

AJB  
Heard at Field House  
On 12 April 2002

APPEAL NO HX11275-2001  
SA (Kashmiri Muslim - Activism)  
India CG [2002] UKIAT 02884

## **IMMIGRATION APPEAL TRIBUNAL**

Dictated on 18 April 2002

Date Determination notified:

22 July 2002

**Before:**

**Mr H J E Latter (Chairman)  
Mr R Chalkley  
Mrs S Hussain JP**

**Between**

**SYED MOHAMMED INAYATULLAH ANDRABI**

**APPELLANT**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**RESPONDENT**

**Appearances:**

For the appellant: Mr E Fripp of Counsel instructed by Noden & Co.,  
solicitors.

For the respondent: Mr J G Jones, Home Office Presenting Officer.

### **DETERMINATION AND REASONS**

1. This is an appeal by Syed Mohammed Inayatullah Andrabi, a citizen of India, against the determination of an Adjudicator (Mrs E S Martins) who dismissed his appeal against the respondent's decision made on 25 January 2001 refusing to grant him leave to remain following a decision that he was not entitled to asylum.
2. The appellant was granted exceptional leave to remain until 25 January 2004 but sought to upgrade his leave to full refugee status. The Secretary of State was not satisfied that the appellant had established a well founded fear of persecution. There was an appeal under the provisions of Section 69(3) of the 1999 Act. The Adjudicator in her determination held that the appeal could not succeed as the appellant had the protection which he sought in the form of exceptional leave to

remain until 2004 and it would be impossible for her to decide whether the requirement for him to leave at that stage would be contrary to the United Kingdom's obligations under the Convention because the situation in Kashmir may change and it would be impossible to forecast what might happen in the future. These comments were in line with the Tribunal's determination Meles 00/TH/02433). However, the Court of Appeal has considered this issue in Saad, Diriye and Osorio (19 December 2001) and come to the view, when considering the wording of section 8(2) of the 1993 Act, that a claim for asylum following the grant of a period of exceptional leave to remain should be allowed if the appellant can show that he is entitled to refugee status at the time of the appeal on the basis that it should be assumed that such a state of affairs will subsist at the time when the exceptional leave comes to an end.

3. The Adjudicator did not consider the merits of the appellant's claim. When the matter was first listed before the Tribunal directions were given so that the Tribunal could consider the legal issues as to whether the judgement in Saad, Diriye and Osorio also applied to section 69(3) of the 1999 Act and also the merits of the appellant's claim for asylum.
4. At the hearing before the Tribunal the appellant produced a bundle of documents ("A") indexed and paginated 1 – 379 and a skeleton argument. Mr Jones produced a copy of the CIPU Report October 2000 for India.
5. The Tribunal heard oral evidence from the appellant. He confirmed that the contents of his witness statement at A28 – 45 and the further statement at A47 – 50 were true. The appellant's case can briefly be summarised as follows. He is a Kashmiri Muslim who grew up in Srinagar in Jammu and Kashmir. From 1995 to 1997 he studied at Aligarh Muslim University for a Master's Degree in Linguistics and then returned briefly to Kashmir before moving on to Poona to undertake a PhD in the Centre for the Advanced Study in Linguistics. It was during this time from 1978 to 1983 that he became interested in politics, joining the Students Islamic Movement of India. In about 1981 he came into contact with Sheikh Tajammul Islam, who was the founder and leader of the Party known as Islami Jamatalbah Jammu and Kashmir. The appellant became involved in highlighting the fact of India's continued occupation of Kashmir as his party saw it.
6. In late 1983 Sheikh Tajammul was forced to flee the country due to harassment from the authorities. The appellant was entrusted with his responsibilities and was elected President of Islami Jamatalbah. He adopted a more low key approach to the leadership because he did not want to put his employment at risk. Between 1983 and 1986 he feared that he would be arrested by the authorities. As he had taken over the leadership secretly it was not entirely clear to the authorities who had taken the place of the Sheikh. However, the intelligence services began asking about his activities and in autumn 1986 there were two

visits to his home. In September 1986 the Kashmir police came to the family home asking for him.

7. The appellant says that he married in October 1986. His uncle who was influential negotiated with the police to allow the marriage to take place without interference. Four days later the Kashmir police raided his home again although the appellant was not there. It is his belief that he would certainly have been arrested if he had been there. During this raid his brother was arrested and although there was a threat that his brother would only be released if the appellant surrendered, in fact the police released his brother after a week.
8. In 1996 the Muslim United Front (MUF) emerged in Kashmir comprising all anti-Indian elements. The Islami Jamatalbah did not join but even though not part of this organisation, the appellant did attend some gatherings and gave speeches. In July 1987 he was arrested without warrant and then detained for 15 days. This was a preventative measure in anticipation of Martyrs' Day in Kashmir. According to the appellant his profile gradually increased. In early 1988 he attended a conference in London and upon his return in March 1988 gave a press conference in Srinagar. His home was raided in April 1989. His brother was arrested again and held for about two months. This coincided with the beginning of the armed struggle. The Indian authorities wrongly thought that he was one of the people involved.
9. The appellant continued to work at the University of Kashmir but began to experience increasing problems. There was a time when he was in hiding and he received intelligence from individuals of the local security service helping him to remain one step ahead of the intelligence services. In 1990 he left Kashmir travelling under a false identity. In 1991 he with four others decided to found Mahaz E Islami which was intended to be a party with broad appeal. In 1993 the appellant travelled to the United Kingdom and Canada under an assumed name and later returned to India on foot from Kathmandu. In 1993 his sister, an activist, was imprisoned with her husband and 9 month old baby for more than a year. They had been accused of being incited by the appellant to carry out anti-Indian activities. Different members of his family fled from India to Pakistan. His parents fled in around 1994 and his brother had previously left in 1991.
10. In 1993 the appellant received a letter from the Indian Foreign Office in New Delhi saying that his passport had been impounded. Between 1989 to 1994 his home was raided on several occasions. In September 1984 one of his close colleagues Mohamed Shafi Shaheen had been killed, the appellant believes by Indian security forces. The appellant was told that he was on a hit list and was at risk. He decided that he had no choice but to leave India. He travelled to Calcutta, obtained a visa for Bangladesh and then made his way to the United Kingdom travelling on a passport in an assumed name.

11. The appellant arrived in the United Kingdom in November 1994. He went to Pakistan in 1995 to see members of his family. He was interviewed on a television programme about Kashmir. News of his appearance on this programme appeared in a leading English daily paper from India. When he was in Pakistan he began to receive threatening telephone calls and in November 1995 he returned to the United Kingdom. Subsequently his wife and children have joined him. In 1996 his cousin Jalil Andrabi was murdered by the Indian security forces. He had been a lawyer by profession and a human rights activist. He had been working discreetly and was not a high profile activist.
12. The appellant in his oral evidence confirmed that he had been outside Kashmir since 1994. The authorities would be interested in him as he was regarded as a supporter of the secessionist movement. He had been surprised when a cousin's sister had wanted to come to the United Kingdom and had been asked what she knew about the appellant. There had been uproar when his sister had been detained with a baby. He did not know where she was now, but she was not in Kashmir. It would not be possible for the appellant to live in any other part of India.
13. In cross-examination the appellant confirmed that he had become involved in politics between 1978 and 1983. He had joined the party in 1979/80. He said that whoever was opposed to Indian rule in Kashmir was at risk of being arrested in time. He had never had a peaceful day at home in Kashmir. In 1988 he had left Kashmir using his own passport. He was away for three days. In 1990 he had travelled from India to Pakistan, not using his own passport, but using a false identity. His travel in 1993 had been arranged through an intermediary.
14. Mr Jones submitted that the appellant's account was not entirely credible. He had travelled to and from Kashmir without apparent difficulty. Until recently at least his sister had remained there. She had retained her political views. Although the appellant referred to a fear of arrest, it was not possible that he had lived in hiding or in fear as he has sought to describe. The CIPU Report did refer to action being taken against militants, but not against people solely because their views were against Indian rule in Kashmir. There was no reference in the CIPU report to the appellant's political party.
15. Mr Fripp submitted that the appellant's credibility had not seriously been challenged prior to the hearing. In any event there was no valid reason for doubting the account which he gave. If the appellant's account was true, he was entitled to asylum. His own activities and political opinions would put him at a risk. Other members of his family had been driven into exile. His brother had been detained on two occasions and a cousin had been killed.

16. The first point for the Tribunal to consider is whether the Court of Appeal's judgement in Saad, Diriye and Osorio applies to section 69(3) of the 1999 Act. Mr Fripps submits that it does and Mr Jones has not sought to argue that it does not. Section 69(3) provides that where a person has been granted limited leave to enter or remain which will not expire within 28 days of being notified of the decision he may appeal to an Adjudicator against the refusal on the ground that requiring him to leave the United Kingdom after the time limited by that leave would be contrary to the Convention. Section 69(3) is a new provision providing an "upgrade" appeal which was not present in the 1993 Act.
17. The Court of Appeal were concerned with Section 8(2) which provided that where a person had limited leave to enter he could appeal against a refusal to vary that leave on the grounds that it would be contrary to the United Kingdom's obligations for him to be required to leave after the time limited by the leave. The words in issue were "after the time limited by the leave". Previous Tribunal authorities had held that the effect of these words was to place upon the appellant the burden of proving that when exceptional leave to remain expired he would enjoy refugee status and that his refugee status at the time of appeal was not in issue. The Court of Appeal asked themselves whether Parliament could have intended section 8(2) to operate in such a bizarre manner. When noting the provisions of section 69 of the 1999 Act the Court of Appeal commented that they had not had their attention drawn to any policy considerations which might have led Parliament in 1999 to be more generous in relation to rights of appeal for asylum seekers than Parliament had been in 1993. They concluded that Parliament's intention in Section 8 was to permit a claim to be considered as at the date of the hearing on the basis that the Adjudicator or Tribunal could properly assume that a state of affairs prevailing at the date of hearing would continue until the expiry of any period of limited leave.
18. The Tribunal are satisfied that the same position applies to a claim under section 69(3). Parliament could hardly have intended to grant an upgrade appeal to those with leave to remain subject to a curtailment so drastic as to negate the right of appeal in most cases to which it would apply. The Tribunal therefore approach this appeal on the basis that if the appellant has a well founded fear of persecution at the date of the hearing, his appeal should be allowed on the premise, at least in the absence of any evidence to the contrary, that the situation will remain until his leave expires in 2004.
19. The Tribunal now turn to the substance of the appellant's claim. We have heard the appellant give evidence. There may be some cause for concern about peripheral aspects of his evidence but the Tribunal accept that the substance of his account is true. We accept that the appellant's political activities have been as he described. We believe that he left Kashmir for the reasons, which he has given. He is a person known to the Indian authorities who has been part of a long-standing campaign for Kashmiri secession from India.

20. The background evidence before the Tribunal has been helpfully summarised by Mr Fripp in paragraph 9 of his skeleton argument. Kashmir was a former principality largely populated by Muslims and it was expected on partition in 1947 to join Pakistan rather than India. However, since 1947 the territory has been in dispute between India and Pakistan for historical reasons which are not relevant to this determination. It has been the cause of two regional wars between India and Pakistan. There has been active and continuing insurgency in Kashmir. There have been many reported breaches of human rights observances by the authorities in Kashmir. The objective country evidence is set out in A259 – 329.
21. The documents appearing at A50 – 179 are of particular importance. They include references to the death of the appellant's cousin Jalil Andrabi. He is referred to in the Amnesty International report at pages 139 and 170-171. His body was found on 27 March 1996, nineteen days after he was seen being taken away by military personnel. In a report at A50 prepared by Amnesty International dated 26 March 2001, there is a reference to efforts by the state to stall legal redress which has produced the impression that perpetrators can get away with abuses and that the state shields its agents from being brought to justice. Those allegedly responsible for the death of the appellant's cousin had not by the date of that report been brought to trial.
22. The Tribunal is satisfied that the appellant is a prominent politician and activist whose views are known to the authorities. His family have all fled Kashmir. His sister's whereabouts are not known. Looking at all these circumstances in the light of the background evidence, the Tribunal is satisfied that the appellant does have a well founded fear of persecution in his home area. It is not seriously suggested that he could avail himself of the option of internal flight and we are satisfied that he is not able to do so. In the light of all the evidence we are satisfied that the appellant does qualify for asylum.
23. Accordingly, this appeal is allowed.

**H J E Latter**  
**Vice President**