IMMIGRATION APPEAL TRIBUNAL

RV (Hindu – Kabul – Ecre guidelines) Afghanistan [2004] UKIAT 00286

Date of Hearing: 4 October 2004
Date Signed 5 October 2004
Date Determination Notified: 12 October 2004

Before:

Mr J G Freeman (Vice-President)
Mrs J A J C Gleeson (Vice-President)
Prof R H Taylor

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

For the Appellant: Miss A Porter of Counsel
Instructed by G Singh, solicitors

For the Respondent: Mr C Buckley, Home Office Presenting Officer

1. The appellant, an Afghan national, appeals with permission against the determination of an Adjudicator, Mr N M K Lawrence, who dismissed his appeal against the Secretary of State's refusal to recognise him as a refugee or grant humanitarian protection, on the basis that there was no risk on return to him as a Hindu in Kabul.

2. The manuscript Grounds of Appeal contain three issues: the Adjudicator's treatment of the Guidelines for the Treatment of Afghan Asylum Seekers and Refugees in Europe (ECRE, April 2003) especially paragraph 15 of that document; Article 8 European Convention on Human Rights and Fundamental Freedoms 1950; and the new

'earned regularisation' concession for employees working in the United Kingdom. Only one of these, the ECRE point, was pursued at the hearing. Neither of the two remaining grounds had been argued below and Miss Porter did not seek to pursue them further.

3. Unfortunately, the ECRE document had not been re-filed for the hearing, and in addition the solicitors had not served their bundle for the hearing on the Home Office. A skeleton argument prepared by Miss Porter for the hearing was produced on the day with only one copy for the Tribunal. There was a quite unnecessary delay in beginning the hearing whilst the Tribunal ensured that all participants had copies of the same documents.

4. The relevant passage from the ECRE document says this –

> "15. European States should give all Afghan asylum claimants the opportunity to lodge an application and have it processed with minimum delay. ECRE considers that **certain categories of individuals amongst the afghan population may have ongoing protection needs that remain unchanged despite recent political developments in Afghanistan.** These groups include…
>
> - Religious minorities are at risk of persecution including Hindus, Sikhs, Shiites, Sunnis and Ismailis 15[14]…
>
> 17. ECRE urges European States to give immediate consideration to the asylum applications of persons falling within the aforementioned categories, and to **consider all asylum applications from Afghans on an individual basis in order to identify and recognise their status as early as possible.** This should include either refugee status in accordance with the 1951 Convention Relating to the Status of Refugees or complementary protection status for those who fear persecution but fall outside a full and inclusive interpretation of the terms of the 1951 Convention. We would recommend against a presumption that applications are deemed to be manifestly unfounded on the basis of the establishment of the Afghanistan Transitional Admin."
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> ***Bold emphasis added by Tribunal***

5. The footnote, 15[14], reads thus –

> "At the end of last year, 170 Ismailis were jailed for several weeks, when they tried to travel to Kabul to welcome home their leader (who fled to Uzbekistan, when the Taliban took over)…"

6. That is not evidence of risk to all Hindus. It is not clear what is the source of ECRE's conclusions as to risk to that particular religious minority, given that the supporting evidence in the footnote relates to Ismailis. Ms Porter accepted that there was little specific evidence, arguing that the reason was the very small number of Hindus in Afghanistan, and that accordingly the Tribunal should be prepared to grant the appellant some latitude as to his argument and evidence. A reference to paragraph 18 of the ECRE document in the appellant's closing submissions to the Adjudicator seems to have been otiose as it deals with internal relocation, and this appellant's claimed difficulties were in Kabul, where he was living before coming to the United Kingdom. Kabul is the only part of Afghanistan to which at present it is generally considered that internal relocation is an option from other parts of the country; therefore, those already in Kabul do not have an internal relocation option.

7. The Adjudicator did consider the ECRE document. At paragraph 5.6 of his determination, he said this –

> "There are also references in "APP 1" at page 45 that religious minorities, such as Sikhs, Hindus, Shiites, Sunnis and Ismailis are at risk of persecution. However, as I have found elsewhere, the Interim Administration has set [up] a human rights commission which could investigate."

8. That is a reference to paragraph 5.2 of the determination, in which the Adjudicator considered the human rights commission and concluded that he was 'satisfied the authorities in Afghanistan have in place a system to protect any violation of the appellant's human rights'.

9. The relevant Ground of Appeal says this –

> "1. The Adjudicator appears not to have considered the Guidelines for the treatment of Afghan asylum seekers and refugees in Europe April 2003 compiled by the European Council on Refugees and Exiles [ECRE]. A copy of the report is enclosed and the reader is referred to paragraph 15 and the paragraph marked "*" which confirms that Hindus may require ongoing protection needs despite the political developments in Afghanistan (the report was contained in the appellant's bundle). In conjunction to the above, it is noted that the Adjudicator has stated in his determination at paragraph 5.1 that "I have considered the objective evidence provided on behalf of the appellant. Both CIPU and objective evidence do register a note of caution". Given the Adjudicator's finding, in addition to the above-mentioned report, the decision of the Adjudicator is irrational and perverse."

10. The skeleton argument makes no reference to paragraph 5.6 and it does appear that in preparing for this appeal, the appellant's solicitors and Counsel may have overlooked the Adjudicator's consideration of the ECRE document set out in that paragraph. In oral argument, Counsel sought to persuade us that *'may have ongoing protection needs'* was disjunctive from the bullet point stating that religious minorities were at risk of persecution (paragraph 15). Further, she referred us to a letter written by UNHCR on the appeal of a different appellant, to a different firm on solicitors, on 18 July 2003, which said that –

> "UNHCR's opinion is that Sikhs and Hindus from present day Afghanistan are among those who may qualify for protection under the 1951Conveniton. Their applications should be assessed in a full and fair procedure, taking into account the personal circumstances and background of the Applicant, an analysis of the prevailing situation in the Applicant's area of origin, and an assessment of the efficacy of law and order mechanisms in that particular area."

11. It is not clear whether Mr Kingsley-Nyinah, the Deputy Representative who wrote in these terms to Bhogal Lal in July 2003, was aware that the letter would be used fifteen months later by G Singh, solicitors. The letter is consistent with the full text of the ECRE document, albeit more crisply expressed. However, Counsel argued that a narrower meaning of the ECRE document could be sustained; that all Sikhs in Afghanistan were at risk today and entitled to asylum. That takes the observations out of their proper context. She also argued that the Adjudicator's conclusion was not 'reasonable' and should not be upheld, but that is not the test; the question is whether the Adjudicator's determination contains an error of law, which may include an error of fact if the determination is so inadequate as to be perverse or *Wednesbury* unreasonable.

12. The Tribunal reminded Ms Porter that following the decision of the Court of Appeal in *CA [2004] EWCA 1165* (see judgment of Laws LJ at paragraphs 14-15 and 18-22) and pursuant to Section 101 of the Nationality, Immigration and Asylum Act 2002 , the appellate function of the Immigration Appeal Tribunal is now limited to situations where an adjudicator had perpetrated a material error of law, not simply reconsideration of the facts, from which under s 101 it is now debarred. The bar on reconsideration of facts includes reconsideration of the country situation, except where the Adjudicator's findings of fact are perverse or *Wednesbury* unreasonable so as to amount to an error of law. If there is an error of law in the determination, the Tribunal may deal with it on the facts at the date of hearing before the Tribunal, but not otherwise.

13. We asked Ms Porter to identify the mistake of law upon which she relied. She replied that the Adjudicator's consideration of the ECRE document in his determination was unreasonably brief, but did not go so far as to suggest that it was perverse or *Wednesbury* unreasonable. She sought to widen the Grounds of Appeal to include the appellant's personal circumstances (which were not argued below, nor included in the Statement of Additional Grounds which accompanied the Grounds of Appeal to the Adjudicator). No application for permission to amend had been made. The Tribunal reserved its determination for postal delivery, which we now give.

14. We remind ourselves of the obligation on an appellant under rules 17 and 20 of the Procedure Rules 2003:

> "**Form and contents of application notice**
> **17.** - (1) An application notice for permission to appeal must be in the appropriate prescribed form and must …
>
> (2) … state all the grounds of appeal and give reasons in support of those grounds.
>
> (3) The grounds of appeal must –
>
> (a) identify the alleged errors of law in the adjudicator's determination; and
> (b) explain why such errors made a material difference to the decision…
>
> **Variation of grounds of appeal**
> **20.** - (1) A party may vary his grounds of appeal only with the permission of the Tribunal.
>
> (2) Where the Tribunal has refused permission to appeal on any ground, it must not grant permission to vary the grounds of appeal to include that ground unless it is satisfied that, because of special circumstances, it would be unjust not to allow the variation."

15. The Grounds of Appeal at Ground 1 are patently misconceived. The Adjudicator did consider the ECRE document (paragraph 5.6) and explained, with reference to paragraph 5.2, why he considered that sufficient protection would be available to the claimant on return. There was no challenge in the grounds to that finding; nor did they contain any argument as to what in the appellant's personal circumstances should have led to the opposite conclusion. Neither was there any application, either in advance or before us, to vary the grounds on which permission had been given; still less any draft of grounds which might have suggested any specific error

of law on the part of the Adjudicator. Without any such error being shown, it was not open to the appellant, in the light cast by *CA* on the meaning of section 101, to seek to challenge the Adjudicator's assessment in paragraph 5.2 that the remaining background evidence as to the situation in Kabul did not lead to the potential risk to Hindus identified by ECRE amounting to a real one in this case, merely on the basis that the weight he had given to ECRE's views was (on no grounds either pleaded or specified) unreasonable.

16. **The appellant's appeal is accordingly dismissed.**

Date: 4 October 2004

J A J C Gleeson
Vice-President