

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76416

AT AUCKLAND

<u>Before:</u>	A R Mackey (Chairman)
<u>Counsel for the Appellant:</u>	The appellant represented himself
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	23 November 2009
<u>Date of Decision:</u>	7 December 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 Pakistan.

[2] The appellant is in his late 20s. He is married to a national of Afghanistan, AA, who has permanent residence in New Zealand having come to this country as a mandated refugee. This is the appellant's second claim for refugee status in this country. He predicts he has a real chance of being persecuted by the Pakistani Taliban, or its supporters, if he is returned to Pakistan.

[3] The determinative issues in this appeal are firstly whether the Authority has jurisdiction to hear the appeal and, if so (provided his claim is found to be credible), does he have a well-founded fear of being persecuted in his home district in the North West Frontier Territory (NWFT) and/or can he access meaningful protection elsewhere in Pakistan away from his home district.

INTRODUCTION

[4] The appellant arrived in New Zealand in March 2005 and made an initial application to claim refugee status at the airport. A confirmation of claim for recognition was presented to the RSB the same month. After being interviewed by the RSB, they declined to recognise him as a refugee as his credibility was not accepted on significant parts of his claim. He then appealed to this Authority in July 2005 (*Refugee Appeal No 75664* (19 September 2005)). The Authority declined his appeal after he had absconded from the Mangere Accommodation Centre (MAC) and had then failed to attend the hearing before the Authority without a valid excuse.

[5] He then remained in New Zealand without a legal permit for a period of three and a half years, during which time he married. After being found working illegally in Manukau in May 2009, and taken into custody under s128 Immigration Act 1987, he then lodged a second confirmation of claim for refugee status, in May 2009. He was interviewed by the RSB in July 2009. The RSB declined his application in September 2009. He then appealed to this Authority.

[6] It is now necessary for the Authority to consider:

- (a) whether the appellant meets the jurisdictional threshold of establishing that circumstances in Pakistan have changed to such an extent that his second claim is based on significantly different grounds from the first claim; and (only if so)
- (b) whether, on the facts as found in the second claim, the appellant establishes he has a well-founded fear of being persecuted for a Refugee Convention reason on his return to Pakistan and, if applicable, he is able to access meaningful state protection in a district away from his home area.

[7] It is appropriate to consider the question of jurisdiction first.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[8] The jurisdiction of a refugee status officer to consider a second or

subsequent appeal is governed by s129J of the Act which provides:

“129J. Limitation on subsequent claims for refugee status—

(1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.

(2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding.”

[9] There is then a right of appeal, pursuant to s129O(1) of the Act, which provides:

“A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision.”

[10] The question of whether there is jurisdiction to entertain a second or subsequent claim was considered in *Refugee Appeal No 75139* (18 November 2004) where the relevant principles were set out at [54] - [57]:

[54] In any appeal involving a subsequent claim under s 129O(1), the issues are not “at large”. Rather, there are three distinct aspects to the appeal.

[55] First, irrespective of the finding made by the refugee status officer at first instance, the claimant must satisfy the Authority that it has jurisdiction to hear the appeal. That is, the claimant must establish that, since the determination of the previous claim, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. As to this:

- (a) The change of circumstances must occur *in* the claimant's home country. It is not open to the claimant to circumvent the jurisdictional bar by submitting that at the hearing of the previous claim the refugee status officer or the Authority misunderstood the facts.
- (b) A “reinterpretation” of a claimant's case is neither a change of circumstances, nor is it a change of circumstances *in* the claimant's home country.
- (c) The claimant cannot invite the Authority to sit as if it were an appellate authority in relation to the decision of the first panel and to rehear the matter. The Authority has no jurisdiction to rehear an appeal after a full hearing and decision.
- (d) A second appeal cannot be used as a pretext to revisit adverse credibility findings made in the course of the prior appeal.
- (e) Jurisdiction under ss 129J(1) and 129O(1) is determined by comparing the previous claim to refugee status against the subsequent claim. This requires the refugee status officer and the Authority to compare the claims as asserted by the refugee claimant, not the facts subsequently found by that officer or the Authority.

- (f) Proper recognition must be given to the statutory language which requires not only that the grounds be different, but that they be ***significantly different***.
- (g) The Authority does not possess what might be called a “miscarriage of justice” jurisdiction.

[56] Second, in any appeal involving a subsequent claim, s 129P(9) expressly prohibits a claimant from challenging any finding of credibility or fact made by the Authority in relation to a previous claim. While the Authority has a discretion whether to rely on any such finding, that discretion only comes alive once the jurisdictional threshold for subsequent claims set by ss 129J(1) and 129O(1) has been successfully crossed.

[57] Third, where jurisdiction to hear the appeal is established, the merits of the further claim to refugee status will be heard by the Authority. That hearing may be restricted by the findings of credibility or of fact made by the Authority in relation to the previous claim, or “at large”, depending on the manner in which the discretion under s 129P(9) is exercised by the Authority.”

[11] Against this background, it is now necessary to have regard to the first and second refugee claims made by the appellant in order to determine whether the jurisdictional threshold is reached.

THE APPELLANT’S FIRST REFUGEE CLAIM

[12] The account which follows is a summary of the claim which was made by the appellant to the RSB. He was represented by experienced counsel at that time.

[13] In his first claim, he stated that he was from the Mardan district in the NWFT. He was a student leader in the Pakistan Muslim League, Nawar Sharif faction (PML(N)). As such, he participated in demonstrations in Mardan city and elsewhere and had gained a profile because of his activities and support of former leaders of the PML(N). He claimed he had been arrested and detained on two occasions.

[14] The RSB rejected the appellant’s credibility in its entirety for the reasons set out in their decision of June 2005.

[15] For the reasons noted above, when the appellant appealed to this Authority, he failed to attend the hearing and his appeal was dismissed.

THE APPELLANT’S SECOND REFUGEE CLAIM (BRIEF SUMMARY)

[16] At the outset of the hearing of this matter, the Authority explained to the appellant the limited jurisdiction in this subsequent appeal and that the Authority

would only be able consider the second claim if the appellant established significantly changed circumstances arising after his first appeal. The Authority advised him that a decision would be made both on the jurisdictional point and, if necessary, his second claim after hearing all the evidence and considering the relevant country information.

[17] The nub of his second claim, as set out in a statement adopted by him and dated July 2009, is that over the period from March 2009 until the date of his statement, the Taliban had come to his home village, where his father was a village leader, and had taken away some young men for training in the Taliban and for them to fight against the government. He claimed that two of his brothers had become involved in a gunfight with some of the Taliban and that his brothers had then fled to an unknown destination. The Taliban had beaten his father. However, they told him that they did not want to kill him but they wished to kill one of his sons in front of him. The appellant predicts that the Taliban will not leave him alive if he returns to Pakistan, as the NWFT zone is still dangerous and the area where his family lives is not safe.

THE QUESTION OF JURISDICTION

[18] The issue can be resolved briefly. The new claim, as asserted, is significantly different from the first claim made to the RSB. Accordingly, the Authority is satisfied that it has jurisdiction to consider this new claim. In doing so, the credibility of the new claim will be addressed.

THE APPELLANT'S SECOND REFUGEE CLAIM (IN DETAIL)

[19] As the appellant was unrepresented, the Authority, before the hearing, made available to him a considerable amount of country material obtained from the Refugee Research and Information Branch of the DOL. This related to the updated country situation in the NWFT, in particular, the Mardan district, and risks posed by the Taliban in the north west and the rest of Pakistan at this time. The appellant signified that he had had the opportunity of reading through this material. He adopted his statement of July 2009.

[20] The appellant is from the village of X in Mardan in NWFT. The village has a population of some 2,000 people. The family have a farm of approximately 20 acres where they grow sugar cane, wheat and cereals. It has been in the family

for several generations. The appellant's father, who is now aged about 70, in addition to being a farmer, held the position as the collector of land taxes and government agent in the district. He has recently retired from that position. His father has been recognised as a traditional leader of the village for the past 15 or 16 years. Before that, the position was held by the appellant's grandfather. There is no local elected council and the appellant's father is recognised as the local leader.

[21] In addition to his parents, who are both alive, the appellant has two brothers and one sister. His sister is married and lives in the village of X. His two older brothers were living in the village but because of problems with the Taliban (to be discussed below), left the village some seven or eight months ago. There has been recent contact with them however.

[22] The appellant completed his schooling in 1995 and then went on to a Bachelor of Arts degree. This was largely an extra-mural course. While at college, the appellant became involved in politics and was a member of a sub-group of the PML(N) Party known as the Muslim Students' Federation.

[23] He arrived in this country in March 2005 and, as noted, lodged his first application. He absconded from MAC, and apparently began living in the Hamilton district. Again as noted, he lodged his second application after being found by Immigration New Zealand working in South Auckland. In 2008, he met his wife and married her in November. His wife, AA, is now five months pregnant with their child.

[24] The town of X is some 30 to 40 minutes' drive from the Swat Valley, an area of major conflict between the Pakistani government forces and the Taliban over the period March to July 2009.

[25] The appellant's family are not sympathetic to the Taliban because of the extremist views taken by them, particularly in relation to the treatment of women and the restrictions on education.

[26] His father, as the local village leader, had tried to discuss matters with the Taliban to ensure that the Taliban did not gain rule in the local area. However, an informer in the village told the Taliban of the father's views and that they were unwelcome. As a result, the Taliban came to the village in March 2009 and took away some young men for training. Later in March, the Taliban had been in touch

with the family and asked about the appellant's two brothers. The brothers were then alerted that the Taliban were coming to take them and thus made themselves ready. When the Taliban came to the house, there was an exchange of gunfire. His brothers both had guns. It was claimed that one of his brothers may have shot one of the Taliban. Because of their fear of retribution, the brothers then promptly left the village. For some period of time, the family did not know where they were or even if they were safe.

[27] The appellant advised that in a telephone call some 20 to 25 days ago, his mother had informed him that his brothers had made contact with the family. They did not say where they were but notified them that they were safe. He was also told that his parents, his two sisters-in-law and their children were remaining in the family home. Due to the recent army operations in the Swat Valley and surrounding districts, he understood that the situation in his home area was much better than it had been. The army had mostly defeated the Taliban so that his family considered that they were now relatively safe.

[28] He confirmed that his brothers were not Taliban supporters and that they had run away from their home district to avoid being captured by the Taliban. At the present time, the family farm is worked by some "refugees" or displaced persons from the Swat Valley district who have taken refuge in the Mardan district. The appellant's parents had offered them a place to live in return for them working on the farm. He understood there were two or three families now based on the family farm who were given support during the period of the current unrest.

[29] His mother also advised him that there were bombs exploding, particularly in Peshawar. However, there had been no explosions or such incidents in the appellant's home village. He noted that over recent times there had been seven bomb blasts in Peshawar and these were referred to in the country information that was made available to him. In addition he had seen reports on television.

[30] The political background of his family was as supporters of the PML(N) faction. That political faction is widely supported in the Mardan area, although the majority of support is for the Awami National Party (ANP) who are part of a coalition with the national government now controlled by the Pakistan Peoples' Party (PPP). The PML(N) had been part of a former government that held office from 1997 to 1999 but presently they were only in power in the Punjab province where they had reached some sort of arrangement with the PPP.

[31] The appellant's family strongly supported the army efforts to eradicate the Taliban from the NWFT and at present the Punjab regiment was based in Mardan, about 10 kilometres away from the appellant's home village. As he understood it, the Taliban had run away from his home district, although not many of them had been killed. The local people had no knowledge as to where they had gone. In the local village, the appellant considered there were some people who were Taliban supporters, including those who had informed on his father.

[32] The appellant stated his father had been threatened when the Taliban came to the village in March. They evidently remained there for a period of some 20 minutes but had left as they appeared to be scared that the police might arrive at any time. The Taliban then returned about one and a half months later and again threatened the appellant's father, telling him that while they could kill him, they did not wish to do so as they wished to kill one of his sons in front of him. At present, his father has heart problems and has been advised by the doctor, after two heart attacks, that a further attack could be fatal.

[33] The last visit by the Taliban was in approximately June 2009. His father rang the police at that time and they called on the family home approximately two or three days later but nothing further was done by them, apart from a basic check of the event and evidence of the exchange of gunfire.

[34] The appellant confirmed that under the traditional method of leadership, his father had taken over as the village leader after his grandfather and that the appellant's elder brother was the next choice for leadership of the village. At the present time, fears in the village were evident so that his niece, aged approximately 10, was too scared to go to school. His nephew, however, who attended school at a hostel away from the village, was considered to be safe. The family felt there was less likelihood of the Taliban being present where his school was located.

[35] The appellant stated that he had absconded before the hearing of his previous appeal as he feared being deported at that time. He had managed to obtain work, illegally, in the Hamilton district and had stayed with some fellow Pakistanis. In 2008 he had met his wife through an internet chat-room where she had put in information about herself in a Pashto-language website. Her family, including her three brothers and her parents, had all come to New Zealand as quota/mandate refugees in 2007. They were formerly from Afghanistan and had come to New Zealand after spending some time in a refugee camp in India. His

parents-in-law were happy with the marriage and fully supported them. His wife had formerly been working but she was now studying English language at a secondary school in Auckland.

[36] He considered that if he returned to Pakistan at the present time, there was still a threat and danger from the Taliban which had not been completely wiped out. This was obvious from the number of bomb blasts that continued to take place. He agreed that generally things were much better than they had been before but they had not reached the extent where one could feel safe on returning.

[37] The appellant was asked to comment on the country information provided to him, if there was anything specific that he wished to draw to the attention of the Authority. He did not consider there was anything of a specific nature but in the past, his family had been specifically threatened.

[38] It was noted by the Authority that the appellant had lived in Lahore and Karachi in the past. He stated that if he was to return to either of these places, there could still be risks as people considered the Taliban still had some presence in Karachi. In Lahore, there were risks from other terrorist organisations.

[39] He agreed that he had relatives and friends in these places but has had no contact with them since he had been in New Zealand. He considered that they would be afraid of having him live with them because of the association the family had had with the Taliban and threats made to the family. While ordinary people in his home district may be at a low risk, because of his father's well-known position, he and his brothers could be at a higher level of risk. His father had not left the village as his mindset was that at his stage of life, he considered that he should stay on and was not prepared to leave just because of the threats from the Taliban.

[40] The Authority offered to go through the country information with the appellant. However, the appellant said that he understood the information, having considered it.

[41] Finally, he explained his family situation in New Zealand. He thought as a single man it may be possible for him to return, particularly if he lived covertly and went into some form of hiding. However, his wife, who is not a Pakistani and was now five months pregnant, would be placed in real difficulty if she tried to go with him. There was also the strong possibility that as an Afghani national, she would

not be admitted and/or could be removed to Afghanistan.

[42] The Authority offered to hear any relevant evidence from his wife. After due consideration of this offer, the appellant advised that he did not wish her to give evidence.

THE ISSUES

[43] 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."

[44] 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 SECOND CLAIM

CREDIBILITY

[45] The Authority found that the appellant gave reasonably open and credible evidence in respect of most aspects of his claim. He was frank and open in conceding that the situation in his home district, and indeed across NWFT, had improved over recent months. There had also been contact between his parents and his brothers to indicate that they were safely relocated in another part of Pakistan, as yet undisclosed.

[46] The Authority, however, considers that the appellant's evidence given in his statement and in the hearings that the Taliban had told his father that they did not want to kill him as he needed more punishment, including killing one of his sons in

front of him, is illogical and inconsistent with the country information on the general practice of the Taliban towards village leaders. The Authority finds this evidence to be self-serving and doubts its credibility in an otherwise acceptable story. The reason for not accepting this part of his claim is that the country evidence shows that over the period from late 2007 until mid-2009, the Taliban and affiliated groups have engaged in a deliberate strategy of assassinating those tribal leaders and other representatives of traditional power structures who oppose their rise. The reports are that those tribal leaders seen as co-operating with the government have been a particular focus of attacks and reports indicate several hundred tribal leaders have been killed since the Taliban's emergence in 2007. A summary of this is set out in *Jane's World Insurgency and Terrorism Report "Tehrik-e-Taliban Pakistan" (TTP)* p6 of 16 – "Tactics and Targeting" posted to the Jane's Information Group website 16 November 2009 at <http://search.Janes.com/Search> (accessed 17 November). A further report from *BBC News*, 15 November 2009 "Militants target Pakistan elders" reports that militants staged two attacks against elders who had stood up to the Taliban in north western Pakistan.

[47] The country evidence is that the Taliban clearly were involved in a widespread practice of killing or removing village tribal leadership. The subtlety of claiming that they had not killed his father but rather were waiting to find one of the sons to kill him in front of the father appears a construct and an unrealistic claim in all the circumstances. The Authority therefore concludes that even if the family were targeted, this appears to have been done to obtain the services and/or support of the appellant's father and two elder brothers. The perceived position of his father is thus unlikely to be one of sufficient importance in the eyes of the Taliban that he should be eliminated.

[48] In all other respects, the Authority accepts the credibility of the appellant's claim.

COUNTRY INFORMATION

[49] Before moving on to assess the well-foundedness of the appellant's claim by assessing his predicament against the objective country information, it is of assistance to set out a brief overview of the latest country information in NWFT, in particular in the Mardan (home) area and additionally to consider the current risks to persons of the appellant's profile in other parts of Pakistan away from NWFT.

[50] Along with country information provided by the RSB to the appellant and his counsel earlier this year, they were provided a copy of the Authority's decision in *Refugee Appeal No 76346* (31 August 2009). In that decision, also involving an appellant from the NWFT area, reasonably close to the appellant's home village, the Authority researched and set out country information as at the date of that decision. In particular, between [47] and [49] of that decision, the Authority considered an article from the *New York Times*, dated 28 July 2009, which reported that hundreds of thousands of people were streaming back into the Swat Valley after months of fighting. It noted one important group was conspicuously absent and that was wealthy land-owners who had fled the Taliban in fear of being singled out as they had been over the past two years. In 76346, the profile of that appellant, as an oldest son of a well-known village leader, was, by comparison with this appellant, a significantly more prominent profile than this appellant, or those of his father and elder brothers.

[51] The more recent country information highlights that there has been an increased level of terrorist attacks in the form of bombings in the province's capital Peshawar. NWFT is currently hosting over one million internally displaced persons (IDPs) and there is a major camp in Mardan; see UNOCHA 2009, *Pakistan Humanitarian Update Issue 3*, 13 November 2009 (www.reliefweb.int/rw/Rwfiles2009.nsf/FilesByRWDocUnidFilename/AZHU-7XR89S_fullreport.pdf (accessed 16 November 2009)). A report from the *Balochistan Times* of 19 October 2009 reports that government and private educational institutes in Mardan have been closed.

[52] There are several reports of the bombings in Peshawar over the past two months, including a report from *Radio Free Europe/Radio Liberty 2009* that reports 90 dead in Peshawar at a time when ex-President Clinton visited Islamabad on 28 October 2009. The same source also reports at least 35 killed in Rawalpindi in a blast on 2 November 2009.

[53] The Authority has considered the UNOCHA report in depth and a number of *BBC News* articles from the BBC Monitoring Service, along with the Jane's Insurgency and Terrorism report noted above and a report from International Crisis Group 2009 *Pakistan: Countering Militancy in FATA* – Asia report 178, 21 October 2009.

[54] This material indicates, as the appellant agrees, that random bombing attacks do appear to be continuing, particularly in Peshawar. The government,

however, have substantially cleared the Taliban and their supporters out of NWFT and considerable numbers of IDPs are now returning to their homes.

WELL-FOUNDED FEAR

[55] The appellant's evidence, as reported to him in recent telephone calls to his family, is reasonably consistent with the country evidence which shows continuing random violence carried out by the Taliban, particularly in Peshawar and other cities. Country evidence, however, does not indicate substantive insecurity or attacks in the Mardan region. Indeed, Mardan city has hosted a considerable number of IDPs. The appellant's family itself, as he reports, is hosting a few families themselves. This clearly reflects a satisfactory level of security both in the Mardan region and in the appellant's home village. The appellant's parents have reported to him that they are not at apparent or significant risk at the present time.

[56] Thus, assessed in the round against the totality of the evidence, the Authority finds that this appellant, as the youngest son of a village elder, who does not appear to have a significant profile in the eyes of the Taliban, would be able to return to his home district in relative safety. This is not to say that there would not be remote or speculative risks of random attacks against the family or the appellant personally, but that there is not a real or substantive chance of the appellant being seriously maltreated on return to his home district at this time. As was noted by the Authority in *Refugee Appeal No 76346* (at [60]), if the Taliban were able to re-establish themselves in the appellant's home district, it would be consistent with the country information that this appellant would be at a higher and increased level of risk. However, the Authority does not find that to be the situation at this time.

[57] In relation to the predicament of the appellant's wife, the Authority notes s129W(e) of the Act, which states:

"129W Immigration matters not within functions of refugee status officers and Authority

The following are matters for the Minister and any appropriate immigration or visa officer only, and are not within the functions, powers, or jurisdiction of refugee status officers and the Authority:

...

(e) Any issue of a humanitarian nature that arises outside the context of a decision relating to the recognition of refugee status in New Zealand."

[58] Accordingly, issues in this regard cannot be taken into account.

[59] For these reasons, therefore, the Authority does not consider this appellant has a well-founded fear of being persecuted on return to his home district.

INTERNAL PROTECTION ALTERNATIVE

[60] Having found the appellant does not have a real chance of being persecuted in his home district it is, strictly speaking, unnecessary to go on and make an alternative assessment as to whether there is an internal protection alternative available to this appellant. The Authority can state, however, that in this appellant's case, on the evidence, an internal protection alternative would be available to him in other parts of Pakistan, such as Karachi or other major cities outside the NWFT. It would appear that the appellant's brothers are accessing an internal protection alternative themselves at this time.

[61] For the reasons largely set out in the Authority's earlier decision in *Refugee Appeal No 76346* between [63] and [71], and because he has a different and lesser profile from the appellant in that case, this appellant does have the ability to access an internal protection alternative and indeed has friends and relatives in major cities who could support him in such a relocation.

CONCLUSION

[62] For the reasons set out above, the Authority considers the appellant currently does not have a well-founded fear of being persecuted should he be returned to his home district in Pakistan. The first issue is therefore answered in the negative. Should, in the alternative, he wish to relocate away from his home area, he will have an internal protection alternative available to him.

[63] In the circumstances, it is unnecessary to consider the second issue as the appellant's fear on return is not well-founded.

[64] Accordingly, 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.

"A R Mackey"
A R Mackey
Chairman