

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 26 November 2004

Date Determination notified:

03/05/2005

Before:

Dr H H Storey (Vice President)
Mr B D Yates

Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

Representatives: Mr S Ouseley, Home Office Presenting Officer, for the appellant; Ms S Kalim, Legal Representative of Ashgar & Co. (Southall) for the respondent.

DETERMINATION AND REASONS

1. The appellant is the Secretary of State. His appeal is against a determination of Adjudicator, Mr P.B. Afako, notified on 10 December 2003 allowing the appeal of the respondent (hereafter “the claimant”) against a decision giving directions for his removal following refusal to grant asylum.
2. The Adjudicator accepted that the claimant was a Pashtun whose home region was Charikar. He had joined the Hizb-e-Islami in the early 1990s. A split had later developed between the group of Haji Pacha Mir (who was also the claimant's cousin) and a Jamiat-e-Islami faction led by a commander called Jan Ahmed. In 1996 the claimant and his cousin had been ambushed by Jan Ahmed’s men. In the ensuing exchange the claimant was injured. His cousin and six others were killed. Three people on Jan Ahmed’s side had been killed. In October 1999 the Taliban captured and tortured the claimant along with others. After a month, the area had been recaptured by the Northern Alliance

and he was freed. In fear of Jan Ahmed, the claimant fled to Kabul. In November 2001, after the Northern Alliance triumphed over the Taliban, Jan Ahmed resurfaced as part of the government in Kabul, while retaining control of the army in the province of Charikar. Jan Ahmed had sent his men to raid and arrest a brother of the claimant's cousin. They were also to arrest the claimant, but he eluded them. Whilst he was in hiding elsewhere they raided his house several times. He then fled the country.

3. The Adjudicator concluded:

“The appellant's fear is of reprisals from Jan Ahmed and his men, who are pursuing a vendetta arising from events which took place in the province of Charikar.”

4. He accepted that there was adequate protection available for most in Kabul, including most Pashtun, but concluded:

“The appellant's case is beyond a generalised ethnic or political risk. A vendetta by a powerful “warlord” is a different class of risk from a general fear of opportunistic targeting, and it is the former that the appellant invokes.”

5. The grounds of appeal contended, firstly, that the Adjudicator erred in allowing the appeal on the basis which he did, as there was no objective evidence to support the claimant's contention about a person called Jan Ahmed. “It is submitted that, if a person called Jan Ahmed were closely connected to the state and the machinery of power in Afghanistan, there would be objective evidence about him”. Secondly, they maintained that the Adjudicator's finding that there would be a failure of state protection towards the claimant was contrary to recent October 2003 CIPU information at paragraph 5.68.

6. At the outset of the hearing Miss Kalim conceded all she had been able to find when searching for references to Jan Ahmed in objective sources was a reference to a General Almas who was described on an Afghan website in an item dated 25 November 2004 as the commander of goleurdu of Porwan in the government of President Hamid Kharzai. She conceded that there was no obvious reason to consider this was a reference to Commander Jan Ahmed.

7. Even given the fact that no evidence has come to light concerning the existence of Commander Jan Ahmed, we see no error of law in the Adjudicator's determination. The grounds of appeal did not challenge the Adjudicator's positive credibility findings and at paragraph 6 the

Adjudicator gave clear and adequate reasons for finding the claimant wholly credible. We note that at several points he considered to what extent the claimant's account was consonant with the objective evidence.

8. Part and parcel of the evidence thus accepted by the Adjudicator was that the claimant had come to the adverse attention of Jan Ahmed both in his home area of Charikar and in Kabul.
9. The lack of any positive identification of Jan Ahmed in the objective evidence is of course a lacuna in the claimant's story. However, we repeat, there has been no challenge to the claimant's credibility. It is an axiom of refugee determination that it is not necessarily fatal to an asylum claim that it is not corroborated. Furthermore, this is not a case where the Adjudicator relied solely on the claimant's evidence without placing that in the context of the background materials. He refers at various points to the CIPU Report, a Human Rights Watch report and a Voice of America news report.
10. There is some albeit limited force in the point raised in the grounds that one would expect to find some reference to Jan Ahmed if he was in fact closely connected to the Northern Alliance. We observe too that the Secretary of State in the grounds stated that there was "no trace of a Jan Ahmed in the objective materials". However, we also note that the "objective materials" relied on were far from being a wide-ranging set of sources. The CIPU October 2003 Report does contain lists of persons prominent in the Northern Alliance, but it does not purport to be exhaustive. As we understand it, this and other main sources on Afghanistan fully recognise that even under the Kharzai regime, the political and military landscape in Afghanistan remains dominated by a shifting and uncertain array of commanders, warlords or other chiefs. Even within Kabul it does not appear that the authorities are able to entirely prevent warlord activities in connection with individual cases. This is not a case where the Secretary of State, in support of his appeal adduced evidence, e.g. from an expert or from a comprehensive list stating positively that there was no local commander in Charikar with connections to the Northern Alliance called Jan Ahmed. In our view, in the context of objective evidence which lacked real comprehensivity and, in the light of the continuing state of political and military flux in Afghanistan, it was not sufficient for the Secretary of State merely to rely on the failure of the claimant to prove his case on the basis of objective materials.
11. We consider our analysis accords with principles set out by the Court of Appeal in respect of the s.101 of the Immigration and Asylum Act

2002 and its limiting of the jurisdiction of the Tribunal to a material error of law, e.g. in the recent Court of Appeal judgment, Ndlovu [2004] EWCA Civ 1567 in which it was held that the Adjudicator did not make an error of law in his assessment of the evidence in relation to food availability and distribution. Their lordships noted that there was no specific background evidence showing that merchants had been instructed to sell food only to card carrying ZANU-PF members. However, the Adjudicator clearly accepted and relied on (i) the claimant's own evidence, as distinct from the background evidence; (ii) the background evidence which was consistent with the claimant's, insofar as it showed that the ruling party used food distribution as a tool against potential political adversaries. The findings made by the Adjudicator were based first on what the claimant herself said and secondly on the background material.

12. There was also no error of law, the Court held, in relation to the Adjudicator's finding as to persecution. The Adjudicator was "*obliged and entitled to form his own evaluation on all the facts and all the evidence*". The Adjudicator had placed heavy reliance on the claimant's particular evidence and was held to be entitled to reach the conclusions he did. More recently, the Court of Appeal in Mlauzi [2005] EWCA Civ 128 in which Brooke, LJ stated at paragraph 42 by reference to the Tribunal's error of law jurisdiction under s.101:

'If it is simply an issue of fact which the Adjudicator had to determine on the facts, including the factual background evidence before him/her, appeals from a reversal by the IAT are going to be less easy to resist ...'

13. In our view the position is very similar in this case. The Adjudicator relied heavily on the claimant's evidence. Although he had no specific evidence of the existence of Jan Ahmed (apart from the claimant's evidence) he plainly saw the claimant's account, in particular the history he recounted of incidents that had occurred in his life since 1996, to be consonant with the background material, to which he did have regard. The background materials before him did not contain any detailed list of warlords. He was therefore entitled to accept the credibility of the existence of Jan Ahmed without reference to any positive objective evidence, because there was a good reason why Jan Ahmed might not be mentioned in that material. Another adjudicator might, permissibly, have reached a different view, but his assessment was not legally flawed. His was a rational approach to a variable situation where there was no comprehensive background.
14. Mr Ouseley, in urging us to take a different view, sought to support his argument by reference to AF ('Warlords/commanders' - evidence

expected) Afghanistan CG [2004] UKIAT 00284. This is a case which was promulgated some time after the Adjudicator notified his determination. Following CA [2004] EWCA Civ 1165 that prevents any account being taken of it by us insofar as deals with factual materials that were not by Mr Afako. However, even a subsequent Country Guideline case can be referred to if it exemplifies or explains an error of law intrinsic to the decision.

15. Can it be said, in this way, that AF exemplifies an error of law on the part of the Adjudicator in this case? We think not.

16. In AF at paragraphs 6 and 7 the Tribunal stated:

‘The responsibility for obtaining evidence under our adversarial system is of course that of the parties; but that in our view does not absolve the Adjudicator from considering what evidence might reasonably be required in a given set of circumstances to confirm a given fact or situation; nor did Mr Bild seek to argue otherwise. It is one thing to accept a claimant’s personal (“subjective”) history, where by the nature of things (see UNHCR Handbook p.197) there may be little evidence available to confirm it); but quite another to accept his account as evidence of a general situation, not supported by such background (“objective”) evidence as might reasonably be expected.’

The passage we have set out from the Adjudicator's paragraph 59 in our view falls into this category. The Adjudicator was well entitled to find that the claimant had, on his own account, a “subjective” fear of Qazavi; but to find on an “objective” basis, that Qazavi held a “position of power” in the current administration, without any attempt to enquire how that might reasonably have been confirmed (beyond the rather vague observation about commanders coming and going), was in our view a mistake, and, for the reasons we have given, one of law which would require us to intervene. That means the Home Office appeal would have to be allowed, unless Mr Bild were able to support the Adjudicator's decision on some other evidence, or some other basis.’

17. From the above passages it would appear firstly that the Adjudicator in the AF case was considered to have relied solely on the appellant’s own account. Secondly, the Adjudicator was seen not to be entitled to accept the credibility of the existence of Qazavi because of his alleged position in the administration, since rationally references to it could have been expected to be in the background if true. We do not know precisely what background material was under consideration by the Tribunal in AF, but to what extent coverage could rationally be expected of the

existence of Qazavi was clearly something the Tribunal in AF was entitled to reach a view about.

18. Thus we consider that there is no significant difference between the view expressed in AF and the view we take here. If it can be realistically expected that an individual warlord be referred to, an Adjudicator should regard that as a negative factor in the balance, for consideration and weighing. But equally if an appellant's particular account (which includes reference to a warlord) is consonant with the background material in other respects, an Adjudicator should regard that as a positive factor in the balance, also for consideration and weighing. An Adjudicator can properly reject a case where the background evidence is silent but might have been expected to contain references, but it all depends on the particular circumstances and the coverage contained in the actual background materials.
19. As already noted, we cannot in the absence of a material error of law consider post-promulgation evidence in the case before us. However, for completeness we would observe that the April 2004 CIPU Report put before us by Mr Ouseley in this case by way of information about warlords, cannot be seen as giving full details of current warlords. Annex C on prominent people is confined to a small number of very key players. Annex D is confined to de jure members of the national Transitional Government. Annex E deals only with Deputy Ministers. Annex F deals only with former Taliban Ministers. In short, there is no specific "Warlords" register.
20. It may be, in the light of the lack of any detailed list of current warlords that the Tribunal may in future Country Guideline cases have to look again at this issue of fact, but, to the extent that AF is consistent with the Court of Appeal principles identified earlier, it remains guidance properly to be followed.
21. Turning to the second limb of the grounds of appeal, we consider it to be weak. The CIPU reference to a UN Security Council report did not establish that the authorities in Kabul were capable of affording adequate protection against a real risk of serious harm from non-state actors in every case. There is nothing in this report which contradicts the Adjudicator's assessment that it remains possible for certain categories of persons to fall through protection gaps, albeit the latter have been significantly reduced: see para 8. The Adjudicator made very clear that he did not dispute that, in the light of the objective evidence, the authorities, supported by ISAF were able to ensure protection for the generality of its citizens, including the generality of Pashtuns. What he relied upon was rather that they would be ill-placed to afford protection to this particular claimant. We think that this was a finding which on the evidence was entirely open to the

Adjudicator, particularly given that Jan Ahmed's men had already been able to attack persons associated with the claimant and to raid the claimant's house with apparent impunity. There was no improper application of Horvath [2004] INLR 239 principles in this case.

22. We would add that we do not consider the Tribunal in reported and guideline decisions such as WK (Credibility - Hizb-e-Islami - Pashtuns - Kabul) Afghanistan [2004] UKIAT 00280, in - AF (Warlords/ commanders - evidence expected Afghanistan) CG [2004] UKIAT 00284 (already mentioned), and S [2003] UKIAT 00088 has ever considered that protection in Kabul in the post-Taliban era has ever been entirely free of gaps.
23. We would accept that right at the end of the determination, there is a passage in which the Adjudicator appears to go slightly further and assert that where "influential armed pursuers" are concerned, protection has been partial and inadequate in Kabul (it would appear the Adjudicator meant to say "always" rather than "never" after "in Kabul has"). If his reasoning hung on the validity of this broader proposition, we would have had greater misgivings. But we do not think his essential reasoning does in fact turn on this. In earlier paragraphs he very carefully explained that his assessment was based very much on the particular circumstances of this claimant's case, including the history of persistent and aggressively motivated visits to his Kabul home in his absence.
24. For the above reasons we consider that the Adjudicator did not fall into any material error of law in his determination. The Secretary of State's grounds of appeal are not made out. Accordingly, this appeal is dismissed and the determination of the Adjudicator stands.

**DR H H STOREY
VICE PRESIDENT**