a Shi'a he does not face a real chance of persecution on return.

The appellant's failure to apply for refugee status

[39] The appellant was insistent that while working for XX Company he was treated like a slave and wanted to leave their employment. However, he did not apply for refugee status in the UAE because:

- (a) He had hardly any free time.
- (b) XX Company would not have allowed him to make the application.
- (c) He had to keep any attempts to leave the company secret.

[40] Upon closer questioning about his time in the UAE, he admitted that in his spare time he had gone shopping and sightseeing in Dubai (25 minutes drive from his place of employment), he had travelled to the Spanish Embassy in Abu Dhabi (four to five hours return trip) and on occasions had gone to the beach.

[41] The appellant maintained that he had to keep secret any attempts he made to leave the company such as seeking travel visas to Spain and New Zealand. However, documentation he had submitted in 2005 and 2006 to the New Zealand Embassy in support of his application for a visitor's visa, specified XX Company's addresses in UAE and in Japan as the addresses where any communication should be sent to the appellant from the New Zealand authorities. When asked why he had supplied the company's addresses (given that he had been vigilant to conceal his attempts to obtain a visa from the company) he replied that the agent EE, not himself, had done this. He could offer no explanation for this (apparent) negligence on the part of the agent.

[42] The appellant maintained that he did not apply for refugee status in Japan or UAE because XX Company would not have allowed him to do so, notwithstanding that he had managed to apply for visas to Spain and New Zealand without the company's knowledge or permission. It was put to him that an application to the UNHCR for refugee status did not require XX Company's consent. He stated that he believed UNHCR would have told XX Company about this however he had not attempted to ascertain whether or not this belief was

correct. When asked why he had not made these enquiries, he did not answer but said there were no human rights there, unlike New Zealand.

Delay in applying for refugee status in New Zealand

[43] The appellant did not apply for refugee status in New Zealand until December 2007 after he had been here for one year. When asked to explain the delay he initially stated that when he first came here he did not know about human rights in New Zealand and it was not until he did that he considered applying for refugee status. He described how he had met Afghanis including CC within a couple of months of his arrival. Almost every Afghani he met was a refugee. He did not however ask them about their circumstances or about human rights in New Zealand or applying for refugee status until he had got to know them. When asked to be more specific about when this occurred, the appellant replied that he had found out about human rights only days before he applied for refugee status (about one year after his arrival) and that his enquiries about this were prompted by the realisation that he could not support himself in New Zealand.

[44] It was pointed out to him that he had never held a work permit and on his own evidence had not been able to support himself in New Zealand but had relied on his friend CC for accommodation and money since shortly after his arrival here. He replied that it was his first option to work and study in New Zealand and build up his future but this had not eventuated so the only remaining option he had was to apply for refugee status. It was when CC told him that he had no choice but to apply for refugee status that he did so. However when questioned by the Authority CC himself stated that he did not know why the appellant had delayed a year in making his application. He also said that most of their conversations were about the appellant's predicament in Afghanistan.

[45] It is apparent to the Authority that the appellant applied for refugee status one year after arrival only because there was no other way of remaining in New Zealand and he was unable to continue studying or supporting himself. It does not accept that he remained unaware of the possibility of applying for refugee status until a year after his arrival. He had begun mixing with Afghanis, most of whom were refugees, soon after he came here. He knew about refugee status and the UNHCR from his time in Pakistan although he said that the efforts of UNHCR there were ineffective. Had he been in fear of persecution on his arrival he would have made the necessary enquiries initially of his Afghani friends. He did not do

so until it was the last resort available to him to ensure that he could remain in New Zealand.

The appellant's returns to Afghanistan

[46] The appellant returned to Afghanistan in 2003 with the consent of XX Company to decide whether he and his family should resettle there. He found the situation had not improved. In 2005 and again in 2006 he was sent by XX Company, despite his fears and protests, to Kabul to apply for a visa for Japan. When asked why he had not done this from the safety of Dubai where there is a Japanese Embassy, he replied that XX Company refused to allow him to do so. However, when faced with the frightening (to him) prospect of returning to Kabul, he himself did not make any enquiries of the Japanese Embassy in UAE as to whether such a visa application could be made from there. The reason he gave for this failure to attempt such an enquiry was that he had been following XX Company's orders in this regard. Similarly on his second visit to Japan he made no enquiries about his ability to renew his visa from there rather than having to return to Kabul to do so (although he knew that this would be required of him). The Authority does not accept that he would have failed to make the enquiries of the Japanese Embassy in UAE or the authorities in Japan in order to avoid travelling to Kabul had he feared persecution there.

The lack of attempts to contact his brothers

[47] The appellant has made no attempt to contact his brothers since 2007 when he asked BB to advise him if he received any news of them. He does not know where they are or even if they are alive. The most recent news was from BB in June 2007 when he told the appellant that his family had left the Z organisation (and presumably Kabul).

[48] Since late 2007, he has not contacted BB or anyone else in an attempt to trace his family. He last spoke directly to his family in 2006 when he was in Japan. When asked why he had not asked BB to arrange telephone contact with his siblings when they were in Kabul he said that "conditions were not right" by this he meant that he was feeling depressed and BB was very busy and travelled overseas a lot.

[49] The appellant produced to the Authority BB's business card containing his email address. When asked why he had not contacted BB by email (if he could

not do so by telephone) he said it was impossible because BB was travelling a lot overseas and very busy. The appellant also knew the street address of the Z organisation but he had not written to BB there as he said there was no point; BB would contact him. The appellant also had not attempted to contact his friend AA either by telephone or by writing. His reason for this was that “BB was enough for me”.

[50] The appellant’s failure to attempt to contact his family is surprising. He has three avenues of contact with BB; telephone, letter or email. He has used none of these since December 2007. His excuse was that BB was a very busy man and travelled a lot. BB had been very helpful to the appellant and his brothers and it is unlikely that he would fail to respond to the appellant making a further enquiry about his family. The Authority rejects this explanation and concludes that the appellant simply either does not want to or does not need to make enquiries about his family. It therefore does not accept his protestations of extreme concern about their welfare (and by implication his own if he was to return to Kabul).

Credibility findings

[51] The Authority finds that:

- (a) The appellant had the opportunity to apply for refugee status in UAE or Japan but he did not choose to do so. He was not desperate to leave the employ of XX Company. Neither did he attempt to keep secret from that company his application for a visa to New Zealand.
- (b) The appellant had made no enquiries of the Japanese Embassy in UAE or the Japanese authorities in Japan to ascertain whether he could avoid returning to Kabul to apply for a Japanese visa. XX Company did not force him to return to Kabul against his will and in disregard of his fear of persecution. He did not attempt to avoid returning to Kabul because he had no reason to fear doing so.
- (c) The appellant did not apply for refugee status in New Zealand until he had been here a year because he preferred to study and hoped to work here to set himself up for a better future. He always knew that he could apply for refugee status but he did not need to avail himself of this protection because he did not fear being persecuted on return.

[52] On return the appellant will go to Kabul as he has on three previous occasions in 2003, 2005 and 2006. The Authority has found that the appellant made no attempt (as he claimed) to avoid returning there in 2005 and 2006 and on his own evidence experienced no problems on any of the three occasions he returned to Kabul.

[53] There is no evidence before the Authority which demonstrates that for an individual such as himself circumstances have changed such that he now faces any well-founded fear of being persecuted on return to Kabul.

[54] As the first issue as framed has been decided in the negative the second does not fall to be considered.

CONCLUSION

[55] For the reasons mentioned above, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

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J Baddeley
Member