

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76394

AT AUCKLAND

<u>Before:</u>	B L Burson (Member)
<u>Representative for the Appellant:</u>	The appellant represented himself
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	6 August 2009
<u>Date of Decision:</u>	1 October 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 declining the grant of refugee status to the appellant, a national of Pakistan.

INTRODUCTION

[2] This is an appeal by a young man who has been in New Zealand for a number of years but who originally hails from the North West Frontier Province (NWFP) in Pakistan and fears being targeted for kidnapping by the Taliban or other gangs because of his length of time abroad. The central issue to be determined in this case is the well-foundedness of the appellant's fears.

[3] What follows is a summary of the evidence given in support of the appellant's case. An assessment follows thereafter.

THE APPELLANT'S CASE

[4] The appellant was born in 1981 in Kohat in the NWFP in Pakistan. He is a Sunni Muslim. He completed his primary and secondary schooling in Kohat, concluding in 1996. His parents and siblings remain living in Kohat.

[5] The appellant's father originates from Z in the Federally Administered Territorial Areas. He had been sent to live in Kohat with his mother by his father because of a dispute between the appellant's grandfather's siblings over land which had threatened the life of his father.

[6] While he was still in Pakistan, the appellant and his siblings travelled on occasions with their parents to the appellant's father's village in Z to visit relatives. Over time, the appellant noticed his relatives telling of changes in the village's social environment. In particular, from the mid-1990s, the appellant's uncles told of a creeping 'Talibanisation' of the area. He recalls his uncles complaining that it was not possible for them to watch television anymore because the Taliban had threatened that they would burn the houses of those they saw with television aerials. Over time, the litany of restrictions remarked upon by his uncles grew to include Taliban-imposed edicts regarding what they must wear, the length of their beards and how women had to behave.

[7] After completing most of his secondary schooling in Kohat, in the mid-1990s, the appellant travelled to Peshawar for the last year of his schooling where he remained with an aunt. From there he came back to Kohat to undertake a further course of training before travelling to Islamabad in 2000 to undertake courses in computer information technology. The appellant remained in Islamabad until 2004 when he came to New Zealand.

[8] The appellant decided to come to New Zealand for economic betterment and because the security situation was beginning to deteriorate. In the months immediately prior to his departure for New Zealand, the appellant was told by his family, whom he visited in Kohat from time to time while studying in Islamabad, that people were increasingly being displaced into Kohat from Z and other areas because of sectarian strife between Sunni and Shi'a communities.

[9] The appellant has not returned to Pakistan since arriving in New Zealand. He has been working throughout this time in New Zealand. During this time he has kept in regular contact with his friends and family. In this time he has become

aware of the deterioration in their living conditions as a result of the increasing tensions in Pakistan, not only between the Sunni and Shi'a, but also now with open conflict between the Taliban and the Pakistani state itself. He has heard from his parents that, not only have increasing numbers of people been displaced into Kohat, but that Kohat itself has now become a site of conflict.

[10] The appellant told the Authority that nothing in particular has happened to his family. His mother and father still work. His younger siblings are still attending school. However, in recent conversations he has had with his parents they have told him that they are concerned for their safety and live in a climate of fear. They regularly hear gunfire and there was a rocket-grenade attack near to where his parents were living. They do not socialise and his mother is anxious that something might happen to the younger children each time they are sent off to school.

[11] The appellant told the Authority that he fears being kidnapped in Pakistan. His coming to New Zealand was no secret in his locality in Kohat and everyone knows that he has been in New Zealand for all this time. This will expose him to danger. The Taliban are using kidnapping and people like him are widely regarded by them as being rich and therefore a source of money.

[12] Nowhere is safe for him in Pakistan. Everywhere there are bomb attacks and other security incidents. Moreover, kidnapping and robberies of people like him, who dress in a western fashion, is on the increase. The appellant mentioned that he has some friends of Pakistani origin who had returned to cities in Pakistan and had been subjected to robberies because they were perceived as "rich westerners". This has also increased his fear.

[13] Also, he could not live in another city such as Karachi, Islamabad or Lahore because it is not now culturally appropriate for him to do so. While he could get a job and sustain himself he is the eldest son in his family. His parents have recently begun harassing him about settling down and finding a wife to take on his responsibilities for looking after the family. His two younger siblings are aged about 16 and 14. His father only works as a casual labourer and is in his 60s. While his mother works, she is in her late 40s, and will be retiring in a couple of years and he must shoulder the burden. It is for this reason that it is not possible for him to go to another city as this would require his whole family to relocate.

Submissions and other documents

[14] At the conclusion of the hearing the Authority served on the appellant a bundle of country information relating to kidnapping in Pakistan from the website *Dawn*, a Pakistani daily newspaper in English, to which the appellant had referred in submissions he had made to the RSB dated 19 June 2009. The appellant was granted leave until 28 August 2009 to file further submissions on this documentation and further statements from the friends who had been robbed when they returned to Pakistan from New Zealand.

Other statements

[15] On 28 August 2009 the Authority received a further statement from the appellant dated 25 August 2009 along with the following letters:

(a) Letter from AA dated 1 August 2009

AA states that he was born and grew up in Karachi prior to travelling to New Zealand in 2002. His parents and one of his siblings remain living in Karachi and he has been returning home to visit his family every two years or so. He was last in Karachi from the end of 2008 until the end of February 2009. AA says that over the course of his return visits to Karachi he has noticed that the everyday life of people has changed. Residents feel that they are always in danger whether it is inside or outside their home. AA states that his younger brother has had his cellphone and wallet stolen at five different times in different areas. In 2007 alone it happened three times and his brother no longer carries a cellphone outside the home. Furthermore, his father has been robbed at gun point while using public transport. His mother has also been robbed of her jewellery.

AA states that, while growing up in Karachi, he had never experienced this kind of violence although he had heard about these things happening in other, less safe, areas of Pakistan. He states that when he visited Karachi in January 2008, within 24 hours of being there he had his wallet and cellphone stolen. He states that even though he had spent most of his life in Karachi he had been identified as being an overseas returned Pakistani. He explains that this can be a very dangerous thing as usually such people are considered a likely target by various groups of people.

AA states that on his latest visit he had many discussions over fights between political parties, Pathans and MQM activists. He explained that

many people are now looking at emigrating because of the deteriorating security situation and concerns over their safety.

(b) Letter from BB dated 20 August 2009

BB states that he has been resident in New Zealand but was born in Swabi in the NWFP. Swabi is located next to the Swat Valley and Buner. Because of this they received a number of refugees from these areas and his family have told him gruesome stories they have heard from these displaced persons about Taliban law and the air force bombings. BB states that although large-scale fighting has stopped, the Taliban still roam around the area killing people for minor issues. BB states he is in regular contact with his parents who tell him about their “unstable and risky lives”. He states that people live in general fear of punishment from the Taliban. BB states there have been a number of kidnappings for ransom and robberies have significantly increased and people avoid travelling after sunset. He says that people who have spent time overseas are especially targeted because it is perceived they are rich, which is usually not the case.

BB states that life in the area was becoming increasingly unsafe as people were acquiring fire arms to defend themselves from criminals and a possible Taliban takeover. BB refers to frequent rocket and bomb attacks in Peshawar, the provincial capital, and states it is the same even in Islamabad. BB states it is his belief that it is very unsafe for the appellant to go back especially if people know that he is coming from overseas and can be targeted by criminals or the Taliban.

[16] Attached to the appellant’s statement of 25 August 2009 was the country information provided to him by the Authority. He also submitted a CD containing electronic copies of his various statements and those of AA and BB, together with electronic copies of newspaper and other reports about the security situation in Kohat and across Pakistan. He made further submissions in respect of this country information. All of this material has been taken into account by the Authority in reaching its decision.

THE ISSUES

[17] 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."

[18] 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

Credibility

[19] There is no doubt about the appellant's credibility. He has demonstrably proven that he is from Kohat, a district within the NWFP as he claimed. The central issue in this case is whether the chance of harm to this appellant reaches the real chance threshold and/or whether there is a sufficiently solid nexus to a Convention reason.

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

Conflict between the Pakistani Army and Jihadi groups

[20] The appellant's predicament has its immediate roots in the controversial policies adopted by former Pakistani President Musharraf towards the *Muttahida Majlis-e-Amal* (MMA), an alliance of religious parties. These policies are summarised in the report by the International Crisis Group (ICG) *Pakistan: The Militant Jihadi Challenge* (13 March 2009) at pp4-5 ("the Jihadi Challenge report"). The Jihadi Challenge report notes that as a result of rigged elections in October 2002, the MMA became the third largest party in the Pakistani National Assembly and it formed the majority provincial government in the NWFP. In return for helping President Musharraf consolidate power against more secular moderate

parties, the MMA was allowed to pursue an Islamisation agenda in the NWFP. In June 2003, the NWFP Provincial Assembly passed a sharia bill declaring sharia to be the supreme law of the province. Some districts in the NWFP, including Swat, become increasingly under the control of the Pakistani Taliban – a matter to which BB refers in his letter.

[21] The Jihadi Challenge report notes that in the Federally Administered Tribal Areas (FATAs), Musharraf adopted a similarly complex policy of seeking to balance United States demands in the context of the “War on Terror” while assuring the Islamist-led provincial government in Peshawar that the army would not stop their pro-Taliban policies. Deals between the government and provincial government in North and South Waziristan in 2004 and 2006 greatly expanded the political space of Islamists without producing peace.

[22] On 16 February 2009, the NWFP’s Awami National Party-led government made a peace deal with the Swat-based Sunni extremist group aligned to the Taliban in which the government agreed to impose sharia law in NWFP’s Malakand region with religious courts deciding all cases after 16 February 2009. This deal was approved in the Pakistani National Assembly on 13 April 2009. Within a month, under pressure from the United States, the Pakistani military launched a campaign to eradicate Pakistani Taliban groups from their strongholds in the NWFP. The fighting resulted in an estimated 2.8 million people being displaced. See ICG Policy Briefing, *Pakistan’s IDP Crisis: Challenges and Opportunities* (3 June 2009) at p2-3 (“the IDP report”). The Pakistani army has managed to regain some degree of control over Swat although the Taliban remain present and some displaced persons are reluctant to return home out of continued fear of the Taliban – see here the recent decision of the Authority in *Refugee Appeal No 76346* (31 August 2008) at para [48].

[23] Although not witnessing conflict on the scale seen in Swat and other parts of the NWFP, Kohat has not been immune. Kohat itself has a Taliban presence – see Pakistan Conflict Map *BBC* (13 May 2009) at p3 – and conflict between the militants and Pakistani military has continued throughout 2009 including up to the present time – see “Kohat: Militants continue attacks on Kohat cantt” *Dawn* Internet edition (3 February 2009) www.dawn.com/2009/02/03/local22.html (accessed 30 July 2009); “Forces kill seven militants in Kohat” *Business Recorder* (2 March 2009), www.findgalegroup.com.ips/start.do?prodID=IPS (accessed 30 July 2009); “Rocket attack damages army club in Kohat” *Dawn* Internet edition

(22 February 2009) www.dawn.com/2009/02/22/local14.html (accessed 30 July 2009); "Suicide car bomber kills at least 20 in Pakistan" *Radio Free Europe/Radio Liberty* (18 April 2009) www.unhcr.org/refworld/docid/49edb5fac.html (accessed 30 July 2009); "Two killed in bus terminal blast" *ARY OneWorld* (1 June 2009); "Around 17 Arrested after Kohat rocket Attacks" *Dawn* newspaper (17 August 2009); "Two killed, 32 injured in Kohat Suicide attacks" *Thaindian News* (29 August 2009); "Twenty-two militants arrested in Kohat operation" *Dawn* newspaper (31 August 2009).

[24] Another feature of the Talibanisation of the FATA and the NWFP has been an upsurge in extremist sectarian violence within these areas including in Z which borders Kohat and from where the appellant's father originates – see the Jihadi Challenge report at p16; this has spilled out into other parts of Pakistan – see Immigration and Refugee Board of Canada, *Pakistan: The treatment of Shias, specifically in Multan and Lahore; government response to violence against Shias (2006 – November 2008)*, 3 December 2008, PAK102973.E, <http://www.unhcr.org/refworld/docid/49913b5e59.html>. Extremist groups of both sides of the Sunni-Shi'a divide becoming openly active in Karachi. This has fuelled fears of a return to open sectarian violence there although none yet appears to have erupted – see the Jihadi Challenge report at p10.

Kidnapping

[25] Increasingly, Pakistan is seeing a rise in instances of kidnapping. Country information establishes that this kidnapping takes the form of not only a purely criminal activity in which criminal gangs kidnap and hold for ransom wealthy people or their children, but also robbery kidnapping has become a source of funding for Jihadi organisations to finance the militant campaign against the Pakistani state – see the Jihadi Challenge report at p10 and "Criminals take cover of militants who are kidnapping" *Dawn* newspaper (14 July 2009): This is the background to the experiences detailed by AA and BB.

[26] Again, Kohat is not immune to this – see "Kohat: Two kidnapped in Kohat" *Dawn* newspaper (29 February 2008). This occurs within the context of a deteriorating law and order situation generally which has seen an extra 1500 police deployed to Kohat district – see "Kohat: 1500 extra policemen deployed in Kohat" *Dawn* newspaper (3 September 2008). In the report, "Sectarianism, Militancy Feuds Plague Kohat" *Dawn* newspaper (6 June 2009) it is noted that the

presence of the Taliban in surrounding areas has seen criminals disguise themselves as Taliban to facilitate their activities. The report notes that the Taliban has started kidnapping people for ransom, targeting people from the Shi'a community and extremists in the Shi'a community targeting people from the Sunni community. The report notes that "victims are considered lucky to be freed alive by militants even after paying the ransom". As to who is being targeted, the report goes on to state:

"Earlier, only businessmen and rich people were the target of the gangs but now teachers, doctors, senior government officials, school children, soldiers, bankers and engineers have also become soft targets. Extremist elements in both rival sects and the slaughtering of the victims have benefited both professional criminals and the Taliban who now make demands for ransom per person as high as Rs10 million."

[27] The report further states:

"The reason why the government and the tribal elders fail to tackle the situation is that sectarianism, militancy, crimes and tribal feuds have mingled with each other in the Kohat region. It is certainly a challenge for the government.

Earlier, the people thought that Kohat would remain unscathed by the militants and criminals because it is the headquarters of a division of the army and there are regional offices of intelligence agencies whose jurisdiction stretches to South Waziristan and Kurram agencies. But they mainly remain concerned with who entered or crossed the Durand line instead of keeping an eye on those entering the settled areas and increasing the internal threat to the state.

Unfortunately, in spite of having better resources compared to the police, the security and intelligence agencies have not been able to clear the Kohat/Darra Adamkhel and Kohat-Parachinar highway from militants during the last four years. Those militants, who operated freely during the government of the MMA, could not be arrested by the law enforcing agencies even today."

Application to the present case

[28] The country information available in this case establishes that robbery and kidnapping does take place in Kohat and appears to be a widespread phenomenon. This is corroborated by the letters from witnesses filed in support of the appellant's case. However, much of this appears to be the product of criminal enterprise. While BB states that persons who have spend time abroad are at some risk because they are perceived as being wealthy, this must be put in context. Labour migration by Pakistanis to other countries is not uncommon. Indeed, as of 2005, Pakistanis comprised some 11 per cent of the estimated stock of Asian-origin temporary contractual workers in the Middle East. While numbers fluctuate, the numbers involved are large. For example, in 2001 some 18,421 Pakistani were engaged in such employment in the United Arab Emirates, rising to 61,329 in 2003 before reducing to 47,441 in 2005 – see International Organisation

for *Migration World Migration Report 2008*, Geneva at p443. His return from a period of time overseas as a migrant worker would not therefore be particularly remarkable. Furthermore, to the extent that the appellant has some risk of being robbed or kidnapped by criminal gangs in a deteriorating law and order situation, this is simply something that falls outside the scope of the Refugee Convention as any risk to him does not have a nexus to a Convention reason.

[29] If there is any Convention-based risk at all to the appellant, it would appear to originate from Shi'a extremist groups by virtue of his Sunni faith. Any risk to him therefore derives from a particular subset of all kidnappings and the issue is whether or not the risk to him from this is objectively well-founded.

[30] The Authority's leading decision on what constitutes a "well-founded" fear of being persecuted is *Refugee Appeal No 72668/01* (5 April 2002). After discussing various formulations of the test in other jurisdictions and noting that New Zealand favoured a 'real chance' test, the Authority stated:

"[130] It must be remembered, however, that the words used in Article 1A(2) of the Refugee Convention are "well-founded" and that to use the real chance test as a substitute for the Convention term is to invite error. This is the point made in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 572; (1997) 144 ALR 567, 576 (HCA). In that case the High Court of Australia (Brennan CJ, Dawson, Toohey, Gaudron, McHugh & Gummow JJ, Kirby J agreeing) made helpful observations as to when a fear of persecution is well-founded. The point stressed was that conjecture or surmise has no part to play in determining whether a fear is well-founded. The majority stated that:

"No doubt in most, perhaps all, cases ... the application of the real chance test, properly understood as the clarification of the phrase 'well-founded', leads to the same result as a direct application of that phrase... Nevertheless, it is always dangerous to treat a particular word or phrase as synonymous with a statutory term, no matter how helpful the use of that word or phrase may be in understanding the statutory term. In the present case, for example, Einfeld J thought that the 'real chance' test invited speculation and that the tribunal had erred because it 'has shunned speculation'. **If, by speculation, His Honour meant making a finding as to whether or not an event might or might not occur in the future, no criticism could be made of his use of the term. But it seems likely, having regard to the context and his Honour's conclusions concerning the tribunal's reasoning process that he was using the term in its primary dictionary meaning of conjecture or surmise. If he was, he fell into error. Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is 'well-founded' when there is a real substantial basis for it. As *Chan* shows, a substantial basis for a fear may exist even though there is far less than a 50% chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.** In this and other cases, the tribunal and the Federal Court have used the

term 'real chance' not as epexegetic of 'well-founded', but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate."

[131] With this statement we respectfully agree."

(emphasis added)

[31] Here, there is no evidence before the Authority to establish that the kidnapping of Shi'a who have returned from overseas has reached such a level that it can be said that the appellant faces a risk of being persecuted at the real chance level. At its core, his fear is an assumed risk. There is no evidence before the Authority to establish that persons who return to Kohat from overseas are being targeted for kidnapping with such frequency as to elevate the risk from mere speculation to one that is well-founded in the sense referred to by the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Guo*.

[32] The appellant also asserts in his statement of 25 August 2009 that if he returns to Kohat he will be forced to choose between the militants and the army and that, whichever side he chooses, the other side will target him. As to this the Authority has not seen any country information which suggest that persons, including those recently returned from overseas and who are not aligned particularly to a Jihadi group, are being forced to take sides in the manner he suggests. His apprehension of risk in this regard is not well-founded. Rather, persons such as he are from time to time caught up in the fighting as unfortunate victims. The degree of risk of that is not higher than random and remote. While the appellant also asserts in his statement of 25 August 2009 that he apprehends being caught up in the frequent bombings that are taking place in Pakistan, such risk is again random and remote and amounts to no more than being in the wrong place at the wrong time. The serendipitous nature of the risk to him is such that it does not reach the real chance threshold.

CONCLUSION

[33] 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.

"B L Burson"
B L Burson
Member