

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 70286/96

T A

AT AUCKLAND

<u>Before:</u>	J M Priestley QC (Chairperson) C Parker (Member)
<u>Counsel for Appellant:</u>	Mr D Ryken
<u>Representative for NZIS:</u>	No Appearance
<u>Date of Hearing:</u>	30 January 1997
<u>Date of Decision:</u>	27 February 1997

DECISION DELIVERED BY C PARKER

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

INTRODUCTION

A medical report was submitted to the Authority, dated 21 January 1997, from Pramila Fernandez, MBBS, FRANZCP, consultant psychiatrist, of Auckland, giving an assessment of the appellant's psychiatric condition. In that report, which has been noted by the Authority, Ms Fernandez stated, inter alia:

"[TA] describes being physically abused by the police. They hit his feet, his legs and his back with a belt and a stick. They subjected him to the 'Roller Treatment'. This involved laying him on his back and passing a piece of wood over his back. Other forms of abuse consisted of hitting him on the back of his head and back with the butt of a rifle. A rope was tied around his forehead and the end of the rope was attached to a stick. The stick was then twisted which in turn tightened the rope around his forehead and he described this experience as 'the rope crushing my brain'. He described his hands being tied to the ceiling while he hung from the ceiling he was physically abused. He was tortured less during the day, but at night almost four or five police tortured him. He observed that at night the policemen

often consumed alcohol and were intoxicated. In this state they subjected him to repeated abuse. Despite them hitting him on the head, there was often no fractures, as they would hit him in such a way that there was no visible bruises. On a couple of nights the police placed electrodes on his abdomen and gave his moderate electric current. This resulted in him experiencing seizures and then he became unconscious. All of the torture occurred in a police cell in Srinagar. His father ultimately paid a large sum of money to the police and had him released from the police cell. On release, his father moved [TA] out of Kashmir into Chandigarh out of fear that the police may still continue to persecute him and kill him. ... [TA] was again arrested by the Chandigarh police who handed him over to the Kashmir police who again tortured him. He does not know how long he was held in custody. His father had to sell their property in order to get him released on this occasion. On release, his father arranged [TA] leave India and seek asylum in New Zealand.

Personal Background History

[TA] is the eldest sibling and has two younger brothers. He describes a happy, uneventful childhood and has a close knit, supportive family. His physical health has been good and he had been attending high school when he became involved in the Jammu Kashmir Liberation Force.

In premorbid personality he describes himself as an outgoing, extrovert person. While studying in high school he was involved in part-time electrical work.

Current Situation

[TA's] friend [PB] informs me that two months ago [TA] had been assessed at the CC Mental Health Centre and had been prescribed anti-depressant therapy. He continues to take Prozac 20 mgms tablets - two daily and attends the CC Mental Health Centre on a regular outpatient basis.

Sequelae of the Torture

[TA] described considerable depressive symptomatology, i.e. tearfulness, depressed mood, anhedonia, lowered appetite, lack of energy, weight loss, lack of motivation and suicide ideation. Since being assessed at the CC Mental Health Centre and being prescribed antidepressant medication, most of the symptoms are under control, but he remains quite fragile in his mental state.

[TA] experiences considerable anxiety and refuses to address certain aspects out of fear. He will not touch a knife out of fear that he may harm himself. He will not look at his passport out of fear of being returned to India. He described 'reliving experiences' and experiences chronic intrusive nightmares. He has suffered considerable losses.

Whilst he is not actively suicidal, he ruminates over chronic suicidal ideation. He considers slashing his wrists, hanging himself or resorting to methods by which he can stop breathing. These remain potential suicidal ideation.

He informed me that the thought of his parents and brothers stop him from acting out on these suicidal ideas. However, given the extreme torture he was subjected to in India, he states that he would rather commit suicide than be returned to India where he will be tortured and killed by the police in the presence of his elderly father. ...

...On arrival into New Zealand on 19 October 1995 and for a period of three months he experienced chronic pain in the back of his head due to the physical abuse but this has stopped.

[TA] remains vulnerable and requires close supervision as provided by his friend [PB]. He occasionally wakes up at night screaming and is found to be in a cold sweat. On these occasions he describes vivid and continuous nightmares of the police torture. He becomes quite terror stricken and agitated and requires supervision.

He presents occasionally with stammering, phobic features leading to him becoming withdrawn and experiences memory problems.

Opinion

I am of the opinion that [TA] presents with considerable features of a Post-Traumatic Stress Disorder which is a direct consequence of the torture he suffered with the Kashmiri police. He experiences terror at the thought of being returned to India and is convinced that he would rather commit suicide than be tortured and killed in a police cell. He requires ongoing monitoring of his mental state and medication. It appears that he is currently receiving this from the C C Mental Health Centre on an outpatient basis. Given his current vulnerable state I am of the opinion that he requires ongoing supervision and hence his current placement with his supportive friends is useful."

THE APPELLANT'S CASE

The appellant is a 20 year old, single man who was born in Chandigarh in the state of the Punjab but moved with his family to the town of A in the state of Kashmir when he was just six or seven months old. The appellant's father, a shopkeeper, had two wives, one Kashmiri, and one Punjabi. The appellant is the oldest son of the Kashmiri wife and resided with his parents and two younger brothers in the family home in A, Kashmir until the family moved to Chandigarh in September 1992.

The appellant attended school until 10th grade when, in June 1992, prior to sitting his matriculation examination, he was arrested by the Kashmiri police. One evening the appellant was at home with his family when two members of the Jammu and Kashmir Liberation Front (JKLF) burst into the appellant's home. The appellant understood that the police were conducting a search of the village and the terrorists wished to hide at the appellant's home until the police had gone. Both men were armed, with guns and grenades, and threatened the family at gun point, saying that they must help them and refrain from informing the police or they would be killed. One of the men was one SA, who the appellant had not met previously but was a well-known terrorist. The men remained at the appellant's home, hiding, for approximately an hour before the police arrived and surrounded the house. They apprehended both terrorists together with the appellant and his father. According to the appellant, who was just 14 years old at the time, this was a very frightening experience and his first ever encounter with any terrorists.

The appellant and his father were taken to jail by the police in a truck and the appellant was questioned alone during the first two days of his detention. He was asked to provide information about the terrorists but made it clear that he knew nothing whatsoever about them and had only seen them for the first time the very evening of his arrest. After questioning the appellant for two days, the police began to torture him. The appellant said that he was not beaten daily and that the beatings mainly occurred at night. The appellant described being beaten with sticks on the back and on the soles of his feet. He was also suspended from the ceiling by a rope through which a stick had been inserted and was turned from time to time to cause additional pain. On other occasions a rope was tied around the appellant's forehead and a stick was placed through this and twisted so as to tighten the rope causing very severe pain and making the appellant fall unconscious on several occasions. In addition, the police applied a roller all over the appellant's body. This was a very large wooden implement and a policeman stood on it with one leg on each end causing very severe injuries to the appellant's body, particularly to his back. The appellant received minimal amounts of food during his detention which lasted approximately three weeks. The appellant's father, who was himself released from police custody after one week, went to great lengths to secure the appellant's release, visiting the police station on a daily basis and finally paying Rs10,000 to the police.

Following his release from custody, the appellant recovered at home and his mother made a number of traditional medical preparations to help reduce the swelling on his body. He continued to live in the family home but the police would come, making enquiries of the appellant about terrorists on a regular basis.

Shortly after his release from police custody, the appellant, along with about 10-12 other boys from the town, were taken away forcibly by JKLF for weapons training. The terrorists would take the boys, blindfolded, in a closed truck to a remote, mountainous area. This training took place about twice a week, using Enfield 303 rifles, a basic weapon employed by the British army in both the first and second world wars and still widely used throughout the Indian sub-continent. Apart from target practice, the boys were also taught to clean and re-assemble their weapons. The appellant could not hit the target and never progressed beyond this very basic level of training, although he understood that some boys, who showed promise, were taken for training in more advanced weaponry.

The appellant could not refuse to participate in these training sessions and, in addition, he carried verbal messages for the JKLF on a few occasions. The appellant's father became concerned about the appellant's safety both on account of the interest the JKLF were showing in him and the continued police interest following his release from custody in June/July 1992. As a result of this, the whole family moved to Chandigarh in the Punjab in about September 1992 where the appellant underwent some training as an electrician. The appellant believes that his father applied for a passport on his behalf upon the family's arrival in Chandigarh and, indeed, a passport was issued on 26 February 1993. The appellant, when he arrived in Chandigarh, became concerned he might easily be identified as a Kashmiri, as he had an Urdu tattoo on his hand which included a reference to "Allah". In order to lessen this risk he had a Hindi tattoo made on the same hand.

In September or October 1994, the appellant was told by his mother that two Kashmiris who she believed to be terrorists, because they were carrying guns and were covered in blankets, had been making enquiries about him and his father. They came to the appellant's house on three occasions, and the appellant, himself, saw them on one occasion from the terrace. They were not armed on that occasion but the appellant was sure they were Kashmiris on account of their beards. Shortly after this the appellant was arrested by the Punjab police who, at the same time arrested another four or five Kashmiri Muslims, some of whom the appellant recognised from the mosque. They were all taken by the Punjab Police in a truck up to Kashmir where they were detained by the Kashmiri police.

The appellant was again questioned and tortured by the Kashmiri police. The soles of his feet were beaten and his legs were tied and he was suspended from the ceiling. He was also tortured with electric shocks and fell unconscious on a number of occasions as a result of this. The guards were often drunk at night when they beat him. The appellant was interrogated about terrorist activities in Kashmir and asked questions concerning the whereabouts of terrorists and their arms caches and the source of the terrorists weapons. The appellant told the police that he did not know about these things but continued to be questioned and tortured. The appellant still does not know where he was detained and is unable to say for how long he was detained due to his very poor condition at the time of his release. His father travelled to Kashmir and managed to secure his release by selling some property in Kashmir and paying Rs15,000 to the police. Upon his release the appellant was taken to the police station in A where he was reunited

with his father. The pair purchased bus tickets in an attempt to leave Kashmir immediately, but unfortunately, due to the weather conditions, the road was closed and so they were forced to remain for a month in the family home in A. The appellant did not venture outside at all during this period and his father made sure that their house had the appearance of being uninhabited.

Upon his return to Chandigarh, in late 1994 or early 1995, the appellant went to hospital for treatment, which included x-rays and a thorough examination of scars on his head.

The appellant was very frightened by this experience and his father began making strenuous efforts to arrange for him to leave India. Unfortunately due to financial problems, it was not possible for him to raise enough money for the airfare until about mid 1995. The appellant was granted a visa to visit New Zealand on 19 September 1995 and he finally left India on 19 October 1995. Whilst waiting for arrangements to be made for his departure, the appellant remained in the Chandigarh area living sometimes at home with his family and sometimes with friends or with his father's second wife. The appellant, himself, did not want to leave India as he did not want to be separated from his parents and live by himself. In addition, having only lived in India and being relatively "unworldly" he did not know that there were safer countries. The appellant recounted his departure saying that he had to be forced on to the aeroplane and that his father had beaten him at Delhi airport to overcome his resistance to leave. However, the appellant now realises that his father was very afraid that he, the appellant, might have been killed if he remained in India.

The appellant arrived in New Zealand on 19 October 1995 and applied for refugee status on 12 November 1995. He was interviewed by the RSB on 2 September 1996 in respect of this application. By letter dated 30 September 1996 the RSB declined his application.

The appellant has been residing with AS and his wife, PB, since approximately December 1995. The appellant had been told by his father that upon his arrival in New Zealand he would be met at the airport but nobody came and after waiting for approximately five hours, the appellant went to a motel where he stayed until his funds ran out. Sometime later he was waiting, in the rain, at bus stop in Auckland when AS drove past and, seeing a young Indian boy, stopped and picked him up.

AS and his wife were so moved by the appellant's plight that they have offered him a place in their home for the past year.

The Authority had the opportunity of hearing from PB who migrated to New Zealand and was granted permanent residence on the "points system" in February 1995. She is a Hindu and a very well qualified school teacher, having obtained a PhD in Linguistics from an Indian university. This witness was able to confirm that she had been given the same core account of the appellant's experiences in India as that given to the Authority. She explained that the appellant had been living with her and her husband since December 1995 and was effectively treated as part of the family. Apart from providing a stable secure environment for the appellant AS and PB regularly take the appellant to the mosque, accompany him to various appointments in connection with his appeal and have organised for him to receive appropriate medical and psychiatric assistance.

PB felt very strongly that the appellant had told her the truth about his experiences and that, were she not convinced of this, she and her husband would not have helped him to the extent they have. She alluded to the fact that she has two children to look after and that her daughter (aged 12) was rather jealous of the appellant. She also mentioned that the appellant was Muslim whereas she and her husband were Hindu and that his presence in their home had been frowned upon by some of their family members and acquaintances. She emphasised that in view of all these matters, she and her husband would not have taken him on if they were not sure that he was truthful and deserving of their help.

PB gave us her impression of the appellant's psychological condition over the past year. She described a depressed, distressed individual who, when he first came to live with her, he had fits and sometimes foamed at the mouth. He was taken to see a general practitioner and prescribed medication for this condition. PB said that his condition has generally improved over the past year, especially since he began attending the CC Mental Health Centre who prescribed Prozac (an anti-depressant) for him. However, he still awakes during the night, from time to time, having had a nightmare about being in prison in Kashmir and is very upset and in a cold sweat. He requires considerable reassurance at these times. PB also described instances where the appellant is distracted by his problems and does not hear what is being said to him.

PB confirmed that her husband had gone to India on 9 November 1996 and had met with the appellant's father, MAK, in Chandigarh. MAK was highly suspicious and fearful at the outset but eventually agreed to speak to AS and provided information which is contained in his Urdu statement, dated 12 November 1996, which has been translated by PB.

The translation of the statement, dated 12 November 1996, of the appellant's father reads as follows:

"Dear Mr David Ryken Sahib,

TA DOB 9.9.77 is my son. TA is from my second wife, HB.

This letter I am writing to you as AS, advised me, who has come from New Zealand recently. I am very much satisfied that AS is very helping person. ... AT was born in Chandigarh but all the time in Kashmir. ... The police, JKLF, and terrorists were after the live of TA, so I could not put him on any job. He in fix from all corners of life. I tried twice so ultimately was successful. I pray to God that he settles down in New Zealand.

I am (or I have to be) forced to face the police because I was arrested in 1992 with my son. After request from bribes I was able to get free from jail after approximately three weeks. The police are always disturbing us. The police keep asking for money. I have grown weak health wise. I told the police I do not know the whereabouts of my son and so they seldom come around to ask me about him. Now the police have started asking me about my younger son who is 12 years old.

I request that saving my son is in your hands so let him stay there. I shall be very thankful to you if you make him stay there. I can die peacefully.

MAK (aged 65 years)" (sic)

PB told us that her husband, AS is a Hindu, of the Brahmin caste, who has a Bachelor of Mechanical Engineering and is the General Manager of the Indian Division of a New Zealand based engineering company. His statement, dated 27 January 1997, confirms that he met with the appellant's father and that their families were known to each other as they lived close to each other in Chandigarh and AS's father (now deceased) was a magistrate and well-known in the neighbourhood.

AS went on, in his statement, to confirm the appellant's account of their meeting in Auckland, and that the appellant has been living with AS and his family. AS states:

"I have been very concerned about this young man who has been staying at my house. He has been extremely withdrawn throughout and I know that he has suffered from what has happened to him in the past."

AS expressed concern in his statement that the appellant had not been assisted properly by his previous representative, US. As an example of this, he pointed out that this representative had stated that AS had sponsored the appellant to come to New Zealand but this was not true.

PB also expressed her disapproval and lack of confidence in the appellant's first representative, who initially presented himself as a qualified barrister which she discovered later on not to be true. She claimed that US "is trained in making up stories. He says 'I'll prepare it, you go home'". PB said she expressed her concern that the appellant's whole story be included in his statement but this representative had apparently been unwilling to refer to Kashmir at all.

In his memorandum dated 29 January 1996 and in his oral submissions, counsel for the appellant, David Ryken, submitted that the appellant was an impressionable young man who was extremely worried and seemingly depressed about his situation. He submitted that the appellant was not a person who had experience in being questioned in detail concerning past events and had great difficulty with this. He submitted that at the RSB interview the interviewing officer took a "confrontational position" and insisted upon the appellant giving details which he had great difficulty in doing and this resulted in misunderstandings between the officer and the appellant so that the information gathered at that interview is somewhat unreliable. Counsel also drew our attention, in his written submissions, to the RSB's reliance upon inconsistencies between what the appellant said in his interview with them and the contents of his original statement made in support of his refugee status application. As far as this is concerned, Counsel submitted:

"it can be seen that this statement is extremely brief however. It will also be known that the appellant's former representative [US] makes very little effort to engage an applicant to write full details. It is submitted therefore that in those circumstances such 'non-disclosure' cannot be material or at least it cannot be definitive." (sic)

As far as the appellant's credibility is concerned, Counsel finally submitted:

"as investigating officers, and lawyers we often forget that the drive for precision is an acquired skill. The appellant is, however, able to describe in detail events that occurred to him and accordingly, there is no reason to disbelieve his account. As his account is totally consistent with information about events in Kashmir in India, known to the Authority, then it is submitted that he must be given the benefit of any doubt." (sic)

Counsel submitted that the appellant had a well-founded fear of persecution on the grounds of his reported associations with the JKLF, or his political opinions and that he fears being re-arrested again and tortured by the Indian forces.

Counsel drew the Authority's attention to Refugee Appeal No. 135/92 Re RS (18 June 1993) which deals, inter alia, with the reasonableness of relocation where an appellant has suffered torture. As far as relocation in the appellant's case was concerned, Counsel urged the Authority to have regard to:

- (i) the fact that he has been tortured on more than one occasion;
- (ii) the fact that torture and custodial killings is an ongoing occurrence in Kashmir (and in wider India);
- (iii) the fact that the Kashmiri police came outside of Kashmir to uplift him from the custody of the police within another state within India (this is a well documented occurrence within India);
- (iv) the relevant age of the appellant;
- (v) the fact that the appellant shows the sequelae of past torture and indicates post-traumatic stress disorder." (sic)

Counsel helpfully, presented a large volume of country information, all of which has been considered by the Authority in reaching its decision.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly 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, is unable or, owing to such fear, is unwilling to return to it."

In terms of Refugee Appeal No. 70074/96 Re ELLM (17 September 1996), the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
2. If the answer is Yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

In order to assess the appellant's case, a credibility finding must first be made. After interviewing the appellant at the hearing, which lasted for a whole day, and considering the evidence of the appellant's witness PB, the statement of AS, the letter from the appellant's father, MAK, and the psychiatric evidence, the Authority found it was able to accept the core of the appellant's story.

The appellant's demeanour throughout the hearing was good and he appeared to be doing his best to assist the Authority and provide as full and frank an account as he was able. However, accepting (as we do) that the appellant is suffering from Post-Traumatic Stress Disorder and is clearly very anxious, we have drawn as much as we can on the objective evidence which, we find, corroborates his account. The Authority was assisted by the evidence of PB, the appellant's current caregiver, who is an educated professional woman who struck us as a person of integrity. She has opened her home to the appellant, a Muslim - her traditional enemy - and has had the opportunity to discuss his experiences with him at some length over the past year and observe him at close quarters. She remains convinced that his account is credible. Her evidence concerning her observations of the appellant's psychiatric condition is completely consistent with the symptoms described in the psychiatric assessment and report provided by Ms Fernandez. The Authority has, of course, reached its own independent conclusion upon the appellant, having observed him ourselves, over the course of the hearing and considered all the material presented in connection with his case, but found PB's evidence of great assistance in assessing the appellant's character.

The appellant had some difficulty, both before us and at the RSB interview, in recalling precise details and providing an accurate chronology. However, we have, when considering his credibility, taken into account the appellant's age, level of education, lack of sophistication and psychiatric condition. We have also taken into account the concerns raised by Counsel, PB and AS concerning the appellant's previous representative. We note that the statement originally submitted in support of the appellant's application for refugee status was extremely short and do not place any weight upon the fact that matters mentioned before the Authority were not included in that statement. We find that notwithstanding the appellant's difficulties we are able to accept the core of his account.

We further note that the appellant's evidence, in respect of the two occasions on which he was detained and tortured, was given in a most compelling manner and we have no reason to doubt it. We note that he made no attempt to embellish his evidence by, for example, saying that he was tortured every day, or that he had sustained broken limbs. His account to us of his treatment is consistent with that he gave to Ms Fernandez, who prepared his psychiatric assessment and report in connection with this appeal. His descriptions of the methods of ill-treatment and torture employed by the Kashmiri police are fully corroborated by the Country Information available to us.

There were however two aspects of the appellant's account about which the Authority had some doubt as these are set out below:

A: Weapons Training

- (i) The appellant was asked in some detail about the actual process of firing the rifle, during weapons training, and whilst there were some aspects of his evidence which were most convincing, for example, his description of the way in which the rifle jolted back into his shoulder after being fired, there were other aspects about which the Authority was not so convinced. For example, the appellant said that he simply pulled the trigger rather than saying that the trigger should be pulled back gently until some resistance is felt and then the trigger pulled again to fire.
- (ii) The appellant's evidence concerning target practice was rather surprising. The appellant was unable to tell the Authority how far away the targets at which he was shooting were placed. When asked by the Authority to tell us how far away a nearby building was, it became evident that the appellant had no conception whatsoever of distances in terms of linear units of measurement. Upon further questioning it became evident that he had no idea that the sights on the Enfield 303 rifle must be adjusted according to the distance of the target if there is to be any possibility of the target being hit.
- (iii) A final matter which somewhat puzzled the Authority was the appellant's evidence concerning the spent shells which would normally be discharged automatically from the rifle after firing, but which the appellant said he took out with either his fingers, or if very hot, tongs.

As far as (i) and (ii) are concerned, we find the appellant had probably never been instructed in these basic techniques of marksmanship. This is consistent with his evidence that he rarely hit the target. The Authority is prepared to accept Counsel's submissions that the training was "rudimentary" in nature and note that the appellant never progressed beyond this most basic level of training.

As far as the appellant's evidence concerning the spent shells is concerned, the Authority is prepared to accept that this training may well have been carried out using very old, perhaps even substandard weapons, which would be consistent with the appellant's evidence of having to remove the shells manually.

These initial doubts about the appellant's account of his weapons training are capable of being satisfied in the manner set out above and, having considered the totality of the appellant's evidence concerning these training exercises, (including his account of being taken to remote, mountainous areas and his clear, detailed explanation of cleaning and re-assembling the 303) the Authority accepts that he did, indeed, undergo weapons training with the JKLF.

B: JKLF in Chandigarh

The Authority was somewhat surprised that the appellant would be bothered by terrorists in Chandigarh in 1994, almost two years after he had left Kashmir. Another aspect of this which concerned us was the appellant's evidence that his mother had seen the terrorists carrying guns and dressed in blankets.

We do not accept that the terrorists would have walked around with guns and blankets in Chandigarh and finds that this is either an embellishment by the appellant or perhaps, an exaggeration by the appellant's mother in an attempt to frighten the appellant and ensure that he did not become embroiled with the JKLF.

We explored, with the appellant, why JKLF members would be enquiring about him and he suggested that they may have thought that he had been in some way responsible for the arrest of SA, one of their leaders, since he (SA) had been arrested at the appellant's family home back in June 1992. The Authority found it implausible that the appellant would have been of interest to the terrorists for the reason he suggested, bearing in mind the fact that he had been selected for weapons training with the JKLF after SA was arrested. To this the appellant said

that the JKLF was relatively uncoordinated and those that picked him up for weapons training may not have known the circumstances of SA's arrest. The appellant finally admitted that he did not really know why these men were looking for him and had previously simply guessed that it had something to do with SA in an attempt to provide an explanation.

The appellant's evidence concerning his arrest was that he was arrested at the same time as four or five other Kashmirian Muslims, some of whom he recognised from the mosque and together with whom he was taken back to Kashmir in a truck.

We now set out the core of the appellant's story which we do accept:

1. The appellant lived, for most of his life, in Kashmir with his family and was arrested in June 1992 in the family home together with his father and two terrorists, one of whom was the wellknown SA.
2. The appellant was tortured and questioned during his three weeks in detention and we fully accept his evidence about these matters
3. We accept that the appellant underwent rudimentary weapons training but failed to progress beyond a very basic level.
4. The family, as a result of the interest being shown in the appellant by both the police and the JKLF moved to Chandigarh and the appellant, in an effort to disguise his Kashmiri connections, had a Hindi tattoo made to distract attention from a tattoo he already bore on his hand and which distinguished him as Kashmiri
5. We accept that the appellant was arrested in September or October 1994 by the police in Chandigarh, either as a result of complaints being made by neighbours concerning Kashmiris loitering near the appellant's home, or, more probably, as a result of a general "round-up" of young Kashmiris.
6. The appellant was taken to Kashmir where he was again questioned and tortured for an unknown period following which he was released through the intervention of his father.

7. The appellant remained in hiding at the homes of friends and other relatives until he was able to leave India in October 1995. We further accept that the appellant, himself, as a young, and perhaps by Western standards, immature, young man was unwilling to leave his family and considerable pressure was placed upon him to do so for his own safety.

In order to determine whether there is a real chance of the appellant being persecuted if returned to Kashmir and, secondly, whether there is a Convention reason for that persecution, we have considered all the country information submitted to us, some of which is set out below.

COUNTRY INFORMATION

Descriptions of the very volatile political situation and widespread human rights abuses in Kashmir have featured prominently in commentaries from human rights commentators over recent years.

The U.S. Department of State, India Country Report on Human Rights Practices for 1996 confirms that the situation in Kashmir still gives cause for concern:

“... Security forces committed an estimated 100-200 extrajudicial killings of suspected militants in Kashmir. ...

... According to human rights groups, unacknowledged, incommunicado detention of suspected militants continued in Kashmir although the practice again decreased compared with previous years. The Government acknowledges that, as of December, it held 2,070 persons in connection with the insurgency in 5 detention centers in Jammu and Kashmir. Of these, 1,298 were held under the Public Safety Act and 772 under other laws, including the Terrorist and Disruptive Activities Act. Several thousand others are held in short-term confinement in transit and interrogation centers.

Human rights groups maintain that as many as 3,000 more are held by the military and paramilitary forces in long-term unacknowledged detention in interrogation centers and transit camps nominally intended for only short-term confinement. ...

... Both government forces and militants continue to commit serious violations of humanitarian law in the disputed state of Jammu and Kashmir. Between 350,000 and 400,000 Indian army and paramilitary forces are deployed in Jammu and Kashmir. The Muslim majority population in the Kashmir Valley is caught between the repressive tactics of the security forces and acts of wanton violence committed by the militants. Under the Jammu and Kashmir Disturbed Areas Act, and the Armed Forces (Jammu and Kashmir) Special Powers Act, both passed in July 1990, security forces personnel have extraordinary powers, including authority to shoot suspected lawbreakers and those disturbing the peace, and to destroy structures suspected of harboring militants or arms. ...” (sic)

This picture of general insecurity and instability in Kashmir is confirmed by Human Rights Watch/Asia in a report on India published in May 1996 which states:

“Armed militant organizations in Kashmir have also committed many grave violations of international human rights and humanitarian law. Armed with sophisticated weaponry mostly procured in Pakistan, militant groups have launched indiscriminate attacks that have killed and injured hundreds of civilians. The militant groups have increasingly made use of car bombs and other explosive devices in crowded areas. The groups have also deployed landmines on public roads and in other areas used by civilians. Militants have thrown grenades at buses and government buildings, killing and wounding civilians. These attacks have occurred in the Kashmir valley and have also been reported in Jammu.”

The widespread practice of torture in Kashmir has been alluded to in many recent reports on human rights practices. The U.S. Department of State, India Country Report on Human Rights Practices for 1996 states:

‘In 1995 the U.N. Special Rapporteur on Torture reported that torture was practised routinely by the army, the Border Security Force, and the Central Reserve Police Force against the vast majority of persons arrested for political reasons in Jammu and Kashmir. According to the Rapporteur, official investigations into allegations of torture, including those that resulted in custodial deaths, were rare. This state of affairs did not change. Past practices have included beating, rape, burning with cigarettes and hot rods, suspension by the feet, crushing of limbs by heavy rollers, and electric shocks. Because many alleged torture victims die in custody, and others are afraid to speak out, there are few firsthand accounts, although the marks of torture having often been found on the bodies of deceased detainees.’

Amnesty International in their report entitled “Torture and Deaths in Custody in Jammu and Kashmir” (January 1995) describe methods of torture routinely used on detainees and state:

“The “roller” is a common method of torture in Jammu and Kashmir. Victims are forced to lie on their backs and a round pole is rolled over their legs and bodies with great force, often by two of the torturers standing on each end of the pole and “walking” it over the victim. “

The “roller” treatment can cause acute renal failure in victims:

“A doctor from the IMS told a law lecturer visiting Jammu and Kashmir on behalf of the Federation Internationale des Ligues des Droits de L’homme (FIDH), International Federation of Human Rights Leagues, who visited the IMS in 1992, that 20 per cent of beds in the hospital were occupied by young men who were being treated for gunshot wounds or for “burns and other injuries caused by serious torture”. He saw two cases of men who had suffered acute renal failure following rhabdomyolysis “caused by the method of torture known as the ‘roller treatment’. The muscles on the legs are crushed or ruptured by the torture, leading to a breakdown of toxins. These toxins enter the bloodstream and cause acute renal failure.

... In 1992 six doctors from the Nephrology Department of the Institute of Medical Sciences (IMS) in Srinagar published a paper in the Journal of Islamic Medical Association of North America. The doctors described 10 cases of acute renal failure which they had treated between July 1990 and August 1991. “All were

males between 18 and 28 years of age and in apparent good health when apprehended by the police. There was alleged history of physical torture of different types. All were beaten on the buttocks, back and limbs; two cases were also given repeated electric shocks and one case was put to 'sit and stand' exercises for about three hours. "The paper detailed the clinical features of renal failure displayed by the 10 young men. All had raised levels of enzyme creatinine phosphokinase in their blood and the muscle breakdown product myoglobin in their urine, suggesting that their renal failure resulted from destruction of muscle known as rhabdomyolysis.

In late 1992 the doctor in charge of the dialysis unit at the IMS told The Observer (London) that the institute had treated 40 cases of acute renal failure as a result of torture since 1991. "In medical jargon this phenomenon is called rhabdomyolysis," he said. "I can tell you with authority that no part of the globe has contributed so many cases to medical literature."

Human Rights Watch/Asia: India (May 1996) also describes some of the commonly employed methods of torture in Jammu and Kashmir:

"... The methods that have long been practiced in the state are fairly crude, and the security forces have demonstrated little concern for disguising injuries caused by torture. These methods include prolonged beatings, electric shocks, burning with heated objects and crushing the muscles with a wooden roller. Detainees are generally held in temporary centers, controlled by the various access to the courts, relatives or medical care. ...

The Human Rights Watch/Asia: India (May 1996) report emphasises the lack of accountability of government security forces in the area. Detainees are often not brought before a competent authority, so that the legitimacy of their detention may be ascertained and their condition monitored. Where human rights abuses do occur they are rarely investigated with any zeal by the Indian authorities. In their report, Human Rights Watch go on to say:

"... Indian security forces in Kashmir continue to administer torture systematically to coerce detainees to reveal information about suspected militants or to confess to militant activity. Torture is also used to punish detainees who are believed to support or sympathize with the militants and to create a climate of political repression. The practice of torture is facilitated by the fact that detainees are generally held in temporary detention centers, controlled by various security forces, without access to the courts, relatives or medical care. ...

The Indian authorities have done little to curb human rights violations by their army and security forces. In the rare cases in which investigations of abuses have taken place, the most severe punishments have generally been limited to dismissals or suspensions from duty. Security officers have also offered bribes and have threatened individuals and families in an attempt to prevent them from pressing charges. The Indian government's failure to account for these abuses and take rigorous action against those members of its forces responsible for murder, rape and torture amounts to a policy of condoning human rights violations."

Human Rights Watch also refer to the report of the U.N. Special Rapporteur on Torture, Nigel Rodley (January 9, 1996):

“[The Special Rapporteur has] received information that torture was practiced routinely by the army, the Border Security Force (BSF) and Central Reserve Police Force (CRPF) against the vast majority of persons arrested for political reasons in Jammu and Kashmir. Official investigations into allegations of torture, including those that resulted in custodial deaths, were said to be rare. On the few occasions when such investigations had taken place, they were carried out by the security forces themselves, rather than by an independent body.”

We are firmly of the view that there is a real chance that the appellant would be persecuted if he returned to India. He has already been arrested twice, once in Kashmir and once in Chandigarh and tortured on both occasions. He is an individual who is clearly of interest to the authorities in Kashmir and is perceived to have associations with the JKLF and to be a potential source of information to them in their fight against terrorism. The appellant was arrested in Chandigarh and subsequently delivered into the custody of the Kashmiri security forces. This indicates to us that the appellant is readily identifiable as Kashmiri and, given the strenuous fight the Indian government is currently waging against the JKLF and other such terrorist organisations in Kashmir, runs the risk of being arrested, not just in Kashmir, but also in other parts of India (as has already happened in Chandigarh) and transported again to Kashmir. The Authority finds that the risk the appellant runs of being arrested amounts to a real chance, especially when the circumstances of his arrest in Chandigarh are taken into consideration. The appellant was arrested with a number of other Kashmiri Muslims which we believe indicates that it may not be necessary for the appellant to be “singled out” or suspected of a particular offence in order for him to be returned to Kashmir for further investigation.

In considering whether the appellant’s fear of persecution is well-founded the Authority has particularly had regard to the country information which describes the measures undertaken by the Indian police to encourage suspects to co-operate with them, which often includes torture. The appellant’s description of his treatment whilst in custody, and in particular his description of being tortured, is wholly consistent with this. The country information confirms that the way in which the appellant was treated was not unusual and certainly not an isolated instance of brutality by the security forces. There is a real chance that, if apprehended again the appellant would be subjected to similar treatment to that which he has already endured.

In light of the appellant’s age and on finding that he has twice been tortured by the police in Kashmir, we do not consider that relocation elsewhere in India is

reasonable for this particular appellant. On the facts of this case we decline to consider relocation. For other Kashmiris relocation may well be a viable option.

Having determined that the appellant does have a well-founded fear of persecution, we go onto consider the second issue, namely the Convention reason for such persecution and find that this is as a result of his Kashmiri racial group and imputed political opinion as a sympathiser of the JKLF.

CONCLUSION

For the above reasons, the Authority finds that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

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Member