

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76484

AT AUCKLAND

<u>Before:</u>	C M Treadwell (Chairperson) S A Aitchison (Member)
<u>Counsel for the Appellant:</u>	C Curtis
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Dates of Hearing:</u>	21 & 22 April 2010
<u>Date of Decision:</u>	19 May 2010

DECISION DELIVERED BY S A AITCHISON

[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 South Africa.

INTRODUCTION

[2] The appellant arrived in New Zealand on 9 October 2009. He lodged his claim for refugee status with the RSB on 11 October 2009. He was interviewed by a refugee status officer on 17 November 2009. By decision dated 28 January 2010 the RSB declined the appellant's claim. The appellant duly appealed to this Authority.

[3] The appellant claims to have a well-founded fear of being persecuted in South Africa on account of his sexual orientation and ethnicity. He fears persecution at the hands of members of the Lajpal Group and from the general populace. The central issues in this appeal are whether the account of the appellant is credible and whether he faces a risk of serious harm in South Africa.

THE APPELLANT'S CASE

[4] What follows is a summary of the appellant's evidence in support of his claim. It will be assessed later in this decision.

Events in Pakistan

[5] The appellant is a married man in his late-30s with two daughters from separate marriages. He was born in Lahore, Pakistan, and raised in the Catholic faith by his parents. He is one of five children.

[6] The appellant completed his primary school education in 1985. He was sporadic in his school attendance as he was bullied and found study difficult. He cannot read or write and is illiterate like his parents. He speaks Punjabi, English and some Afrikaans.

[7] After leaving school he assisted his parents in their separate occupations. He helped his father in his grocery store, which included driving a delivery truck, and assisted his mother with her cleaning jobs.

[8] The appellant became sexually active when he was around 14 years of age. He formed sexual relationships with men, many of whom were Muslim. One relationship with a Muslim man, AA, was particularly significant to him. AA was several years older than the appellant and lived a few streets away. They met while AA was working in his father's shop. They began talking about sexual matters and then commenced a relationship. Both had experienced sexual relations with men prior to commencing their relationship. They met some six times a week and had sexual relations approximately three times a week. They would meet at the appellant's home, AA's home, at the store after closing, and in various other places outdoors.

[9] The appellant became aware that homosexuality was punishable by death in Islamic law and ended his relationship with AA in approximately 1994-1995. AA was not happy about the relationship ending and threatened to expose the appellant's homosexual activities to his parents and the village priest. AA told the appellant that it was possible to get him killed, as homosexuality was punishable by death under Islamic Law. The appellant was forced to see him on at least one further occasion.

[10] The appellant's father discovered that the appellant was having sexual relationships with men and beat him, telling him to cease such behaviour immediately.

[11] The appellant went into hiding to avoid AA and stayed with various relatives for some six months before leaving the country. During this time people came looking for him at his father's store. They continued to enquire about him even after he had left Pakistan for South Africa.

Events in South Africa

[12] The appellant's father made arrangements for the appellant to travel to South Africa. The appellant entered South Africa in 1996 on a visitor's visa. Upon arrival, he stayed with some Christians in Johannesburg who assisted him in finding employment, initially preparing meals for supply, then later operating a stall at the market.

[13] The appellant moved to Pretoria and sold goods in a market stall. He also made deliveries for other stall owners. In approximately 1998 he met BB and commenced a relationship with her. They began living together, but this was not continuous, and they spent much of their time at their own separate addresses. During this time the appellant had casual sexual relations with other men and women. BB had no knowledge of these activities. The appellant felt guilty when he had sexual relations with men and wanted to change his behaviour. He tried his best not to be gay.

[14] The appellant and BB were married by a priest in Johannesburg in June 2000. Not long after the wedding BB fell pregnant and later gave birth to a daughter, CC.

[15] The appellant did not renew his working visa when it expired in South Africa. He was not aware that he needed a visa to stay in the country. It was not until his wife insisted that they go to the Home Affairs Office in Pretoria to register the birth of their daughter that he became aware that he should obtain legal residency in the country. He made an application for residence on marriage grounds and was granted this in approximately 2002.

Problems with the Lajpal Group

[16] The appellant was introduced to members of the Lajpal Group at a party that he attended in Pretoria in approximately 2004. The Lajpal Group comprised members from various backgrounds including Nigerian, Pakistani, Bangladeshi, and European, amongst others. Many were Muslim extremists. The appellant did not know much about their activities but knew that they kidnapped and killed people.

[17] The party was arranged by the appellant's friend DD, for his two-year-old child. Between twelve to fifteen people attended the party. While the appellant was sitting in the yard a member of the Lajpal Group approached him and began questioning him. He asked the appellant for his name, address and whether he knew certain persons. He grew angry with the appellant and began arguing and swearing at him. He slapped him and pulled his hair.

[18] Four members of the Lajpal Group became involved in this argument with the appellant at the party. Two of the men were dressed in traditional Pakistani dress, and one was dressed in a full black Muslim dress with a hat. One of the members carried a gun. During the argument, one of the members, asked another member of the group why he was not killing the appellant. The group told the appellant they knew who he was, what he had done, and that they would kill him. They said that homosexuality was a crime in Islam punishable by death, and that whoever punished him would go to heaven. One of them pointed a gun at the appellant while the others encouraged him to kill the appellant. The appellant was then physically attacked by the person in the Muslim dress, who aimed a knife at his face. The appellant lifted his arm to protect himself and received a slash on the inside of his left forearm. The appellant fell to the ground and the group began kicking him until he fell unconscious.

[19] The appellant awoke in hospital in Pretoria two days later. His arm had been stitched and bandaged. A doctor visited him and asked how he had received the injury, but the appellant was in shock and did not respond. He was also visited by a police officer, EE, who asked what had happened to him. He did not offer any explanation. Several hours after waking he escaped from the hospital in his hospital gown. He took a bus to Braamfontein, in Johannesburg, and contacted a friend there. The appellant did not seek further medical attention and removed his own stitches from his arm with a pair of scissors.

[20] The appellant continued to receive threats from members of the Lajpal Group. He received telephone calls and messages in which he was told that he had committed a crime against Islam. He changed his telephone number up to eight times in an attempt to avoid contact with them.

[21] Members of the Lajpal Group demanded money from the appellant on two to three occasions, threatening him with death if he did not comply. On one occasion he paid between 1500 to 2000 rand to a man who had threatened him by telephone. He met this person at a park and handed him the requested cash. He was not sure if this person was a member of the Lajpal Group.

[22] The appellant did not report these matters to the police as he considered that the police were corrupt. He knew that the Lajpal Group were responsible for killing many people and that the police had not taken any action regarding these crimes.

Return to Pakistan

[23] The appellant returned to Pakistan in October 2005. He remained there for three months, living with his parents. During this time he was threatened by Mullahs and other Muslim persons on account of his homosexuality. He rarely left home for fear of his life. A community person relayed a message to his family that what he had done in the past was against Islam and that he would be punished for his deeds.

Return to South Africa

[24] The appellant returned to South Africa in January 2006 and lived with BB in Pretoria. He worked at a market stall and operated a delivery truck. He stayed at many other places that he could not remember; one of the places he recalled was Pietermaritzburg.

[25] A week after arriving in South Africa the appellant travelled to Lesotho on two consecutive days with friends to go sightseeing. He also travelled with a friend to Swaziland in May 2006. After the appellant left for the United Kingdom in June 2006 he did not live with BB again.

[26] Apart from meeting men casually for sex the appellant did not have any serious or long-term relationships. He was not comfortable to be open about his

sexuality in South Africa, and knew that Muslims in South Africa held extremist views. Because of his colour he was disliked by the local black and white men.

Events in the United Kingdom

[27] The appellant travelled to London in June 2006 and entered on a six-month visitor's visa. He experienced no difficulties in London and felt safe. He approached a lawyer there who lodged an application on his behalf for leave to remain in the United Kingdom. This application was refused in September 2007. The appellant did not apply for refugee status as he did not know about this procedure. He was required to leave the country, and consequently bought his own ticket and departed.

Second return to Pakistan

[28] The appellant returned to Pakistan in April 2009 and lived at various addresses with his parents, his maternal aunt, paternal uncle, sister and others. He married FF a month after returning, a marriage arranged by his parents. He continued, however, to have sexual relations with men while in Pakistan. Most of these relations were casual, although one man, GG he saw regularly.

[29] While staying in Pakistan the appellant received threats from Mullahs who told him that he had committed a crime against Islam on account of his homosexual activities. One particular Mullah told him that he knew the appellant had been committing these acts both before and after his marriage.

Nationality

[30] The appellant claims that he is a citizen of South Africa and has lost his citizenship status in Pakistan. While he carries a passport from Pakistan, he requires a visa to enter and remain there.

Materials filed with the Authority

[31] Counsel filed submissions with the Authority on 14 April 2010.

THE ISSUES

[32] 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."

[33] 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

Nationality

[34] The Authority finds that the appellant is a national of South Africa. He acquired citizenship in that country in 2005. The Authority also accepts the appellant's claim that he does not currently possess the rights of a Pakistani national, noting that he requires a visa to enter and remain in Pakistan. On the available evidence, the appellant's ability to re-acquire Pakistani nationality cannot be said to be a mere formality. His claim for refugee status falls to be determined in relation to South Africa alone.

[35] For the sake of completeness we observe that, even if he was a national of Pakistan or could re-acquire Pakistani nationality as a mere formality, the outcome of this appeal is such that an assessment of the appellant's claim against that country is unnecessary.

Credibility

[36] Prior to determining the identified issues, it is necessary to make an assessment of the appellant's credibility.

[37] The appellant says that he received a primary school education, albeit poor, and that he is illiterate. He speaks Punjabi, English, and a little Afrikaans.

[38] In making this credibility assessment, the Authority has made every allowance for the appellant's illiteracy. It has also taken into account the fact that the appellant's statement and RSB interviews were completed while he was held in prison, and that he did not have the benefit of an interpreter when his statement was taken.

[39] The Authority has concluded that the narrative advanced by the appellant in support of his claim to refugee status is not truthful in any material respect and rejects the evidence presented. Detailed reasons for this finding follow.

[40] The appellant's evidence to the Authority was characterised by multiple inconsistencies going to the core of his claim. When provided an opportunity to explain these inconsistencies he either claimed memory loss, or his evidence became mobile. The appellant's claimed memory loss, however, is not supported by any medical opinion or evidence, and the Authority is cognisant that it habitually arose after he was directed to inconsistencies in his evidence.

Attack by members of Lajpal Group

[41] The appellant claims to have been attacked at a party in Pretoria in 2004. In his statement, he claimed that while attending this party a man attacked him suddenly with a knife, called him a "Paki" and told him to go home. At the RSB interview, the appellant claimed that a member of the Lajpal Group at the party mocked him and attacked him with a knife. Before the Authority, the appellant claimed that he had an argument with a member of the Lajpal Group at the party who slapped and pulled his hair. Four members of the Lajpal Group then became involved in the argument, which lasted for approximately an hour, before one member directed a gun at him. The group threatened to kill him because he was homosexual. He was then slashed with a knife by another member, then kicked unconscious by the rest of the group.

[42] The Authority directed the appellant to the apparent discrepancies in his evidence, pointing out how his claim had grown and evolved since he first provided a statement and was interviewed before the RSB. When asked to comment on this the appellant stated that at the RSB interview he was told not to go into too much detail and that he simply explained what he had been asked. He stated that he was under stress when his statement was taken from him in prison, and could not think properly and remember things. He stated that he could not recall what

he had told the RSB about the party, but that what he told the Authority was correct.

[43] The appellant's account of his time in hospital also evolved, even during the appeal hearing. At his RSB interview, he claimed that he was questioned in hospital by the police about his injury, but because he feared the Lajpal Group and thought the police were corrupt he told them instead that he had fallen and cut his arm on a glass jug. Before the Authority, he claimed that he did not speak to anyone during his two hours of consciousness in hospital. Later in evidence before the Authority he added that a doctor had visited him and asked him questions. When asked why he had earlier stated that no one spoke to him in hospital he responded that he had only been asked whether there was someone present with him in hospital. The Authority directed him to the precise question that had been asked, namely, "In those two hours who had been to see you?" and he responded that he had understood the question to mean had there been someone with him. Later, again, in evidence he added that the police officer EE had been to visit him at this time as well. When asked to explain why he had omitted this detail in his earlier evidence to the Authority he stated that he had not remembered this and that he had needed time to think about it to recall it.

[44] Before the Authority, the appellant gave an account of his departure from the hospital. He claimed that he escaped in his hospital gown and – without his clothes, wallet, identity card, and other personal effects – immediately caught a bus to Braamfontein. It is inherently implausible that the appellant would escape hospital in his hospital gown, and instead of going to his home address in Pretoria, or seeking other assistance closer at hand, travel the distance to Johannesburg without any money, identity card, driver's licence or other personal effects. His explanation for accessing an inter-city bus service without any money – that the driver took pity on his distressed state and hospital attire, is also implausible.

[45] Equally implausible is his account to the Authority that he did not seek further medical attention, but removed the stitches from his arm himself. This would have involved the removal of a considerable number of stitches, the wound being approximately 10 centimetres in length and leaving behind a significant scar. It is not that such self-surgery would be impossible, but rather that he had no sensible reason for not going to a doctor to have the stitches removed without pain.

Threats from Lajpal Group members

[46] In his Confirmation of Claim to Refugee Status (“Confirmation of Claim Form”), the appellant asserted that he had been attacked by members of the Lajpal Group on three to four occasions between 2005 and 2006. Before the Authority, however, the appellant claimed that apart from the attack at the party in 2004 he had not experienced any further attacks at the hands of the Lajpal Group. When asked to comment on this discrepancy he stated that he could not remember what he had claimed previously. The Authority further reminded the appellant that in his Confirmation of Claim Form he stated that he was beaten by the members of the Lajpal Group and injured during these attacks between 2005 and 2006. When asked to respond the appellant stated that he had not mentioned this. When asked why he could not remember if someone had injured him he stated that he tries to remember but forgets things.

[47] Before the Authority, the appellant claimed to have received telephoned threats from the Lajpal Group. He went to great lengths, he said, to evade the calls, moving address and changing his pre-pay mobile telephone’s SIM card up to eight times. It implausible that the Lajpal Group could access the appellant’s pre-pay mobile telephone numbers on eight occasions while he was moving between residences – and that they would go to such lengths to contact him, threaten him, and then do nothing more.

[48] The Authority further finds the appellant’s claim that he met a person who had been threatening him by telephone in a park, and personally handed him 2000 rand (about NZ\$400), implausible. The appellant gave vague evidence as to the threats and the transaction, and eventually claimed that he did not even know if the person was a member of the Lajpal Group.

Change of residence

[49] On repeated occasions throughout the hearing before the Authority the appellant could not provide details about where he lived in South Africa. He struggled to recall where he was living prior to his visits to Pakistan and the United Kingdom, and where he lived upon return to South Africa following those visits. His evidence in this regard was vague and mobile.

Threats in Pakistan in 2005

[50] The appellant's claims to have received threats in Pakistan on account of his sexual orientation are not accepted.

[51] Before the Authority, the appellant claimed to have returned to Pakistan in October 2005, and to have been subjected to threats from Mullahs. He did not, however, mention any such threats in his statement. At his RSB interview, while he mentioned returning to Pakistan, he did not claim to have received any threats upon his return. When asked to explain this discrepancy the appellant stated that his memory was not good, and that if he was asked in a month's time what he had said to the Authority he would not remember.

[52] The appellant stated to the Authority that when he returned to Pakistan a community person that he knew told him that he would be punished for the deeds he had committed against Islam. When the Authority asked for this person's name he stated that it was an elderly person respected in the community. When pressed further he said that it was a matter of gossip and that when his father had gathered in a community group he was told about this matter. When asked to clarify whether he or his father received these threats he explained that it is a cultural matter and people grew jealous of those who travelled abroad. With his evidence evolving even further, he added that if he had to name the persons who had conveyed these threats there would be over a hundred of them.

[53] At the RSB interview, he explained that he had returned to Pakistan in 2005 because his mother was ill. Before the Authority, he claimed that there was no particular reason for his returning to Pakistan. When asked to explain this apparent discrepancy he stated that he did not know why he had missed out this detail.

Relationships with men

[54] The Authority finds that the appellant has presented no credible evidence of having conducted any relationships with men. The evidence presented is inherently inconsistent, vague and contradictory. No corroborative evidence of any gay relationship or activity has been presented to the Authority.

[55] The appellant asserts that the one significant gay relationship in his life was with a Muslim man "AA" in Pakistan. In his statement, he claimed that after a year into their relationship AA told him that what they were doing was wrong and that

he did not want to have a sexual relationship with the appellant any longer. At the RSB interview, however, the appellant claimed that it had been he, not AA, who had sought to end the relationship. Before the Authority, he again asserted that he was the one who ended the relationship. When asked to comment on the discrepancy between this and his earlier statement he responded that he did not know what was written in his statement as he did not have a good memory. We have had careful regard to the difficulties which the appellant says he had in prison, when instructing his lawyer as to the content of his statement. We do not find that the stress of his environment or the need to converse with his lawyer in English, could have accounted for such a discrepancy. The statement is detailed and explicit. Further, the appellant's English, while a second language, is adequate (he has lived predominantly in English-speaking countries for the past 14 years). In his statement, the appellant also claimed that AA told him that he (the appellant) was the person who had introduced him to sex with men. Before the Authority, he claimed that AA was sexually experienced before he met him and that he knew some of his former partners. When asked to comment on this discrepancy the appellant stated that AA had not told him about his prior sexual experience at first but later in the relationship told him about it.

[56] At the RSB interview, the appellant stated that he did not know what AA did to earn a living. Before the Authority, he hesitated when asked for AA's occupation, then stated that he was probably a labourer because he "had enough money". It is implausible that the appellant would not have a clear understanding of AA's occupation given that they shared a relationship of some one and a half years together, seeing each other up to six days a week.

[57] Upon his second return to Pakistan, in 2009, the appellant claimed that he had a regular relationship with a person known as GG. His evidence of this relationship was also characterised by vagueness. When asked by the Authority where he had met GG he could not remember, despite the fact that this meeting would have occurred less than a year ago. When asked where he would visit GG he simply responded "out of the locality".

[58] The Authority finds no credible evidence to support the appellant's claim to have conducted relationships with men. Furthermore, the appellant has not presented any credible evidence of his claim to be homosexual. While he claims to be distinctively gay, the Authority could not discern this from his physical presentation at the hearing.

Conclusion on credibility

[59] On the cumulative weight of the foregoing concerns, the Authority concludes that the appellant's claim to be homosexual and at risk of serious harm at the hands of the Lajpal Group is untrue.

[60] It is accepted that the appellant is a Pakistani Christian, a married man and a citizen of South Africa. His claim falls to be assessed on this basis.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Pakistan?

[61] Persecution is defined in refugee law as the sustained or systemic violation of basic or core human rights such to be demonstrative of a failure of state protection; See J C Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at para 15.

[62] The appellant claims that he is at risk of persecution in South Africa on account of his Punjabi ethnicity, notwithstanding that, before the Authority, he retracted his initial claims that he had made in his statement about being the subject of past xenophobic attacks.

[63] It is evident from country information that xenophobia is a feature of modern day South Africa. The United States Department of State's *Country Reports on Human Rights Practices: South Africa* (February 2010) states that:

Although not as pervasive as in the previous year, xenophobic attacks on foreign African migrants and ethnic minorities occurred and sometimes resulted in displacement.

[64] The preceding year a mob chased approximately 3000 Zimbabwean migrants out of the town of De Doorns by attacking their shacks. In May 2008, 62 persons were killed in Western Cape, Gauteng, and KZN provinces. Twenty-one of these were South African citizens, 11 were Mozambican, five were Zimbabwean, and three were Somali; US Department of State Report (supra).

[65] Christy McDonnell "Migration and Xenophobia in South Africa" (2009) 1 Conflict Trends, when considering migration policy and xenophobia in South Africa writes, at pp34-40 :

Over the last decade, little tremors and eruptions of xenophobia have been apparent with the greatest of those occurring in May 2008. Even now, the rumblings of xenophobia still remain.

[66] The South African authorities took steps to address the xenophobic attacks of May 2008, and criminal trials were conducted for suspects resulting in a number of convictions. NGOs, however, criticised that only one suspect was convicted of murder and that the process was slow: See the United States Department of State Report (*supra*); 2009 Human Rights Watch World Report for South Africa.

[67] The South African government has taken positive steps to combat xenophobia. A “Social Dialogue on Promoting Tolerance and Diversity” was held in Pretoria (now Tshwane) in August 2008. A number of addresses were made, including that of Minister in The Presidency, Essop Phahad, whose address was entitled: ‘Xenophobia has no place in a free and democratic South Africa’. He reiterated the Joint Communiqué of the Progressive Governance Leader’s summit of 2004 that “Pluralism encompassing cultural, ethnic and religious diversity is one of the key features of our societies – our societies are enriched by diversity”; www.info.gov.za. A cluster of initiatives were undertaken by the government following the attacks that included provision of humanitarian support, reintegration, and justice for those affected.

[68] The Authority considers that while country information indicates that xenophobia is a feature of South African life, and that foreign African migrants have been a particular target in recent times, there is no evidence to suggest that foreigners, whether of black, Asian or other origin, are systematically harmed to the extent that every foreigner is at risk of persecution to the level of a real chance. Furthermore, there is no evidence that the state of South Africa is unable or unwilling to provide protection to foreigners. It is an open, democratic society with a developed legal system that makes serious efforts to protect its citizens from harm.

[69] There is nothing in the appellant’s personal history to suggest that he faces a real chance of persecution upon return to South Africa. Any harm to him is entirely speculative and falls short of a real chance of persecution by a demonstrable margin.

[70] There is also no evidence that the appellant will experience persecution on account of being a Christian in South Africa. As stated in the 2010 Department of State Report: “The constitution and law provide for freedom of religion, and the government generally respected this right in practice”. No other country

information of which the Authority is aware suggests that a Christian, whether of Pakistani origin or not, is at risk of serious harm in South Africa on account of his religious beliefs.

[71] There is nothing to indicate that a person having the characteristics of the appellant is at risk of serious harm in South Africa.

[72] The first issue raised by the Convention being answered in the negative, the second issue, that of a Convention reason, does not arise.

CONCLUSION

[73] 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.

"S A Aitchison"

S A Aitchison
Member