

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 70983/98

AT AUCKLAND

Before: D J Plunkett (Member)

Counsel for Appellant: G Monk

Date of Hearing: 9 September 1998

Date of Decision: 30 July 1999

DECISION

This is an appeal against the decision of the Refugee Status Branch (RSB) of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a national of India of the Sikh faith.

INTRODUCTION

This is the second substantive appeal that the appellant has made to this Authority, though it is the third hearing before the Authority (for reasons which are explained shortly).

The appellant is a 30 year-old married man from the Punjab. He is separated from his wife, who is a New Zealand citizen. They have one child who lives with his mother-in-law and to whom he has weekly access. The appellant arrived in New Zealand on 27 June 1989 and made his first application for refugee status on 5 December 1991. Following an interview with the Immigration Service on 19 April 1993, the appellant was notified of the decline of his decision by letter dated 26 May 1993, to his then counsel. This prompted the appellant's first appeal to this Authority which was heard on 30 November 1994 and dismissed in a decision dated 9 November 1995 (Refugee Appeal No. 1593/93). The Authority gave the appellant the benefit of the doubt and found that he had a genuine subjective fear of persecution. It also found that the police had maintained a continuing interest in

him while he was hiding in Uttar Pradesh and subsequently after his arrival in New Zealand. It therefore held that there was a real chance of the appellant suffering persecution if he was to return to his local area but concluded that he could relocate elsewhere in India with safety.

In the interim, on 22 February 1994, the appellant was served with a removal order.

The appellant sought judicial review of the Authority's first decision and on 26 July 1996 the High Court ordered, by consent, that his appeal be referred back to the Authority. This arose because the Authority had failed to address the contents of a report by Human Rights Watch - Asia Dead Silence - The Legacy of Abuses in Punjab (May 1994).

The appeal was duly re-heard on 13 May 1997 by a differently constituted panel of the Authority and dismissed in a decision dated 17 July 1997 (Refugee Appeal No. 70457/97). The Authority found that it accepted the core of the appellant's story that he had been detained on two occasions and on the second occasion had been subjected to maltreatment. It also accepted that there was some continuing interest in the appellant and his family until he left India. The evidence of the appellant's mother as to the regularity of police visits to all members of the appellant's family was considered inherently improbable though it was not entirely rejected. The Authority therefore accepted that, during the period 1989 to early 1996, when she was in India prior to coming to New Zealand, the police showed some interest in family members. The Authority considered that such interest would have been at a low level and was more directed to the profile of the appellant's brother, JSJ, rather than the appellant. The Authority concluded that the appellant had virtually no profile with the police in the Punjab. The Authority reviewed the country information concerning the situation in the Punjab for Sikhs at the time of its decision and concluded that, while there may have been a remote chance of the appellant suffering persecution from the police if he returned to his home district, that chance was no greater than remote and did not rise to the internationally accepted level of a real chance as required under the Refugee Convention. The Authority found that there was a remote chance that the appellant might be visited by the police should he return to the Punjab and be questioned, particularly about his brother, but that none of the country information showed that the appellant would be likely to suffer persecution as a result of such questioning. The Authority found that alternatively, even if the appellant did have

a well founded fear of persecution in his home district, he had the ability to relocate to other parts of India and that it would be reasonable for him to do so. It noted that he was a person of little or no profile and that it did not appear that he was on any police "blacklist".

On 22 October 1997, the appellant filed his second application for refugee status. The RSB wrote to the appellant's solicitors on 23 October 1997 pointing out their jurisdiction in relation to second claims and requiring the appellant's evidence and submissions on this within 10 working days. His solicitors replied on 29 October 1997 referring to the submissions set out with their letter enclosing the appellant's second claim. On 2 June 1998, the RSB wrote to the appellant's solicitors advising that it was refusing to accept his second claim and enclosing an assessment of the same. This led to the appellant's second appeal to this Authority which was heard by a panel differently constituted from the previous two panels that had heard the appellant's earlier appeals.

The Authority records that the appellant has convictions in New Zealand for driving while under the influence of alcohol and assault of his wife. He was sentenced to periodic detention for the former. In respect of the latter, the appellant said that he had been sentenced to community service for the first assault and to 14 days imprisonment for the second assault, of which he served six days.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

The jurisdictional issues raised by second time appeals are fully canvassed in Refugee Appeal No 2245/94 (28 October 1994) and no purpose would be served by repeating what is said there. The essential issue to be addressed is whether, since the original determination, i.e. the first appeal,

1. circumstances in the appellant's home country have changed
2. to such an extent that the further claim is based on significantly different grounds to the original claim.

While that case was decided under the Authority's previous Terms of Reference, whereas this appeal falls to be determined under the current Rules Governing Refugee Status Determination Procedures in New Zealand, there is no material difference in the Authority's jurisdiction in relation to second-time appeals and

accordingly the issues as found in Refugee Appeal No. 2245/94 decided under the Terms of Reference remain valid.

To determine this issue, it is necessary to examine the factual basis of both the first and second refugee applications submitted by the appellant.

THE FACTUAL BASIS OF THE APPELLANT'S FIRST REFUGEE APPLICATION

This is set out in the decision of the Authority dated 17 July 1997. One of the appellant's brothers, RS, arrived in New Zealand in 1988 before the appellant, and in 1994, obtained refugee status in New Zealand. His sister also resides in New Zealand, having joined her husband, who obtained refugee status in New Zealand in 1996. The appellant's brother, JSJ, was granted refugee status in the United States and is a leading figure in the Sikh movement and in particular, in the International Sikh Youth Federation (ISYF) and the All India Sikh Students Federation (AISSF). The appellant has one sister and a brother, a government servant (who works for a bus company), still living in the Punjab.

The appellant did not belong to any political organisation, although he was sympathetic to the Sikh cause. In June 1987, there was a major incident in a nearby village during a festival, resulting in the deaths of 30 people at the hands of terrorists. As a result, the police rounded up a number of young Sikh men in the district, including the appellant. He was taken to a local police station but before he was interrogated, the Sarpanch of his village arrived and secured his release with the payment of a bribe of Rs5000.

The appellant was taken into custody again in August or September 1987. The police said that a person had been killed approximately two kilometres away from his village and he was suspected because a motor scooter, owned by the killer, had been left outside the appellant's shop. He was accused of associating with the people who owned the motor scooter. The appellant was held for five days during which time he was grievously mistreated. As he thought he would die, he admitted to the allegations and as a result, was taken to a Magistrate's Court where he was charged with being associated with terrorists and possession of arms and ammunition. At the hearing however, the police assured the Magistrate that they could arrest the appellant whenever they wished to and accordingly, no conviction was entered against him. He was released after payment of a further bribe.

The appellant travelled to Uttar Pradesh, some 300 kilometres away and remained there for two years. From time to time, the police went to his home in the Punjab looking for him. After about two years, the police in Uttar Pradesh went to his cousin's house, seeking the appellant. However he was not home at the time. The appellant then returned to the Punjab and stayed with his brother for approximately two months before fleeing India and coming to New Zealand, arriving here in June 1989. Since coming to New Zealand he had been told by his family that the police were still looking for him and his brothers. The police had told his mother that if her sons (including the appellant) returned, they would kill them.

RECENT DEVELOPMENTS: THE FACTUAL BASIS OF THE APPELLANT'S SECOND REFUGEE APPLICATION

The basis of the appellant's second claim are two warrants of arrest issued by a Magistrate in the Punjab.

The first is dated 22 September 1997 and was served on the appellant's brother on about that date. It refers to an "FIR" (First Information Request) of "21/2/84". The Authority observes that the "2" (denoting February) is oddly written and has plainly been changed ("7" appears to have been altered to "2") but no point is taken in relation to this. The document records that the appellant is charged with a number of offences under sections 25, 27 and what appears to be 54 and/or 59 of "A Act" (which the Authority understands to be the Arms Act) and "4/5 TD Act" (which is a reference to the Terrorism and Disruptive Activities (Prevention) Act, commonly known as "TADA"). The appellant is directed to appear before the Magistrate on or before 1 December 1997. The appellant does not know the nature of the offences he is charged with nor what incident or incidents in 1984 (or earlier) that the warrant is dealing with.

The second warrant was received by the appellant a few days prior to the hearing. It is dated 25 August 1998 and was served on the village Sarpanch. It refers to an "FIR" of "12.9.83" and requires the appellant's attendance before the Magistrate on or before 24 October 1998. The appellant is said to be charged with the offence of "3/4 TD Act 302/341PC". He did not know what he had been charged with or what incidents in 1983 this related to.

The appellant had not asked his brother or the Sarpanch to make any enquiries of the police or the court as to what offences or incidents these warrants related to.

The appellant also submitted an undated statement from a village elder recording that the appellant is likely to be arrested in the event that he returns home, given that police officials have been visiting and making enquiries of his whereabouts. Reference was also made to the arrest warrants which had been issued against him.

The appellant's second refugee claim was accompanied by an unsigned, undated statement from him giving details as to the whereabouts of his mother and siblings and recording that his mother, who had come to New Zealand, had been told by his brother, resident in India, that the police continued to be interested in the whereabouts of the appellant and his brothers. He also refers to his difficulty in recalling details of what happened to him because it had been a long time since the first incident in June 1987 giving rise to his refugee application. The appellant said he feared arrest, detention, torture and even death, at the hands of the police, if he returned.

The appellant's mother also provided an unsigned and undated statement confirming that she had been in regular contact by telephone with her son in India who told her that he continues to be asked about the whereabouts and activities of his brothers. She says that the police know that the appellant's brothers have refugee status and are certain that he and his brothers are terrorists. She is also certain that he will be killed if he returns to India.

At the hearing, the appellant told the Authority that he had had problems with the police prior to 1987 and as early as 1984 when the Golden Temple in Amritsar was stormed.

The appellant also told the Authority that an earlier warrant for his arrest had been issued but that his brother had torn it up and thrown it away. The appellant does not know why he did that or when the warrant was served on his brother, though he believes it was in 1995. He said that this happened prior to his interview before the Authority on 13 May 1997. His brother told him on the telephone a few days after he had been served. The appellant said that he did not mention it to the Authority at the hearing of his earlier appeal because the warrant had been torn up and he did not have a copy of it. He also told the Authority that there must have

been other warrants for his arrest issued before 1995. He does not know how many warrants were issued.

The appellant said that the police continued to visit his brother inquiring as to his (the appellant's) whereabouts. They have been three or four times to his home since service of the warrant in September 1997. The last time was about two weeks prior to the hearing before the Authority. His brother was not mistreated on these visits. His sister, who still lives in the home village, does not have any problems from the police.

The appellant submitted a short video which he had obtained from his brother in the United States. The Authority has viewed it and remarks that it is of very poor quality. It is titled 'Disappearances in Punjab' and is from 'The Committee for Information and Initiative on Punjab'. Counsel describes it as a perspective from the Sikh movement. It was made in 1995. It does not deal specifically with the appellant or his family but more generally with Sikh history up to 1995.

Counsel provided a comprehensive memorandum of submissions (dated 8 September 1998), with enclosed materials, including World Sikh News articles, country information with graphic photographs of alleged police abuse of Sikhs (those dated appear to be mainly in the 1991 / 1992 period), recent Council of Khalistan documents dealing with the human rights situation in the Punjab and what is said to be recent police atrocities, and photographs of the appellant's brother (JSJ). Further submissions were produced on 14 October 1998, together with a report from a consultant psychiatrist (Dr Logie) dated 30 September 1998. On 27 May 1999, the Authority sent counsel a bundle of decisions of this Authority and the Refugee Review Tribunal of Australia and other country materials and invited further submissions. In the light of the effluxion of time since the hearing, the appellant was also invited to submit any further evidence he wanted considered. Counsel's submissions were received in reply on 9 July 1999, though no additional evidence was produced. The Authority has also considered the submissions in counsel's letter of 21 October 1997 to the RSB.

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY ISSUES

The Authority must firstly determine, prior to addressing the jurisdictional issues, whether the appellant is a credible witness. The Authority has no hesitation in concluding that the appellant is an untruthful witness and that the documentary evidence is fabricated. In so concluding, the Authority takes into account the following:

- (1) It is implausible that the authorities would issue warrants for the appellant's arrest in September 1997 and August 1998, being eight to nine years after the appellant left India and 10 to 11 years after his two arrests in 1987. It is also inherently improbable that the police would issue warrants in 1997 and 1998 for incidents which are alleged to have occurred not later than 1984 and 1983 respectively (when the FIR's were issued). The appellant's evidence that a warrant was issued in 1995 is equally implausible, being six years after he left India and eight years after his two arrests. Had the police sought the appellant, they would have done so much earlier and indeed could have done so in the two years he remained in India following his two arrests. The appellant had no explanation for the lengthy effluxion of time prior to the issue of these warrants.
- (2) It is also implausible that the police would seek to pursue charges in the court against the appellant given that they had taken him to court in 1987 following his second arrest, but elected not to proceed because, according to the appellant, they felt could arrest him at any time. Had the police wanted to pursue the appellant through the court system, they would have done so at that time. The decision then not to proceed against him indicates that the appellant was not regarded as a significant suspect at the time. It is therefore highly improbable that they would now regard him as of any significance. The appellant also had no explanation for this.
- (3) The two warrants refer to First Information Requests issued in 1983 and 1984. The appellant has never previously alleged that he had any problems with the police prior to 1987 or that he had been accused of any involvement in criminal activities before then. In his statement accompanying his second refugee application, he says that his problems

began in about June 1987. He told the Authority, for the first time in his lengthy refugee claim history in New Zealand, that he had earlier problems and had been arrested before 1987 and perhaps as early as 1984 when the Golden Temple was stormed. He could not remember when though. The Authority finds the reference to alleged criminal incidents in 1983 and 1984 to be wholly inconsistent with the appellant's previous claims. When questioned by the Authority, he was particularly vague as to the timing and nature of his earlier problems. In particular, he did not know what incidents these dates were a reference to. Later in his evidence, he claimed not to recall whether he had even been arrested before 1987. While the Authority appreciates the difficulty in recalling the events of more than 10 years ago, the Authority would expect him to broadly recall the nature of the incident even if he cannot remember the details. Counsel says that the date the authorities have chosen to put on the warrants is irrelevant since they are false allegations. This was not, however, the appellant's explanation for the early dates. He says he was in trouble with the police before 1987 and perhaps as early as 1984.

- (4) The "first" warrant (being the first of the two warrants in respect of which the appellant was able to produce a copy) was issued on 22 September 1997, which is just over two months after the dismissal of his first appeal. The "second" warrant was dated 25 August 1998 and received by him in early September 1998, immediately prior to the hearing before this Authority. Given the period of time the appellant has been outside India and also the prolonged period since his two arrests in 1987, these coincidences are too striking to be put down to the hand of fate. The Authority concludes that the timing of the warrants evidences their falsity.
- (5) The issuing of warrants against the appellant in 1997 and 1998 is also inherently improbable in the light of the country information available to the Authority concerning the situation for Sikhs in the Punjab today.

The Authority has extensively reviewed the country materials since the publication in May 1994 by Human Rights Watch/Asia of Dead Silence - The Legacy of Abuses in the Punjab which exposed the extent of the human rights violations by the Indian and Punjabi authorities. It is beyond peradventure that Sikh militancy, which was prevalent in the Punjab throughout the late 1980s and early 1990s, has largely been crushed. This

has led to a very significant reduction in the abuse by the police and security forces of suspected Sikh terrorists since the levels seen at the height of the government crackdown in 1991 and 1992. The grim statistics recording deaths at the hands of both the terrorists and the police set out in the Authority's decision in Refugee Appeal No. 523/92 (17 March 1995) (at pp 71-72) show an unmistakable trend towards modest or negligible levels by 1994. The Authority is unaware of the precise figures since then but it is clear from other country information that the situation continued to improve after 1994. This is the conclusion reached, not only by other panels of this Authority, but also by our Australian counterpart, the Refugee Review Tribunal.

Refugee Appeal No. 523/92 (17 March 1995) pp 71-77
 DIRB India: Information from four specialists on the Punjab (17 February 1997) pp 3, 6-12
Refugee Appeal No. 70457/97 (17 July 1997) pp 16-20
 RRT V 97/06155 (11 February 1998) pp 6-8
 The Vancouver Sun Why Khalistan isn't in the news anymore 3 April 1998
Refugee Appeal No. 70712/97 (30 July 1998) pp 27-31
 RRT V97/07223 (27 October 1998) pp 6-9
 RRT V97/07644 (22 January 1999) p 7
 United States Department of State India Country Report on Human Rights Practices for 1998 (26 February 1999) pp 1-2, 8-9

There has been much improvement in the human rights position in the Punjab since about 1995 and the widespread and systematic human rights abuses during the crackdown are at an end. In May 1995, the law under which thousands of persons were held for prolonged periods without charge, the Terrorist and Disruptive Practices (Prevention) Act, was allowed to lapse by the government. The government has established a National Human Rights Commission in the Punjab which actively investigates past and present human rights violations. In 1998, the Supreme Court acknowledged and condemned the serious abuses of the early 1990's and delegated responsibility for their investigation to the National Human Rights Commission. Human rights activists report that approximately 100 police officials were either facing charges, had been prosecuted or were under investigation for human rights abuses by December 1998. Some 35 police officers have been jailed on charges of murder and human rights violations.

RRT V97/06376 (19 February 1998) pp 8-9, 15-16
 UNHCR Background Paper on Refugees and Asylum Seekers from India (October 1998) p 12
 RRT V97/07233 supra pp 6-7
 Human Rights Watch World Report 1999 (December 1998) p 187

United States Department of State India Country Report on Human Rights Practices for 1998 *ibid* pp 1-2, 8-9, 12

The presence of the Sikh political party, the Shiromani Akali Dal, in the coalition Punjab state government (since February 1997) and in the coordination committee of the multi - party national government (since April 1998) has no doubt contributed to the improved climate for Sikhs. They now have a voice in state and political national affairs.

Refugee Appeal No. 70457/97 *supra* pp 17-18
The Vancouver Sun Why Khalistan isn't in the news anymore *ibid*
The Hindu India 14 members in coordination panel 29 April 1998

It is accepted though that while the Sikh militancy has largely been crushed and the human rights situation commensurately demonstrably improved, the Sikh movement seeking an independent state of Khalistan has not been completely eliminated and there continues to be isolated acts of terrorism and with it, police abuses of suspected militants. The ingrained culture of violence and human rights violations which characterised the actions of the security forces in the 1990s will not be jettisoned overnight.

DIRB India: Information from four specialists on the Punjab *ibid* pp 7-8
DIRB India: Information from three human rights workers and one human rights lawyer from the Punjab (4 June 1997) pp2-7
RRT V97/06376 *supra* pp 9-12, 16-19
RRT V97/07223 *ibid* pp 8-9
Amnesty International Report 1997 pp 177-180, Amnesty International Report 1998 pp 193-196
Human Rights Watch World Report 1998 *ibid* pp 184-188, World Report 1999 (December 1998) pp 184-189
UNHCR Background Paper *ibid* p 13

However, the Authority finds that a review of the totality of the country information available shows clearly that the pattern of widespread abuse of ordinary Sikhs is at an end and it is only high profile terrorist suspects who are at any real risk of persecution by the Punjabi and Indian government agencies. The position is best summarised in DIRB India: Information from four specialists on the Punjab *ibid* (pp 10-11):

"Groups at Risk

According to Bob Brack, people who are not high profile militant suspects are not at risk in the Punjab today. For Brack, the high - profile suspects might include a perceived leader of a militant organization, or someone suspected of a terrorist attack. Brack as well stated that the Sikhs with some slight perceived condition to the militancy - through a family member, for example - would not now be targets of the Punjab police. Laurence Brooks indicated that

there were only a few high profile militant suspects left, with virtually none remaining in Punjab or India itself.

Ravi Nair defined a high profile individual as someone suspected of anti - state activities by the Indian authorities. Nair stated that a family member of such a person or someone who was forced to provide shelter for militants during the height of the insurgency would not now be considered a high profile suspect. According to Nair, those without a high profile have much less to fear from the Punjab police, and now have much better access to judicial recourse if they are treated improperly. Nair stated that simply holding a pro - Khalistani opinion, for example, would not make an individual a high profile suspect; one would have to engage in violent anti - state acts. According to Brack, many of the high profile suspects wanted by the Punjab police would actually be excluded from claiming refugee status in Canada because of their past actions”.

Counsel has also submitted a number of publications documenting continued police abuses of Sikhs in the Punjab, most notably press releases from the Council of Khalistan (dated 17 & 24 July 1998, 11 & 12 August 1998), the testimony of Dr Gurmit Singh Aulaskh (the President of the Council) at the United Nations on 16 July 1998, a statement from Dr Aulaskh at a demonstration on 15 August 1998, his testimony before the United States House of Representatives on 6 August 1998 and an entry in the Congressional Record of 25 June 1998. The Authority's own research has uncovered a further document from the Council, the Council of Khalistan Atrocity Report (23 January 1998), covering the period from March to December 1997.

These publications deal with both the historical (in the sense of pre - 1995) and current situations and point to continued incidents of police violation of Sikhs. It is alleged by the Council that up to July 1998 there had been 150 atrocities (at least) in Punjab since the coalition government, including the Shiromani Akali Dal, came to power in March 1997. Few details of these are given. The Council report of 23 January 1998 describes some incidents, though many of the entries either do not describe incidents of persecutory conduct by the Indian and Punjabi authorities at all or do not relate to the Punjab or even to Sikhs. Some of the entries confirm that the authorities are prosecuting police officers for involvement in the deaths and torture of Sikhs. The Authority is sceptical as to the veracity of some of the entries in this report and as to the tenor of the Council documents as a whole. It is accepted by the Authority there are still isolated acts of persecution of Sikh leaders and suspected terrorists since independent sources confirm this but, to the extent that the Council purports to demonstrate that the situation has not improved since 1995 and that there

remains widespread persecution of Sikhs generally in the Punjab, the Authority finds the Council materials as partisan and unreliable. There is an absence of corroboration in more authoritative independent sources. Dr Singh claimed in his testimony at the United Nations in July 1998 that the “human rights situation in Punjab, Khalistan remains as bad as it ever was”. This is plainly inconsistent with a wealth of more objective materials and is rejected.

While human rights abuses do still occur throughout India, including the Punjab, both against Sikhs and others, the Authority finds that their frequency and severity in a country with such a large population as India, is not such that it can be said that this appellant is exposed to a real risk of persecution should he return to India. The appellant is not a high profile terrorist suspect nor is he perceived as such by the security forces. Indeed, he has a rather low profile. He was arrested one or more times before 1987 (though he is not entirely clear about this or the details of such arrests). Then he was arrested twice in 1987. The first arrest was only a general round up of Sikhs following an incident and he was released without being questioned or mistreated. His second arrest was due to the death of a person and the appellant's alleged association with those people because a motor scooter was seen outside his shop. The appellant was held for a short period of time, though he was badly mistreated. He was taken to court but the police decided not to proceed against him. He remained in India for two years after this but the police appear to have made little effort to find him and did not locate him. Nor does his relationship with his brother in the United States raise his profile beyond the level that can be characterised as low. In the circumstances, the appellant cannot be said to be in the category of a high profile terrorist suspect who would be at risk of persecution in the Punjab today. The appellant's claim is therefore implausible, given the backdrop of the situation in the Punjab for Sikhs since 1995.

A consultant psychiatrist has diagnosed the appellant (apparently primarily for an application for permanent residence on humanitarian grounds) as suffering from “Post Traumatic Stress Disorder - Chronic”. He offers no opinion on the effect such a diagnosis would have on the appellant's ability to recall and recount in a lucid and consistent way the details of his claim, though he records that while “no perceptual disturbances were noted”, the appellant's attention and concentration

during the consultation “lapsed at times”. His cognitive functioning was “otherwise clinically grossly intact”. Counsel submits that the appellant was distressed and emotional during the hearing, which the Authority accepts. As counsel observes, some of the answers to the Authority’s questions were illogical or irrelevant. Other parts of the evidence though were coherent and relevant. The Authority accepts that his distress is a factor in assessing the extent to which the appellant’s inconsistent or vague evidence impacts his credibility. However, the Authority does not accept that the appellant’s agitated and pre-occupied mental state displayed at certain times during the hearing is an explanation for a discrepancy as fundamental as when he first had problems with the police and was arrested by them. Nor does it explain his inability to provide the Authority with any description of the pre-1987 incidents or the matters alleged against him by the police in the recent warrants. Moreover, the appellant’s state provides no explanation of the overwhelming improbability of his account of recent events.

In concluding that the warrants themselves and the appellant’s evidence concerning them, are false, the Authority is mindful of the conclusion reached by the Authority on each of his earlier appeals that the core of his story was truthful (the Authority on the first appeal giving him the benefit of the doubt), including some (but not all) of the evidence of continuing police interest after his departure from India. However, this Authority, for the above reasons, has no doubt that his evidence as to the two warrants issued in 1997 and 1998 respectively is false. The Authority doubts that there has been any interest in the appellant by the authorities for some years but, if there is any such interest, it agrees with the finding of the earlier Authority (on 17 July 1997) that it is at a particularly low level and will concern the appellant’s brother, JSJ, rather than the appellant himself.

JURISDICTIONAL ISSUES - CHANGE OF CIRCUMSTANCES

However, even if the appellant's claim that two warrants for his arrest have been issued was true, which it is not, the appellant would still not meet the Authority’s jurisdiction for second time claims since it is evident that a warrant was issued in 1995, prior to the (second) hearing of the appeal on the appellant's first application. The appellant knew this but decided not to tell the Authority because, he says, his brother had torn it up and he could therefore not produce it to the Authority. The Authority disbelieves the appellant's explanation for not telling the earlier Authority but, whatever the reason for not doing so, it is now his evidence that there was (or were) an earlier warrant (or warrants). Accordingly, the issue of

warrants in 1997 and 1998 cannot be regarded as a change of circumstances since the decision by the Authority on his first appeal (17 July 1997).

Counsel says that this evidence does amount to a change of circumstances because it is new evidence that was not before the Authority on the earlier occasion. The Authority cannot accept counsel's construction of paragraph 5(1)(f) of its Rules. The rule is quite clear. There must be a change of circumstances in the appellant's country (to such an extent that the further claim is based on significantly different grounds) and not merely a change in the evidence as to the earlier circumstances. The appellant says there were warrants issued before the earlier appeal. The only difference now is that we have evidence in the form of copies of the later warrants and the appellant's evidence concerning them. The circumstances have not changed at all let alone to the extent that the further claim is based on significantly different grounds; it is only the evidence that is different. Furthermore, if counsel's argument was to be accepted, it would allow asylum seekers to cynically manipulate their refugee claims by 'holding up their sleeve' some part of their claim in order to advance it as a ground for their second claim, in the event that the first is unsuccessful. This is not a case of subsequent evidence showing an intensification or escalation of police interest in him, or a change in the police attitude, as counsel submits. It was the appellant's evidence that one or more warrants had been issued before, in 1995 or earlier, but had been torn up by his brother. There was no confusion in the appellant's mind concerning this. Counsel submits that the Authority should avoid fine semantic and philosophical distinctions in its interpretation of the Rules concerning its jurisdiction in the light of the humanitarian purpose of the Convention. The Authority accepts this. However, its jurisdiction is determined by paragraph 5(1)(f) of the Rules and it is the text of that rule which must be interpreted and applied, albeit in a humanitarian way. In approaching its task in a humanitarian way, the Authority cannot alter the clear terms of the rule. The Authority is not, under the guise of interpretation, entitled to assume a jurisdiction it does not have. The text does not admit of the construction advanced by counsel.

Counsel also submits that the continued prominence of the appellant's brother as a Sikh activist in the United States amounts to a change of circumstances. He refers to the publication of his photograph in two newspapers in September 1992 and August 1996. However, the high profile of his brother as an activist was before the Authority at the earlier hearing (including the fact that his photograph had appeared in newspapers) and both the publications relied on occurred before

the hearing and subsequent decision in May and July 1997 respectively. This cannot constitute a change of circumstances. Similarly, the refugee status of his brother, RS, granted in New Zealand in 1994 and which was known to the Authority at the earlier hearing.

DETENTION AT THE BORDER

Counsel says that the appellant is at risk of being detained at the Indian border immediately upon his return if he is deported or removed from New Zealand following an unsuccessful refugee claim. This is due to his previous experiences with the police (including the warrants for his arrest), his family's persecution and his brother's status as a Sikh activist in the United States. In his oral submissions, counsel says that the appellant will now be on a "black list" due to the warrants against him. Counsel relies on the following passage from the Human Rights Watch publication Dead Silence-The Legacy of Abuses in Punjab *ibid* p 21:

"Police persecution in Punjab has driven a large number of Punjabi Sikhs to seek asylum abroad. According to one of the police officers interviewed by PHR/HRW, those who are denied asylum and returned home face grave risks:

Another group of individuals who are subject to police scrutiny is anyone who is returned to India after having been deported from the United States, Germany, Canada, England or any other country. Once a deportee reaches an airport in India, he is immediately placed in custody. In Delhi, all returning Sikh deportees are held in the Dhiar Jail. Upon incarceration, a wireless message is sent to Punjab inquiring whether the person is on the police blacklist for political activities. I personally know of an incident in which five Sikh deportees were being held in detention in Bombay after returning from deportation. A wireless message was received at my station, as well as other stations in Punjab. The message identified the individuals and invited any local station to come get them if they were wanted. I later learned that all five were killed by the authorities in "police encounter".

This passage is quoted with approval in Refugee Appeal No. 2245/94 (28 October 1994) at pp 21 - 22.

The short answer to this argument is that the Authority has no jurisdiction to consider this ground since it does not relate to any change of circumstances in his home country since the determination of his earlier appeal. The Dead Silence report, published in 1994, largely deals with the situation in Punjab in 1992, at the height of the Government crackdown (see *ibid* p 1). It is not submitted that the situation is any worse today in the Punjab or throughout India for Sikh returnees. Counsel accepted there had been some change for the better. In the Authority's

view, it is demonstrably clear that the general situation for Sikhs in the Punjab and throughout India has significantly improved. As for the appellant in particular, to the extent that the warrants are said to expose him to greater risk, the Authority notes its rejection of the warrants and observes that, even if they were genuine, earlier warrants existed and therefore these later warrants cannot give rise to a change of circumstances in regard to this argument that he is at risk at the border. Furthermore, the appellant raised this issue on his earlier claim and it was dealt with, briefly, in the decision of the Authority dated 17 July 1997 (see pp 10 & 17).

However, in deference to counsel's submissions, the Authority will deal substantively with this claim. It is important to bear in mind that the Dead Silence report was published in May 1994 and largely deals with the situation in 1992. It is unsurprising that it was favourably considered in a decision of the Authority published in October 1994. However, it cannot be relied on as representing the position in 1999. More recent country information shows that Sikh returnees, apart from those with high profiles, are not at risk of detention upon their return:

"According to Brack, officials from the Canadian High Commission in New Delhi regularly monitor the airport arrivals of individuals deported from Canada. Brack stated that in the last few years this group has numbered 8 or 10, and Indian authorities have not pursued any of them, with the exception of Sarabjit Singh Bhatti, who was arrested by Indian police in September 1996 after being deported from Canada. According to Brack, Bhatti was arrested because he was a senior official of the Khalistan Commando Force (KCF).

... According to Brack, High Commission staff have also observed that many Convention refugees from Punjab return to their former homes, and that some even accompany their spouses and families to the High Commission in New Delhi to help them with their immigration applications".

DIRB India: Information from four specialists in the Punjab *ibid* pp 12 - 13

Counsel distinguishes this report on the basis that it is confined to Canadian deportees only. The Authority does not regard this as a valid distinction. There is no suggestion in the report that deportees from Canada are treated any differently.

The claim that pro-Khalistan sympathisers are at risk at the border was considered by the Australian Refugee Review Tribunal in N97/17241 (24 November 1998) and rejected (see p.6).

Counsel also observes that the Dead Silence report was relied on in the Authority's decision in Refugee Appeal No. 70057/96 (12 December 1996) and Refugee Appeal No. 70126/96 (22 May 1997). As to the former decision, the

Authority notes that, not only was this decision published before the DIRB report in February 1997, but the appellant in that case was regarded as a person of “some comparative profile” due to his relatively high rank and status within the airforce. This distinguishes him from the appellant in this instant case. In the latter case, the Authority had before it the DIRB report and accepted it. It found that the appellant had been identified by the Punjab police as a terrorist supporter, that he had been subject to four arrests (all but one lengthy and brutal) up to as recently as 1994 and it is clear that he was regarded by the Authority as a “high profile militant suspect”. Even in that case, the Authority found that the chance of the appellant suffering persecution should he return to his home village, while real, was at the lower end of the scale. Furthermore, the chance fell below the requisite level if the appellant relocated, though in the circumstances of his case, that was found to be unreasonable. That case can therefore also be distinguished from the case at hand.

The Authority does not therefore accept that persons with such a low profile as the appellant's, whose involvement with the police is as remote in time as it is, is at any real risk of detention and persecution at the border. There is only the remotest possibility of this. Nor does the Authority accept that his relationship with his brother will lead to serious problems at the border, except possibly routine questioning. His relationship does not elevate the chance of persecution beyond the remote level. The Authority has already rejected the warrants. It is also noted that the appellant could reduce the remote risk of problems on arrival even further by returning voluntarily rather than waiting to be removed. Furthermore, there is no reason to believe the Indian authorities would know of his application for asylum in New Zealand, nor is this alleged.

SUMMARY

The appellant's evidence and his documentation in support is not accepted as genuine. Alternatively, even if his second claim is genuine, there is no change of circumstances as there was an earlier warrant (or warrants). The Authority concludes that circumstances in the appellant's home country have not changed to such an extent that this second claim can be said to be based on significantly different grounds to the first claim.

CONCLUSION

For the above reasons, the Authority finds that 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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Member