IN THE IMMIGRATION APPEAL TRIBUNAL

AF ("Warlords/commanders"- evidence expected) Afghanistan CG [2004] UKIAT 00284

Heard: 21.09.2004
Signed: 24.09.2004
Sent out: 15/10/2004

NATIONALITY, IMMIGRATION AND ASYLUM ACTS 1971-2002

Before:

John Freeman (a vice-president)
K Drabu (a vice-president) and
Mrs LR Schmitt

Between:

Secretary of State for the Home Department,
appellant

and:

claimant

Miss R Brown for the Secretary of State
Mr J Bild for the claimant

DECISION ON APPEAL

This is an appeal from a decision of an adjudicator (Mr PW Cruthers), sitting at Manchester on 12 January 2004, allowing an appeal by a Hazara citizen of Afghanistan, on asylum and human rights grounds. Permission to appeal was given on the basis that the adjudicator might not have been entitled to find that one Commander Qazavi (whom he accepted the claimant genuinely feared) actually occupied "… a position of power in the current administration" without any background evidence to support that finding.

2. We bear in mind **CA [2004] EWCA 1165**, which makes it clear that, contrary to what some people had thought, the requirement in the present (2002) Act for there to be a point of law involved for an appeal to be allowed is not merely a threshhold requirement at the permission stage, but a substantive one, relating to the decision at hearing. The definition of such a point has recently been somewhat extended in **E & R [2003] EWCA Civ 49**. However most lawyers are familiar with the long-established general rule that deciding an issue on insufficient evidence does not raise a point of law; but deciding it on no relevant evidence at all does.

3. Those involved in this field will also be familiar with the approval given in **S [2002] EWCA 539** to what Laws LJ described in these terms at § 27:

While in our general law this notion of a factual precedent is exotic, in the context of the IAT's responsibilities it seems to us, in principle, to be benign and practical.

At that time of course, the Tribunal had jurisdiction to entertain appeals on points of fact as well as law; but it is interesting to compare the Court of Appeal's assessment of their own position in **Shirazi [2003] EWCA Civ 1562**. The Court of Appeal of course required an error of law to entertain an appeal; but they were able to find one in there being Tribunal decisions on the general factual point in question which were inconsistent with each other..

4. If that situation involves an error of law by those responsible, then it must equally be the responsibility of the Tribunal to do what we can to prevent its arising in the first place, and in particular to provide adjudicators with suitable general guidance. A system of "country guidance" cases has been developed since the decision in **Shirazi** with that object in mind, and this will be one of them. So far as it is of general application (which will be made clear), adjudicators will be expected to follow it, and it is anticipated that the Tribunal will regard any failure to do so as raising a point of law.

5. The passage on which the point turns in this case is at § 59, referring to the claimant's belief that Qazavi would be able to wreak vengeance on him on return to Kabul:

The exact basis of the appellant's belief has not been spelt out but given the way that commanders have come and gone from power under various governments in Afghanistan in recent years, it seems to me that there is a real possibility that Commander Qazavi does hold a position of power in the current administration.

Put like that, the basis for the adjudicator's decision on this point seems to involve a complete failure to inquire what evidence might have been expected to confirm such a contention. Adjudicators, like other fact-finders in the asylum system, are subject to the double obligation expressed in §§ 203-4 of the UNHCR handbook: by § 203, they must be prepared to give the claimant the benefit of the doubt (and particularly on his individual history) where no evidence is available after a genuine effort to obtain it; but by § 204, they should only do so, not only when satisfied of his general credibility, but after obtaining and checking all available evidence.

6. 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 § 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.

7. The passage we have set out from the adjudicator's § 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 inquire 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.

8. As it happens, Mr Bild put the claimant's case before us in quite a different way. Qazavi was no longer presented as someone holding a "position of power in the current administration": if that had been the case, so far as Kabul was concerned, we do not doubt that due diligence by the claimant's advisers would have produced at least some reference to him in the background evidence. However Mr Bild now presented him as probably only a commander of some 40 or 50 men: a neighbourhood, rather than a national figure. This of course would beg the question as to how he was to harm the claimant on return.

9. That is answered by Mr Bild in this way: Qazavi's *Harakat e-Islami* ['Islamic Movement'] is allied (see CIPU April 2004, p 124) to the *Jamiat e-Islami* ['Islamic Society'], which it was accepted in **No. 32 [2002] UKIAT 0008360** policed Kabul with their militia. ISAF had (as is generally accepted) no neighbourhood policing function; and it followed, he said, that whatever plans of vengeance Qazavi might have against the claimant would meet no opposition from any law enforcement forces.

10. As a Hazara, the claimant would have no alternative to living in the Hazara quarter of the capital: see the report by Dr SA Moussavi of St Anthony's College, Oxford, who goes on to mention the lack of protection there for them. Although the claimant's wife and daughter stayed there when he left, apparently running the family shop, a recent letter from the wife has been produced, showing the difficulties she says she has had.

11. Miss Brown was more concerned to note the adjudicator's errors in approach, with which we have already dealt, than to challenge the result on the individual case. We think on its very particular facts, as put before us by Mr Bild, that result may be justified by the claimant's individual position putting him at risk of identification and ill-treatment by a minor figure who might have wider support; but we should emphasize that this decision is not to be regarded as any kind of paradigm for future ones in favour of persons claiming to fear minor Kabul "warlords".

12. So far as the "country guidance" point is concerned, it relates to the approach adjudicators should take to claims of fear of "warlords". In our view they need in each case to ask themselves the following questions:

a) What is the exact position of the "warlord" (so far as it can reasonably be obtained)?
b) What are the geographical limits of his power? and

In the light of a) and b):

c) What background evidence of his existence and position might reasonably be expected? and in the light of that:
d) How far does whatever the adjudicator accepts about him lead to any real risk for the claimant at the point of return (or elsewhere, so far as relevant)?

13. There is of course an exercize of judgement called for as to how far any individual "warlord" who (in Mr Bild's apt phrase) came "below the radar" of the background evidence would be in a position to present any real risk on return; but that is for individual adjudicators to make on the facts before them. No doubt they will bear in mind that there is a great deal more information in the public domain about Kabul, which is also the point of return, than about areas outside the capital.

Home Office appeal dismissed