

Heard at Field House
On: 4 November 2004
Prepared on: 4 November 2004

KH(Afghanistan – Bahai faith)
Afghanistan [2005] UKIAT
00041

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

25 January 2005

Before:

His Honour Judge Huskinson (Vice President)
Mr C H Bennett
Mrs R Faux JP

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the Appellant: Mr. Danny Bazini (Counsel - instructed by
Fisher Jones Greenwood).
For the Respondent: Ms. Jane Sigley
(Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of Afghanistan born on 26 July 1982. He appeals to the Tribunal, with permission, from the Determination of Mr. A.G. O'Malley, Adjudicator, promulgated on 6 January 2004

whereby he dismissed the Appellant's appeal on asylum grounds and human rights grounds against the Respondent's decision to refuse asylum to the Appellant and to give directions for the removal of the Appellant to Afghanistan.

2. The Appellant's account on the basis of which he claimed asylum, is summarised by the Adjudicator in paragraphs 10-16 of the Determination in the following terms:

"10. The Appellant is a single man. He is of Tajik ethnicity and espouses the Ba'hai faith. He lived with his parents and siblings in Kabul. His mother taught English and he received a good education from her. He gave evidence without the aid of an interpreter.

11. His parents converted from Islam to the Ba'hai faith some time ago and the Appellant was brought up in that faith. His father traded in Iran but his business suffered when they discovered he was not Muslim.

12. There were no other Ba'hais in the area apart from the Appellant's own family and his uncle. On the 15 July 2001 a problem arose when his father fought with a villager over religion and the villager stabbed his father. Five days later thieves broke into the house. They knew the Appellant and his family were not practising Islam. They told his family to leave otherwise they would tell the Taliban.

13. In August the family sold its land having decided to leave. Shortly after that his family home was bombed, possibly by the Taliban. Everyone in the house was killed. The Appellant lost his mother, brother, eldest sister, uncle and uncle's family.

14. The Appellant was sent to Pakistan for safety. There he waited for his family to join him. They did not and the Appellant has heard nothing from them since.

15. The Appellant had no contacts with other Ba'hai in Pakistan and there was no freedom for him to practice his religion. He had problems when it was discovered he did not practice Islam. Yaqoub, who had travelled to Pakistan with Appellant, was beaten as a consequence. They decided to leave.

16. The Appellant left Pakistan at the end of April 2002. He feared that if he returned to Afghanistan he would be killed because he is not a Muslim."

3. Certain challenges to the Claimant's credibility were raised in the Respondent's Reasons for Refusal letter, but the Adjudicator was not impressed by these (see paragraph 19 of the Determination). Although the Adjudicator did not expressly make a positive credibility finding in relation to the whole of the Appellant's account, he did expressly accept that he was a member of the Bahai faith. Bearing in mind the terms in which the Adjudicator expresses himself in his Determination, Ms. Sigley accepted (correctly in the Tribunal's judgment) that the Adjudicator's Determination should be read on the basis that the Adjudicator was accepting as credible the Appellant's account of events in Afghanistan. It follows from the foregoing that the Adjudicator accepted the matters mentioned in paragraphs 12 and 13 of the Determination.
4. The Adjudicator concluded that the question of whether, as a Bahai, the Appellant faced a real risk of persecution if returned to Afghanistan was not an easy question to answer there being, he observed, no information at all in the background evidence. The Adjudicator drew attention to the fact that the Appellant's claim was that he was persecuted under the Taliban and that the Taliban have gone and that the administration of President Karzai has an avowed religious tolerance. He stated that "There is no evidence that Bahais are not tolerated in Afghanistan". He ultimately reminded himself that the burden of proof was on the Appellant and he concluded that the Appellant had not discharged this burden of proof in that he had not established that Bahais are persecuted in Afghanistan under the Transitional Administration or that the Transitional Administration is unable or unwilling to offer effective protection for those persecuted for their religious beliefs.
5. Mr. Bazini contended that the Adjudicator had erred in law in that he had failed to take into account an expert report which was before him from Mr. Peter Marsden MBE dated 7 December 2003 at pages 86-94 of the bundle and also that the Adjudicator had failed to recognise that the grievous treatment suffered by the Appellant's family in Afghanistan was at the hands of persons who either were not the Taliban (see the events in paragraph 12 of the Determination) or of whom it could only be said that they were possibly the Taliban. Accordingly the Adjudicator was said to have erred in law in directing himself that the Appellant's case was that he was persecuted under the Taliban. Ms. Sigley did not concede that the Adjudicator had made any error of law but she was unable to advance any significant argument in answer to Mr. Bazini's contentions. The Tribunal is satisfied that the Adjudicator did indeed err in law in the manners contended for by Mr. Bazini. In the result the matter is therefore for the Tribunal to consider, on

the objective evidence before us, as to whether the Appellant would face a real risk of persecution or Article 3 infringing treatment by reason of his Bahai faith were he now to be returned to Afghanistan.

6. Certain further preliminary points can be dealt with at this stage. First Ms. Sigley accepted (correctly in our view) that bearing in mind the history of the Appellant's treatment in his home village in Paghman there would be a real risk of severe adverse treatment (capable of amounting to persecution or Article 3 infringement) if he were to return to his home area. She did not feel able to argue that the authorities would be able to provide for him, in his home area, a sufficiency of protection against such adverse treatment. Accordingly Ms. Sigley accepted that the case involved the question of whether, if the Claimant relocated to Kabul, he could do so without (a) being at real risk of persecutory or Article 3 infringing treatment there, and (b) it being unduly harsh for him to do so.

7. We can also at this stage dispose of one strand of Mr. Bazini's argument which was based upon the contention that the Appellant, on return to Afghanistan, would face a real risk of persecutory treatment at the hands of the State itself by reason of being viewed as an apostate. Mr. Bazini accepted that the Appellant himself had not been born a Muslim and had not himself converted away from Islam so as to embrace the Bahai faith. Instead the Appellant's parents had both converted to the Bahai faith before the Appellant was born. Mr. Bazini was unable to draw the Tribunal's attention to any objective evidence suggesting that a person in these circumstances, who had not himself converted away from Islam, would nonetheless be viewed as an apostate upon whom the death penalty should (or could) be visited under Sharia law. Mr. Bazini did however contend that nonetheless the Appellant might be accused of having converted and that he would then have great difficulty in seeking to call evidence to show that it was his parents who had converted before he was born rather than that he had converted. We do however view this as a speculative argument which we could not accept without evidence to the effect that persons could be accused under Sharia law of being an apostate notwithstanding that they themselves had been born outside the Muslim faith by reason of their parents having converted before their birth. The fact is that the Appellant on his own evidence is not an apostate. In the absence of the evidence we have mentioned, we cannot accept there is a real risk that the Appellant will be nonetheless accused of being an apostate and will be convicted of such (despite the fact that he is not an apostate) and will be sentenced as such and will have such sentence carried out.

8. We therefore turn to the other limb of Mr. Bazini's argument, namely that the Appellant faces a real risk of persecution at the hands of non-state actors by reason of his Bahai faith and that there would be an insufficiency of state protection for him against such persecutory treatment. In support of this argument Mr. Bazini advanced the following points.
9. He contended that the fact that the Appellant is of the Bahai faith is bound to come out sooner or later, or (if this is not so) there is at least a real risk that it would come out. It would come out because the Appellant would behave in a manner consistent with a member of the Bahai faith and inconsistent with a practising Muslim. In particular he would not pray five times a day and would not keep the fasts which Muslims would keep. He drew attention to the very small non-Muslim community in Afghanistan, see paragraph 6.55 of the CIPU Country Report on Afghanistan of April 2004 showing that about 84 percent of the population is Sunni Muslim, about 15 percent is Shia Muslim, and other religions including Sikhs, Hindus and Jews make up less than 1 percent of the population. It is also stated there is a small extremely low profile Christian community "in addition to small numbers of adherents of other religions". Paragraph 6.56 records that most members of the Hindu, Sikh, Jewish and Christian community have left. Paragraph 6.62 refers to the fact that sources consulted during a September 2002 Danish Fact-Finding Mission to Afghanistan "had no knowledge of the possible existence of Bahais or a Bahai community in Afghanistan". Accordingly Mr. Bazini contended that the Appellant would stand out and would inevitably soon be recognised as not being a Muslim.
10. Mr. Bazini drew attention to what had happened to the Appellant and his family in 2001 when there was cause for a quarrel with the family as a result of which thieves broke into the house and, subsequently, the house was bombed with the Appellant's mother, brother, elder sister, uncle and uncle's family being killed because, it seems clear, of their Bahai faith.
11. Mr. Bazini drew attention to the fact that the tenets of the Bahai faith are considered to be contrary to Islam. He referred to page 283 of the bundle which is taken from an ABC News article dated 21 May 2003 regarding the position for Bahais in Iran:

"The Bahai religion dates back to 1844, when a young Shiite Muslim named Bahaullah in what is now Iran announced his divine revelation of the spiritual unity of humanity and an equality of all faiths. Today, there are an estimated 300,000 adherents in Iran.

But while religious minorities such as Christians, Jews and Zoroastrians are officially recognised in the Islamic Republic of Iran and are granted official, if not actual, 'equal rights', Bahais are the non-people of Iran.

It's an exclusion that comes with a host of subtle and often not-so-subtle persecutions ranging from an inability to practice their faith to a ban on any identifying structures on Bahai graves.

The principal reasons for the persecution, some experts say, are rooted in a narrow reading of theology. The fact that Bahai was founded in 19th-century Persia by a young Muslim is viewed by some as a challenge to Islam. Bahauallah's teaching is seen in the Islamic state of Iran as an affront to the Prophet Mohammad, whose teachings, Muslims believe, were the last revelation."

He also referred to an article at page 271 and following of the bundle describing the deep animosity for Bahais and recording that they are often viewed as having a Zionist connection, because the base of the Bahai faith is in Haifa in Israel. In this connection Mr. Bazini drew attention to the difficulties for Bahais in other Muslim countries in particular Iran, Egypt and Tunisia.

12. Mr. Bazini accepted that he was unable to draw attention to any objective evidence specifically recording difficulties for Bahais in Afghanistan. However he submitted that that could not be fatal to his argument. The reason why there was no such evidence could be explained by the fact that there were exceedingly few Bahais in Afghanistan. It was not a prerequisite of his argument succeeding that there must be already some documented persecution of members of the Bahai faith in Afghanistan. Instead the Tribunal should examine the case as a matter of principle as to what was reasonably likely to happen to the Claimant on return bearing in mind that he is a member of the Bahai faith and bearing in mind the attitude in Afghanistan so far as concerns religious tolerance.
13. Mr. Bazini drew attention to the difficulties for Sikhs in Afghanistan and contended that the recent Tribunal Determinations in **[2004] UKIAT 00150 IB** and **[2004] UKIAT 00258 KK** were of relevance as indicating both the extent of religious intolerance and also the insufficiency of state protection against such treatment. He argued that in fact the Appellant would be worse off than a member of the Sikh community because there was at least some, albeit very small, Sikh community in Kabul, whereas the Appellant would in effect be on his own without the support of even such a community.

14. Mr. Bazini drew attention to continuing human rights abuses in Afghanistan as recorded in the document at 192 and following of the bundle being the Human Rights Watch report entitled "Killing you is a very easy thing for us".
15. So far as concerns the question of sufficiency of protection, Mr. Bazini drew attention to the continuing influence of the Jamiat-e-Islami in Kabul in, among other organisations, the police, see page 201 of the bundle. He also reminded the Tribunal of the fact that when the Appellant was in Pakistan he specifically encountered difficulties from members of Jamiat-e-Islami, see the answers to Qs.32 and 34 in his interview.
16. Mr. Bazini also relied on the expert report of Mr. Marsden whose substantial experience and qualifications are set out at page 86. At paragraphs 27-29 of his report he states as follows:

"27. It would not be an option for [redacted] to return to Kabul as he would be in a highly vulnerable position, having no family members to protect him or accommodation to go to. It is difficult not to arouse suspicion as a stranger in Afghanistan and questions would be asked as to his origins and personal history. The population has lived under intense fear for over two decades under a succession of regimes which have relied heavily on a combination of brute force and the use of intelligence services, with an associated use of imprisonment and torture. The rumour mill is extremely powerful and stories can quickly spread, arising from the threat that strangers represent, which can put them at risk.

28. In any event, rents have risen in the past year or so way beyond the capacity of the average citizen to pay and there have been high levels of eviction as a result, with many families having to take refuge in the homes of relatives, thus contributing to growing overcrowding. If Mr. Hisham is not able to find accommodation, he would be compelled to survive under conditions of destitution amongst the ruins of southern and western Kabul. Here, he would be in an exposed position in relation to the various militia forces and to the surrounding population if it became clear that he was not a practicing Muslim.

29. To summarise, [redacted] would be at risk of arbitrary violence, if he returned, from those who were responsible for placing a bomb in his family home and to any others amongst the various power holders and the population at large who would find his abandonment of Islam

unacceptable. It is clear that this bomb attack, and the burglary that preceded it, were aimed to intimidate his family into leaving the village because of their abandonment of Islam and were, therefore, of a persecutory nature. He cannot return in security to his village and is also in a situation in which there is no other place in Afghanistan where he would have family members to protect him. Without such protection, the individual is extremely vulnerable throughout Afghanistan."

17. In answer to Mr. Bazini's argument Ms. Sigley advanced the following points.
18. She contended that the Appellant would not "stand out like a sore thumb" as Mr. Bazini had suggested he would. She observed that the reason the Appellant would allegedly stand out is by reason of what he does not do rather than what he does do - it is thus suggested that he would stand out because he does not observe the fasts and does not pray five times a day. However she argued that there must inevitably be many lapsed Muslims who, although still of the Muslim faith, do not observe the prayers and fasts as assiduously as their fellows. She contended there was no objective material showing that such persons were persecuted. In the alternative she submitted there was no objective evidence to show that effectively every Muslim man in Afghanistan dutifully observed all the prayers and fasts. In the absence of objective evidence upon one or other of these points she contended that the inference must be that there existed lapsed Muslims who, although not observing the prayers and fasts, were not persecuted. She contended that there was therefore no more reason to conclude that the Appellant would be persecuted by reason of what he did not do. She also contended, by reference to paragraphs 6.290 and 6.301 of the CIPU Report, that the Appellant would be one of very many people who were returnees to Kabul and that as such he would not stand out as a stranger.
19. Ms. Sigley further contended that there was a climate of increasing religious tolerance in Afghanistan. She referred to the CIPU Report at 6.55 and following, especially at 6.63, 6.68, 6.74 (which she referred to so as to draw an analogy with the treatment of Ismailis), and 6.76.
20. She referred to the recent presidential elections in Afghanistan and to the fact that President Karzai is not a member of Jamiat-e-Islami. She referred to objective evidence indicating that Jamiat-e-Islami had handed in some of its weapons and she argued that it did not have too great an influence on matters such as policing.

21. She argued that there was sufficient security in Kabul. She pointed out that ISAF were generally responsible for security and were doing a good job and that the local police force was being expanded. She referred to the CIPU Report at paragraphs 5.92, 5.95, 5.98, 5.103, 5.126, 5.127, 5.163, 5.164 and 5.169.
22. She also referred to the fact that the objective evidence shows that attitudes towards women are improving and she referred to paragraphs 6.171 and 6.175 of the CIPU Report. Ms. Sigley argued that Mr. Marsden's report did not properly consider the improvements in security and the capabilities of ISAF and the Afghanistan police force.
23. The Tribunal has decided that the Appellant's appeal must be allowed. Our reasons for so concluding are as follows.
24. We accept Mr. Bazini's argument that it is inevitable sooner or later (and we think sooner) that it will become clear to the other members of the community in which the Appellant is living that he is not a practising Muslim and that he is of another faith - and once this has become clear the nature of his faith is also likely to be revealed. We have in mind paragraph 6.65 of the CIPU Report which records that the government continued a policy of religious tolerance "however, custom and law required affiliation with some religion". Once it has become clear, which it will do, that the Appellant is not a practising Muslim then we consider it inevitable that it will be discovered, or he will be coerced into revealing, what his faith is. We do not consider that the analogy with a lapsed or non-practising Muslim assists Ms. Sigley's argument. Such a person, albeit not assiduously following the customs and practices of a Muslim, would be known as a Muslim and would doubtless be vouched for by other members of the family as being a Muslim. The opprobrium that may be levelled against a lapsed or non-practising Muslim is in our judgment of a different character from that which would be experienced by someone of a different faith altogether, who is therefore seen to be outside the religion of Islam.
25. We also accept Mr. Bazini's argument that it is not a prerequisite for the Appellant to succeed in his appeal that he is able to refer to objective evidence recording persecutory or Article 3 infringing treatment for some identified Bahai in Afghanistan. Bearing in mind the very few Bahai in Afghanistan, the fact that there may not be recorded incidents of persecutory treatment against them which those writing the objective evidence have thought appropriate to record, does not mean that for an individual Bahai returned to Afghanistan there would be no real risk of persecution. Instead the matter must be viewed as a matter of principle and analysis having regard to the objective evidence and the question

must be asked as to whether in the light of all that evidence there is a real risk of persecution or Article 3 infringing treatment for the Appellant on return. The absence of specific evidence on this point in relation to Bahais does not determinatively answer the question against the Appellant, although it is a point which we bear in mind.

26. We are satisfied that for the Appellant returning alone to Kabul as a member of the Bahai faith and with no family and no Bahai community to return to there would be a real risk of persecutory or Article 3 infringing treatment. We reach this conclusion having regard to the following matters:
- (1) The previous treatment, which was very severe, suffered by the Appellant's family in 2001 by reason of their Bahai faith.
 - (2) The general religious intolerance in Afghanistan. This is demonstrated, for example, by the treatment received by members of the Sikh community, see the cases of **IB 150** and **KK 258**.
 - (3) The treatment received by Bahais in other Muslim countries and the manner in which they are there viewed. Among other matters we bear in mind the perceived Zionist connection.
 - (4) The report from Mr. Marsden in which he specifically considers the Appellant's case and concludes that he would be at risk of arbitrary violence if he returned.
27. We also accept Mr. Bazini's argument that, as compared with members of the Sikh community, the Appellant would be likely to be less happily rather than more happily placed. It is true that as regards outward appearances it may be that a member of the Sikh community would be more immediately recognised as such and therefore as not being a Muslim. However while it may take longer for the Appellant to be recognised as non-Muslim he would (as we have already found to be inevitable) soon be identified as not being a Muslim. Once so identified we see no reason to conclude why the Appellant could expect to be any better treated than a member of the Sikh community. In fact we accept Mr. Bazini's argument that, bearing in mind that there is no identified Bahai community to which the Appellant could return (whereas there is a small Sikh community in Kabul) the Appellant would be worse placed than a returning member of the Sikh community. However as regards a member of the Sikh community the cases of **IB 150** and **KK 258** show the grave difficulties for them. In **IB 150** it was held by the Tribunal that for the applicant whose

home area was Jalalabad (where it was accepted he was at real risk of persecution) it would be unduly harsh to relocate to Kabul. In **KK** the Tribunal concluded on the evidence before it that there would be a real risk of persecutory treatment for the applicant as a Sikh on return to Kabul. We conclude that there would for the Appellant be a real risk of persecutory or Article 3 infringing treatment on return.

28. This persecutory or Article 3 infringing treatment would be at the hands of non-state actors. However we do not consider that there is a sufficiency of protection for the Appellant in Kabul. We have in mind the analysis in **IB 150** at paragraph 34 which records that ISAF has no mandates to intervene in relation to human rights violations without a request from the government and that ISAF cannot be regarded as of itself being able to provide a sufficiency of security to individuals in the Sikh community, notwithstanding that ISAF's presence may have a generally calming effect in Kabul. We also have in mind **KK 258** at paragraph 34 where the Tribunal concluded that there was nothing to show any specific commitment either by the international forces or the Afghan authorities to the protection of minorities generally or the Sikhs in particular. We also have in mind the passage at page 201 of the bundle recording the fact that many of the most powerful police and army commanders in Kabul today come from parties within the former Northern Alliance, including the Jamiat-e-Islami. We also have in mind the Appellant's evidence, recorded above, as to the adverse treatment he received in Pakistan from members of Jamiat-e-Islami by reason of his Bahai faith. We do not consider in these circumstances that there would be a sufficiency of state protection for the Appellant against the real risk of persecutory or Article 3 infringing treatment from non-state actors which the Claimant would face because of his religion.
29. Even if, contrary to the foregoing conclusions, the Appellant could find sufficient safety in Kabul, this would involve an internal flight alternative because the Appellant's home area is not Kabul and it is accepted (and certainly we find) that the Appellant would be at real risk of persecution or Article 3 infringing treatment in his home area and there would not be a sufficiency of protection for him there. Accordingly even if the Appellant found sufficient safety in Kabul, it would be necessary to consider whether it was unduly harsh to expect him to relocate there. Bearing in mind the matters raised in Mr. Marsden's report at paragraphs 27 and 28 and also to the analysis in **IB 150** at paragraph 43 and bearing mind that the Appellant would be returning as a lone Bahai with no Bahai community to join in Kabul, we consider that it would be unduly harsh to expect him to relocate to Kabul.

30. In the result therefore the Tribunal allows the Appellant's appeal both under the Refugee Convention and under Article 3 of the ECHR.

**HIS HONOUR JUDGE HUSKINSON
VICE PRESIDENT**