AM (Risk-Warlord-Perceived Taliban) Afghanistan [2004] CG UKIAT 00004

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 27 November 2003

Date Determination notified:

15 January 2004.....

Before:

Dr H H Storey (Chairman)
Mr R Hamilton
Dr A U Chaudhry

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. This case is reported in order to clarify the position arising when an Adjudicator relies on a case not cited by the parties nor referred to in the hearing.

2. The appellant, a national of Afghanistan, appeals with leave of the Tribunal against a determination of an Adjudicator, Mr T. Somerville, dismissing his appeal against a decision giving directions for removal following refusal to grant asylum. Mr J. Keating of Counsel, instructed by S. Osman Solicitors, appeared for the appellant. Mr J. McGirr appeared for the respondent.

3. The basis of the appellant's claim was that he was at risk of persecution in his home area of Ghazni at the hands of the father of warlord (Commander Nazif) who wanted revenge for the death of his son. The

appellant also considered that he would be perceived as a supporter of the Taliban.

4. The Adjudicator accepted the appellant's story as "substantially true". He found that the appellant:

> '... has a subjective fear that if he is returned to Afghanistan then he may be subjected to persecution in that the father of Nazif may use his power as a senior member of Hezbi-I-Whadat to extract revenge against the appellant for the death of his son.'

5. It is not entirely clear from the wording of paragraph 27 whether the Adjudicator also accepted that the appellant had been detained by the Hezbi-I-Whadat for a period of one month whilst they investigated and interrogated the appellant and others regarding the death of Nazif, but, in view of the Adjudicator's acceptance that the appellant's account was 'substantially true', we will proceed on the basis that this detention was accepted. We also note he accepted that the Hezbi-I-Whadat 'has a particularly violent reputation'.

6. However, it is clear the Adjudicator did not accept that this detention demonstrated that the appellant faced retribution from his captors, since they could have killed him at any time they wished to during the month they held him in detention.

7. The grounds of appeal did not challenge this finding of the Adjudicator as such. They concentrated on the Adjudicator's alternative finding at paragraphs 28 and 29. At paragraph 28 the Adjudicator stated:

> "Even if I am wrong in rejecting the appellant's human rights claim for the reasons I have, I find the option of internal flight is available to the appellant without undue hardship.'

8. At paragraph 29 he went on to conclude that the appellant could return safely to Kabul.

9. We asked Mr Keating whether he wished to challenge the Adjudicator's primary findings and on what basis. He contended that the appellant's subjective fear was based on objective difficulties he had experienced in his home area, in the form of detention and a desire for revenge on the part of Commander Nazif's father and the Hezbi-I-Whadat organisation.

10. However, we do not see anything unsustainable in the Adjudicator's assessment that, if his captors had the intention to wreak revenge on the appellant, they would have done so during his one-month period of detention. The appellant's subjective fear had not been shown to have any objective basis.

11. Mr Keating urged us to conclude that, even if we concluded the appellant had failed to show a real risk of serious harm in his home area, he would still be at risk upon return to Kabul. We cannot agree. If his captors had not taken the opportunity to harm the appellant whilst they had him detained in his home area, we do not consider they would seek to harm the appellant elsewhere. Particularly given that the appellant's detention had occurred as long ago as 1995 or 1996, we consider it was entirely sustainable for the Adjudicator to conclude that there was no current risk upon return.

12. Mr Keating also sought to argue that the circumstances of the appellant's release from detention in Kabul would place him at real risk of being perceived by the authorities in Kabul as pro-Taliban. In this regard he reminded us of the appellant's evidence that he had been released by the Taliban when they took control of the area. We fail to see, however, that there would be such a real risk. In the first place, we do not see how the authorities would know or come to learn that the appellant had been released by the Taliban. It was not reasonably likely the appellant would volunteer that information to the authorities in Kabul or that any records of a 1996 detention by the Hezbi-I-Whadat in the appellant's home area would exist anywhere (certainly not outside his home region) several years later. In the second place, even if this incident did become known, the appellant on his own account was never more than a Taliban supporter. Despite Mr Keating's efforts to persuade us to the contrary, we do not think that the objective country materials establish that low-level Taliban supporters face a real risk from any quarter in Afghanistan.

13. Given the failure of the appellant to show that he would be targeted, that is effectively the end of his appeal.

14. Even had we accepted, however, that the appellant faced a real risk upon return to his home area from Nazif's father and Hezbi-I-Whadat, we would still not have allowed the appeal. That is because we consider the evidence in this case still fell well short of demonstrating that it would be unduly harsh for the appellant to relocate in Kabul. The appellant failed to identify any objective evidence indicating that Hezbi-I-Whadat had any significant presence in Kabul or that, even if it were assumed to have some presence there, it had the ability to target the appellant. Furthermore, even if this organisation were somehow to

identify the appellant as a target for serious harm in Kabul, the objective evidence does not establish that the authorities with protection responsibilities in Kabul – which include ISAF – would be unwilling or unable to protect him.

15. As regards other difficulties the appellant might face in Kabul, we do not consider these would cross the threshold to become serious harm. In this regard we do not consider that any of the latest materials adduced by Mr Keating establish that difficulties in obtaining employment and housing would be acute.

16. Mr Keating took issue with the Adjudicator's approach to the issue of sufficiency of protection in general in Kabul. The Adjudicator had erroneously relied, he said, on the findings of fact made by the Tribunal in the case of No. 14 [2002] S UKIAT 05345, despite the fact that this addressed the situation as set out in the CIPU Report 2002 and not more recent materials. That offended, argued Mr Keating, the Ravinchandran principle of assessment of risk as at the date of hearing.

17. We see no merit in Mr Keating's submissions on this point. For one thing it is clear that the Adjudicator did not merely rely on the findings in No. 14. At paragraph 29 he referred to the Human Rights Watch report and at paragraph 30 he referred to the CIPU Report for October 2002. For another, it is clear from the Court of Appeal judgment in S [2002] INLR 416 paragraphs 29 and 30 that an Adjudicator is quite entitled to base his or her findings regarding general country conditions on comprehensive Tribunal assessments, so long as he satisfies himself that there is no compelling evidence of more recent origin indicating a significant change in circumstances.

18. Plainly the Adjudicator did not consider that the more recent materials placed before him warranted a different conclusion.

19. Mr Keating sought to persuade us that materials before the Adjudicator other than the CIPU October 2002 report and the Human Rights Watch did compel a different conclusion. We fail to see this.

20. One further aspect of Mr Keating's arguments relating to the Adjudicator's reliance on No. 14 needs specific attention. It concerned procedure. The Adjudicator fell into procedural error, he said, in failing to inform the parties at the hearing that he considered the No. 14 case as one which was to be followed. Both parties should be given an opportunity to deal with any case that they have not referred to which appears to have determinative value in the case: he cited R v IAT ex parte Sui Rong Sven [1997] Imm AR 355. We would agree that the Adjudicator should have invited the parties to address him on the

relevance to the issues to be decided of the No. 14 case, if necessary by reconvening the hearing. It was incumbent on him to do so, because he saw this case as containing important guidance on the issues he had to decide.

21. However, we would stress two things here.

22. Firstly, in relation to citation of cases it is primarily the duty of representatives to apprise themselves of relevant case law and indeed to put all cases or authorities they consider relevant before the appellate authorities.

23. Secondly, Adjudicators are entitled to follow well-known cases, even if representatives fail to cite them. No representative is entitled to claim to be unaware of cases that are or should be well-known. A representative must be taken to be aware of a well-known case and, if he makes no reference to it at the hearing, an Adjudicator is entitled to assume that this is because he has nothing to say about it or has decided he need not say anything about it. In either case the Adjudicator is entitled to follow it.

24. However, we accept that the position with cases that are not well known is different. It would be wrong for an Adjudicator to rely on a point from pre-Practice Direction No. 10 (PD10) cases that are not well-known without warning the parties. The position with an unfamiliar case is akin to that in relation to a piece of evidence that has not been adduced at the hearing but relied on by an Adjudicator nonetheless as a result of his research afterwards.

25. What constitutes a well known case? A representative must be expected to keep up with relevant reported cases and cannot properly claim ignorance of relevant ones. This certainly includes Tribunal reported case under the new [2003] reporting system. However, the position is less clear with older cases, although as in any area of law, ongoing Tribunal and court decisions and leading publications and websites on immigration law identify older (if not always recent) key cases.

26. We do not consider that the 2002 case of No. 14 fell into the category of a well-known case, certainly not one so well known that any immigration judge was entitled to make the assumption we have referred to in paragraph 23 above. We are fortified in that view by the fact that the Adjudicator relied on this case not for any proposition of law but as a source of general country guidance. While the Court of Appeal in S has properly identified a role for country guideline cases which are to be followed as far as possible, it remains that recourse to

such pre-PD10 cases, especially ones (like No. 14) which were not set down as country guideline cases, without warning the parties, is quite close to using evidence not adduced at the hearing. There may or may not be specific things the representatives in this case would have wanted to say about the situation since then, and would have said had the Adjudicator clarified that he considered the situation as at the date of hearing was on all fours with the one assessed in No. 14.

27. Accordingly we agree with Mr Keating that the Adjudicator erred in relying in the way he did and to the extent that he did on No. 14.

28. If the validity of the determination depended solely on the issue of the Adjudicator's reliance on No. 14, we would have allowed the appeal by way of a remittal. However, as previously explained, the Adjudicator did not merely rely on the findings in No. 14 and considered other sources of evidence. In our view in the light of the evidence as a whole that was before him, he was entitled to reach the conclusions that he did.

29. Mr Keating further sought to persuade us that in any event, whatever was available to the Adjudicator, the evidence adduced before the Tribunal did disclose that the protection situation in Kabul and Afghanistan had deteriorated seriously. We are not persuaded that this is so. Particularly in the light of the latest evidence as set out in the CIPU Assessment for 2003, we consider that, whilst there remains a certain level of insecurity in Kabul and whilst certain parts of that city continue to experience lawlessness, it is equally clear that ISAF and the current government is generally able to maintain law and order.

30. For the above reasons this appeal is dismissed.

H.H. STOREY
VICE PRESIDENT