

IN THE IMMIGRATION APPEAL TRIBUNAL

AR (Christians – risk in Kabul) Afghanistan [2005] UKIAT 00035

Heard at: Field House Decision number:
Heard on: 10 November 2004 Appeal number:
Date typed: 27 November 2004
Date promulgated: 4 February 2005

Before:

MS D K GILL (VICE PRESIDENT)
MR. P S AUJLA
MR A. E. ARMITAGE

Between:

Appellant

And

The Secretary of State for the Home Department

Respondent

DETERMINATION AND REASONS

Representation:

For the Appellant: Mr. D. O'Callaghan, of Counsel, instructed by Bhogal Lal Solicitors.
For the Respondent: Mr. D. W. Saville, Senior Home Office Presenting Officer.

1. The Appellant (a national of Afghanistan) has appealed, with permission, against the determination of Mr. P J Bryant OBE, an Adjudicator, who (in a Determination promulgated on 17 December 2003 following a hearing on 2 December 2003 at Hatton Cross) dismissed his appeal on asylum and human rights grounds against the Respondent's decision of 24 February 2003 to give directions for his removal from the United Kingdom as an illegal entrant.
2. In this case, the Tribunal's jurisdiction is limited by Section 101 of the 2002 Act. This confers jurisdiction to entertain appeals on points of law only. The Tribunal cannot allow an appeal unless it holds that the Adjudicator had perpetrated a material error or mistake of law (see CA v. SSHD [2004] EWCA Civ 1165).
3. At the hearing before us, Mr. O'Callaghan withdrew the Article 8 grounds. This means that the sole issue before us is whether the Adjudicator erred materially in law in finding that the Appellant is not at real risk of persecution or Article 3 ill-treatment on account on of being a Muslim who has converted to Christianity. If he did make a material error of law, then the Tribunal would consider the fresh evidence submitted to reach its own conclusion.
4. The Appellant arrived in the United Kingdom on 28 July 1999. He claimed asylum on 23 July 1999.
5. The Adjudicator considered the risk to the Appellant as a Christian convert at paragraph 40 of the Determination, which we now quote:

40. I accept the appellant's evidence that he has converted to Catholicism and I acknowledge the baptism certificate, the relevant photograph, and the letter from Rev. Moroney of 14 October

2003. The appellant is married to a Pakistani national, who herself was born into Catholicism, and that, therefore, he and his wife form a Christian family. On any return to Afghanistan, therefore, the appellant would be in the Christian faith and the position of Christians in Afghanistan was considered by the IAT in [2003] UKIAT 00081 R (Afghanistan), which was heard only in August 2003. I find that Determination useful in considering the objective evidence before the hearing but, of course, I have also considered the objective evidence in this case that has been placed before me. **I do not find relevant objective material on the position in Afghanistan of those who have converted to Christianity within the appellant's objective bundle.** I do note at paragraphs 6.55 – 6.56 of the CIPU report that the UNHCR was unaware of any death sentence since the establishment of the new administration in Afghanistan for having converted from Islam to Christianity. I note that religious freedom in Afghanistan is part of the 2001 Bonn Agreement and that the 1964 Constitution states that non-Muslim citizens shall be free to perform their rituals within the limits determined by the laws on public decency and public peace. I note that the US Department of State report of 2002, referred to within paragraph 6.35 of the CIPU report, reported that the central government in Afghanistan has begun to pursue a policy of religious tolerance. It is for the appellant to prove his case, and I find, taking into account the findings in [2003] UKIAT 00081 R (Afghanistan), and the objective evidence placed before me, that the appellant has not proved to the low standard required that he would be persecuted as a converted Christian and in the practice of Christianity, whilst living in Kabul.

(our emphasis)

6.1 **Documents before the Adjudicator:** Before the Adjudicator, the Appellant relied on a 126-page bundle of documents. The specific documents which relate to the issue of the risk faced by Christian converts and to which our attention was drawn are:

- (i) an article by CBN news (the Christian Broadcasting Network) entitled: “Afghan Iron Curtain: The Post-Taliban Islamic” (at pages 84 to 87 of the Appellant’s bundle); and
- (ii) the report of the ECRE (European Council on Refugees and Exiles) dated April 2003 entitled: “Guidelines for the treatment of Afghan Asylum Seekers & Refugees in Europe” (at pages 106 to 110 of the Appellant’s bundle).

It is asserted in the grounds that the Adjudicator had erred in not referring to, or considering, the above documents to which (it is asserted) his attention had been drawn.

6.2 **Documents before the Tribunal:** A bundle (paginated 127 to 212) has been submitted to the Tribunal on the Appellant’s behalf. The specific documents which relate to the issue of the risk faced by Christian converts and to which our attention was drawn are:

- (i) paragraphs 5.2.2 and 5.4 of the 2004 Danish Fact-Finding Report. These are to be found on pages 166 to 167 of the Appellant’s bundle and pages 172 and 173, respectively, of the Appellant’s bundle. They form part of the report dated June 2004 of the Danish Foreign Office Fact-Finding Mission to Kabul from 20 March to 2 April 2004 and which is entitled: “Political conditions, The Security Situation and Human rights conditions In Afghanistan” (a copy of the entire report is before us); and
- (ii) an “expert report” from a Dr. A. Wali Wardak dated 31 October 2004 (there is a typographical error as to the date on the front cover of the report). This report has been prepared specifically for the Appellant.

On behalf of the Respondent, Mr. Saville relied on the Report of the Country Information and Policy Unit of the Immigration and Nationality Directorate (the CIPU Report) on Afghanistan dated April 2004.

- 7.1 At the hearing before us, Mr. O'Callaghan suggested that, in the event that the Tribunal concluded that the Adjudicator had made a material error of law, the Tribunal might wish to adjourn the hearing part-heard at that stage if we wished to hear oral evidence from Dr. Wardak. His instructions were that Dr. Wardak would be willing to give oral evidence. Mr. Saville informed us that he was prepared to challenge the written evidence of Dr. Wardak, but he was content if the Tribunal wished to hear oral evidence from him. We were not persuaded that the Tribunal should adjourn the hearing part-heard for oral evidence from the Dr. Wardak. The Appellant and his representatives had had sufficient notice of the hearing. If it was considered that the Tribunal should hear oral evidence from Dr. Wardak, then an application ought to have been made for permission to call oral evidence and arrangements should have been made for Dr. Wardak to be available on the hearing day. Adjournments part-heard by the Tribunal cause immense problems, largely because it is often difficult to reconvene the same panel for a considerable period, especially if some panel members have professional commitments elsewhere. Finally, an expert gives oral evidence principally to enable the opposing party to test his evidence. It should not be seen as a further opportunity for the "expert" to improve the quality of the written report or its acceptability. As Mr. Saville was prepared to challenge the written evidence, we informed Mr. O'Callaghan that we would not consider the option of adjourning for Dr. Wardak to give oral evidence in the event that we concluded that there was a material error of law.
- 7.2 Before we commenced hearing submissions, Mr. O'Callaghan confirmed that the only issues before the Tribunal were the asylum and Article 3 claims based on the fact that the Appellant is an apostate.

Submissions

- 8.1 Mr. O'Callaghan submitted that the Adjudicator had made a material error of law because:
- (a) he failed to consider appropriately the CBN article and the extract of the ECRE report referred to above. The word "relevant" in paragraph 40 of the Determination (see the emboldened text above) may mean that the Adjudicator had overlooked these documents. This would be an error of law. Alternatively, it may mean that the Adjudicator had considered the documents but had not found them relevant. In this event, the Adjudicator had erred in law by not giving reasons, or any adequate reasons, for finding that the documents were not relevant. The failure to give adequate reasons is an error of law. In Mr. O'Callaghan's submission, the documents were relevant because:
 - (i) the article at page 85 states that Sharia law is in place in Afghanistan. The Deputy Minister of Justice is quoted as stating that Muslims are not allowed to convert. The Chief Justice (Judge Shinwari) is quoted as referring to extreme measures to deal with non-Muslims. He is quoted as saying that those found guilty in his courtroom of "sharing the gospel" could face the death penalty. He is quoted as saying that there are three ways to deal with non-Muslims – the first, being a polite request to join the Muslim faith; if he refuses to do so, the second step would be to insist that he obeys the laws of Islam; if he still refuses to do so, then the third step would be to behead the individual.

- (ii) page 86 gives the example of a Christian convert who lives in Kabul in fear of being publicly executed.

If the Adjudicator had referred to this material and, having considered it, concluded that there was no real risk for the Appellant, then Mr. O'Callaghan accepted that it would have been difficult for him to contend that the Adjudicator's conclusion was unreasonable. However, it was not open to the Adjudicator to say that the documents were not relevant. Mr. O'Callaghan accepted that the ECRE report at page 106 was not very helpful, in that, it makes no reference to Christians, nor does it refer to apostates. However, in Mr. O'Callaghan's submission, this is because the Christian community is very small in Kabul. It should be borne in mind that the report states that religious minorities are at risk. The ECRE report, taken together with the CBN article, may well have led the Adjudicator to a different conclusion.

- (b) the Adjudicator had relied on the No. 81 case. The Tribunal had stated in that case that there was not much objective material before it on the issue of the risk facing Christians in Kabul. The Adjudicator had more objective material before him, which he did not consider. Furthermore, the No. 81 case approached the issue of risk on the basis that the Bonn accord provided for religious tolerance, whereas it is clear now that Sharia law is in place in Afghanistan.

8.2 If we were satisfied that the Adjudicator had made a material error of law, then Mr. O'Callaghan relied on paragraph 10 (ii) onwards of the Skeleton Argument and also the documents described at paragraph 6.2 above. Paragraph 5.5.2 of the 2004 Danish Fact-Finding Report shows that the constitution is read in line with Sharia law. The President of the Supreme Court is quoted as saying that the old law is still being used everywhere in the country. The law which is used in courts is Sharia law and the Koran, supplemented by secular law if this is necessary. In Mr. O'Callaghan's submission, this goes against the Adjudicator's finding and that of the Tribunal in the No. 81 case that the Constitution provides for religious tolerance, whereas paragraph 5.5.2 of the 2004 Danish Fact-Finding Report states that Sharia law applies, and not the constitution, on the issue of apostasy. The final paragraph of paragraph 5.5.2 (on page 167 of the Appellant's bundle) makes it clear that Sharia law is used even in Kabul.

8.3 We asked Mr. O'Callaghan to draw our attention to any objective evidence which shows that there is in practice a real risk of persecution for apostates. Mr. O'Callaghan acknowledged that this was his difficulty. As there are so few apostates in Afghanistan, there is no objective evidence which shows that apostates are being persecuted in Kabul. We noted that the fourth paragraph of paragraph 5.4 of the 2004 Danish Fact-Finding Report (which corresponds to the first paragraph on page 173 of the Appellant's bundle) shows that the CCA (Cooperation Centre for Afghanistan) are aware of people in Afghanistan who have converted from Islam to other religions. We noted that the CCA does not indicate that it was aware of any problems being experienced by these converts. Mr. O'Callaghan cautioned against concluding, from the absence of any reference to problems being experienced by converts, that such converts are not at real risk of persecution. He asked us to bear in mind that the CBN article indicates that converts are living underground, although he acknowledged that, in the first paragraph on page 173 of the Appellant's bundle, the CCA does not state that converts are living underground and are fearful of being caught. He also asked us to bear in mind the fact that the third paragraph of paragraph 5.4 of the 2004 Danish Fact-Finding Report (which corresponds to the last

paragraph on page 172 of the Appellant's bundle) states that Christians in Afghanistan form "a very small group". This would include those born into Christianity as well as those who have converted from other religions, including Muslims. If a Muslim convert is caught, the objective evidence indicates that they are at real risk of persecution, because conversions by Muslims are not allowed or accepted. In the 2004 Danish Fact-Finding Report, the CCA makes clear (see the fourth paragraph of paragraph 5.4) that the surrounding community do not accept apostasy. Whilst we would be entitled to place some weight on the fact that the 2004 Danish Fact-Finding Report does not make mention of any Muslim converts to Christianity experiencing any problems, we would also have to bear in mind that Sharia law is practised, that apostasy is against Sharia law and that the courts have said that they will take action if an apostate is brought before them.

- 8.4 Mr. O'Callaghan asked us to place weight on Dr. Wardak's report. Although this is not stated in the latest version of his curriculum vitae, Mr. O'Callaghan's instructions were that Dr. Wardak visits Afghanistan regularly. Primarily, Mr. O'Callaghan relied on the fact that Dr. Wardak is a lawyer. He is the holder of a "B.A. degree in (Law / Jurisprudence" from Kabul / King Abdul Azia Universities in 1978. This means that he knows Sharia law and the 1964 Constitution. Following the Bonn Agreement, Afghanistan reverted to the 1964 Constitution, although the transitional administration is hoping to amend it. Given that Sharia law has re-emerged in Afghanistan, Dr. Wardak would know what Sharia law states with regard to apostasy. In his report, Dr. Wardak explains that there are four schools of thought in Sunni Islamic jurisprudence. Apostasy from Islam comes under the jurisdiction of the Hanafi school of jurisprudence. He states that the consensus amongst all four Sunni schools of Islamic jurisprudence, including the Hanafi school, is that apostasy should be punished with the death penalty. However, amongst the four judicial schools, the Hanafi school insists that the apostate should be given a chance to repent and reconsider his/her position prior to the imposition of the sentence.
- 8.5 We noted that there was nothing in Dr. Wardak's report which provides any anecdotal evidence of the problems experienced by apostates. Mr. O'Callaghan acknowledged this, stating that the difficulty was that the number of apostates is so small and there is no evidence of anyone having been tried in the last year or so since Sharia law re-emerged in Afghanistan. Mr. O'Callaghan could only refer us to the CBN article which quotes the Chief Justice explaining what would happen to an apostate if he/she were to be brought before a court. Mr. O'Callaghan acknowledged that there was no evidence before us that apostates have been taken to court.
- 9.1 Mr. Saville submitted that the Adjudicator had not made a material error of law. The Adjudicator had stated that he did not find any relevant objective evidence in the Appellant's bundle. In Mr. Saville's submission, the documents at pages 84 and 106 of the Appellant's bundle were not relevant because:
- (a) the CBN article was not an article by an objective source. The CBN is a very devout Christian organisation. Page 87 of the Appellant's bundle shows that the CBN is an evangelical network.
 - (b) whilst Mr. Saville accepted that, under Sharia law, the punishment for apostasy is death, this does not mean that the penalty is applied. The Deputy Minister of Justice is quoted in the CBN article (on page 85 of the Appellant's bundle) as saying that no Muslim is allowed to convert. However, nothing is said as to what would happen to a Muslim who does convert. The quote from Judge Shinwari (that those found guilty in his courtroom of sharing the gospel could

face the death penalty) refers specifically to those who evangelise, as indicated by the words “sharing the gospel”. The next quote from Judge Shinwari (which refers to the three ways of dealing with non-Muslims) could, in theory, apply even to those born into Christianity. In other words, he could be taken to be saying that he would want to execute all non-Muslims. Yet, there is no suggestion on the Appellant’s behalf that all Christians are at real risk of persecution. The example of the convert Simon on pages 86 and 87 does not help the Appellant, because it is clear, from what Simon is quoted as saying in the article, that he is an evangelising Christian. Although Simon says that he would be executed if caught – which, in Mr. Saville’s submission, shows a subjective fear on Simon’s part – the article does not show that any fear on the Appellant’s part, as someone who has not said he would evangelise, is well-founded.

- (c) the ECRE report at page 107 of the Appellant’s bundle refers to sections of the community who “may” have protection concerns. In other words, ECRE are not saying that the sections of the community thereafter specified would be at real risk. Furthermore, the categories named by ECRE are “Hindus, Sikhs, Shiites, Sunnis and Ismailis”. There is no mention of Muslim converts to Christianity. It is therefore difficult to see how the ECRE document is a relevant source which the Adjudicator should have considered.

- 9.2 An Adjudicator is only obliged to refer to relevant evidence. Any relevance which the above documents may have had, in Mr. Saville’s submission, so small that they do not have a significant impact on the outcome. Accordingly, in Mr. Saville’s submission, there was no material error of law in the Determination.
- 9.3 In the event that we were not with him, Mr. Saville referred us to paragraph 6.94 of the CIPU Report, which quotes an extract from an interview by Reuters with Judge Shinwari on 24 January 2002. He refers to punishment for those who get themselves involved in missionary or anti-Islamic activities. According to paragraph 6.93 of the CIPU Report, the UNHCR are quoted in the Danish Fact-Finding Mission report of 2002 (relating to a mission to Afghanistan from 22 September 2002 to 5 October 2002) (the 2002 Danish Fact-Finding Report) as saying that there were no Christians in Afghanistan. This is not consistent with paragraph 6.55 of the CIPU, which quotes the Europa World Year Book 2003 as stating that there is a small, extremely low-profile Christian community in Afghanistan.
- 9.4 Mr. Saville did not dispute that Sharia law is the basis of Afghan law. However, paragraph 5.2.2 of the 2004 Danish Fact-Finding Report (page 166 of the Appellant’s bundle) states that, according to UNAMA (United Nations Assistance Mission in Afghanistan), Sharia law was used under the Taliban to apply strict punishments such as amputations and stonings but that these were not now used because many forms of proof must be applied before such a punishment can be given. The first and second paragraphs on page 167 of the Appellant’s bundle also state that, after the fall of the Taliban, stoning and amputation were no longer used. This shows that Sharia law is not applied with full rigour. The first paragraph of paragraph 5.4 of the 2004 Danish Fact-Finding Report (page 172 of the Appellant’s bundle) states that conversion from Islam is not allowed and that the punishment for apostasy is death. However, in the first paragraph on page 174, the CCA refers to people having converted from Islam but makes no mention of their having received any judicial punishments. The CCA makes assumptions that persons who have converted would face difficulties but does not say what happens in practice.

- 9.5 Mr. Saville asked us not to place weight on Dr. Wardak's report. Dr. Wardak is a Chartered Psychologist. It may be that he qualified with a law degree from Afghanistan and that he travels to and from Afghanistan regularly. However, his law degree was obtained in 1978 – that is, 26 years ago - when he was 18 years old. This does not make him a lawyer. Since obtaining his law degree, he has practised in a different field. He gained qualifications relating to mental health. That has been the principal focus of his career. His law degree in 1978 does not make him an expert on current Afghan law. Whilst on page 2 of his report, Dr. Wardak states that the traditional punishment for apostasy is death, he does not mention any evidence of that punishment being carried out. On pages 3 to 4 of his report, he refers to the risk which converts face principally from warlords and extremist groups in society. In Mr. Saville's submission, the risk from warlords is not reflected in the objective evidence. He refers to two killings in Kabul but these were of people who were politically involved in Kabul. Even if the report were to be accepted, the fact is that Dr. Wardak only refers to societal problems for converts.
- 10.1 In response, Mr. O'Callaghan submitted that the Adjudicator was duty bound to explain why the documents in the Appellant's bundle (pages 84 and 106) were not relevant. The reasoning which Mr. Saville had provided at the hearing before us should have been given by the Adjudicator. The Adjudicator's error is material because, if he had given the documents at pages 84 and 106 some weight, he could have come to a different conclusion. The reference to "sharing the gospel" by Judge Shinwari on page 85 of the Appellant's bundle is not limited to evangelical activities. He could have been referring also to those who attend church. The three ways Judge Shinwari describes of dealing with non-Muslims accords with the approach of the Hanafi school of jurisprudence to apostates. The Hanafi school insists that apostates should be given a chance to repent and reconsider his/her position. Accordingly, in Mr. O'Callaghan's submission, Judge Shinwari must have been referring to apostates.
- 10.2 Mr. O'Callaghan referred us to the fact that, at paragraph 6.93 of the CIPU Report, the CCA state that it would not rule out that NGOs might have converted Muslims to Christianity, whereas the CCA are quoted in the 2004 Danish Fact-Finding Report (page 173 of the Appellant's bundle) as saying that it has become aware of people who have converted from Islam to other religions in Afghanistan. The UNHCR were also quoted in 2002 as saying that there were no Christians in Afghanistan. The evidence is that there is now a small community of Christians in Afghanistan.

11. We reserved our determination.

Determination

12. We remind ourselves of the recent judgement of the Court of Appeal in CA v. SSHD [2004] EWCA Civ 1165. The Tribunal's jurisdiction is limited by Section 101 of the 2002 Act, which confers jurisdiction to entertain appeals on points of law only. The Tribunal cannot allow an appeal unless it holds that the Adjudicator had perpetrated a material error or mistake of law.
- 13.1 It is not clear, from paragraph 40 of the Determination, whether the Adjudicator had considered the CBN article and the ECRE report at pages 106 to 110 of the Appellant's bundle. It may be that the Adjudicator had not considered these documents are all. On the other hand, it may be that the Adjudicator had considered the documents but did not find them relevant. Clearly, the CBN article and the extract of the ECRE report have some bearing on the issue of risk which the Adjudicator had

to determine. At least that much can be said of these documents. The Adjudicator's failure to give any reasons for concluding that the documents were not relevant (if he had considered them) is an error of law. Accordingly, whether the Adjudicator had simply overlooked the documents or had considered them but found them not relevant, we are satisfied that there is an error of law in the Determination. The question is whether that error is material.

- 13.2 Mr. O'Callaghan submits that the error would be a material one if, on the basis of the CBN article and the ECRE report, the Adjudicator could have reached a different conclusion. We do not consider that the test is whether the Adjudicator "could have" reached a different conclusion but whether the documents would properly have led him to a different conclusion on the whole of the evidence which was before him.
- 13.3 We are satisfied that the CBN article and the ECRE report would not properly have led the Adjudicator to reach a different conclusion for reasons which we now give:

The ECRE report (pages 107 and 108 of the Appellant's bundle):

- (a) Paragraph 15 (on page 107) refers to certain categories of individuals who "may have ongoing protection needs that remain unchanged despite recent political developments in Afghanistan". Page 108 refers to "religious minorities at risk of persecution including Hindus, Sikhs, Shiites, Sunnis and Ismailis". Mr. Saville relies on the absence of any mention of converts. The implication is that this means that they are not at real risk. We consider that this is an overly simplistic approach. The list was not meant to be exhaustive, as is indicated by the word "including". The Appellant is clearly a member of a religious minority. Potentially, therefore, he was someone who might be at risk. Beyond this, the ECRE was of no relevance, since it provided no detailed information as to the difficulties, if any, which apostates face in Kabul.

The CBN article:

- (b) We agree with Mr. Saville that CBN is a partisan source. It is a Christian evangelical network, as can be seen from the caption at the bottom of page 87. This has to be borne in mind in assessing the weight to be attached to the article as a whole.
- (c) The article is four pages long, but there is a section on each page which can barely be read. The quality of the copy before the Adjudicator was the same. We do not therefore know whether there is relevant information (which may be for or against the Appellant) which we are unable to read.
- (d) We can see from the top of page 85 of the Appellant's bundle that the Afghan President, Mr. Hamid Karzai, is said to be in a tug-of-war with powerful radical Muslim groups which (it is said) are trying to stop his efforts to create a more open and stable society. In a paragraph further down on the same page, President Karzai is said to have announced in June (this must be June 2002 or earlier, since the article is dated 11 May 2003) with Judge Shinwari by his side that Afghanistan would continue to follow Sharia law. The fact that this announcement was made by President Karzai has some significance, because it is generally accepted that moves towards a more tolerant society are being led by President Karzai.

- (e) The Adjudicator had before him evidence that Sharia law providing for punishments by stoning and amputations had not been applied, at least in Kabul, since the fall of the Taliban. The Deputy Minister of Justice is quoted in the CBN article (page 85 of the Appellant's bundle) as saying that no Muslim is allowed to convert. However, the CBN article also referred to the example of Simon who had converted and who had not reported in the CBN article any actual problems he experienced living in Kabul as a convert. Mr. O'Callaghan submitted that the evidence was that Simon was living underground in Kabul. We do not agree. There is reference to the interview with CBN being a clandestine one. There is reference to Simon fearing that the authorities would find out that he has converted from Islam to Christianity. However, there is nothing which suggests that he is living underground in Kabul. The article indicates that Simon had a subjective fear of being discovered by the authorities. Nevertheless, Simon also expressed evangelical desires. Simon made no mention of any problems he had experienced in Kabul, either from the authorities or from society in general. We acknowledge that the article indicates that Simon had, as at the date of the article, only recently returned from Pakistan to Kabul. However, 1 ½ years have elapsed since that article was written. If Simon had experienced problems in the interim on account of his conversion, one would expect some report of this, at least by the CBN. The absence of any such evidence is itself evidence on which some weight can properly be placed.
- (f) The quote from Judge Shinwari (that those found guilty in his courtroom of sharing the gospel could face the death penalty) should be seen within the context of the rest of the article (in particular, the fact that it goes on to give the example of an evangelical convert) and the fact that the CBN is an evangelical network. Accordingly, the Adjudicator could not reasonably have come to the conclusion that Judge Shinwari's reference to those "sharing the gospel" was meant to include even those who do not evangelise but who simply attend church.
- (g) Finally, we note that, whilst there is reference in the CBN article to an interview with Judge Shinwari, the full text of the interview has not been provided. We cannot therefore tell whether Judge Shinwari was describing the punishments which could be applied under Sharia law or the punishment which would in fact be applied in his courtroom. He is quoted as saying that those found guilty in his courtroom of sharing the gospel "could" face the death penalty. It is true to say that, under Sharia law, the death penalty "could" be applied. This does not mean that the death penalty would in practice be applied. The article goes on to quote Judge Shinwari as describing the three ways in which non-Muslims are dealt with. On the evidence which was before the Adjudicator, it was not possible to say whether Judge Shinwari was referring to what could be done under Sharia law or what would in fact happen in practice.
- (h) Even if Judge Shinwari was referring to what he would in practice do if someone is convicted of a relevant offence in his courtroom, this does not mean that there is a real risk of a convert being subjected to those consequences. It is relevant to bear in mind that there is tension in Kabul between those who would wish to have the full rigours of Sharia law applied and those who would wish a more tolerant society. Page 85 of the Appellant's bundle gives us evidence of that tension. There is clear reference to President Karzai's efforts to create a more open and stable society (see the first paragraph on page 85). There is clear evidence of radical Islamic views. This

tension shows why it is relevant to consider whether there is any evidence as to what happens in practice. There is a complete dearth of anecdotal evidence of difficulties experienced by the Christian convert community in Kabul. We appreciate, and bear in mind, that the community is small. Nevertheless, the absence of any such evidence is relevant evidence on which some weight can be placed.

- (i) The Appellant is someone who has not said that he is evangelical, or would be in Kabul.
- (j) As the Adjudicator reminded himself in paragraph 40 of the Determination, the burden of proof remained on the Appellant, albeit to the low standard for proof.

13.4 On the totality of the evidence which the Adjudicator had before him and for the reasons we have given above, we are satisfied that the error of law in the Adjudicator's Determination is not material. He was entitled to reach the conclusion he did (that the Appellant was not at real risk of persecution of Article 3 ill-treatment on account of being an apostate) on the evidence which was before him. He could not properly have reached a different conclusion. In case this is raised subsequently, this is not an appropriate case for the application of the benefit of the doubt in the Appellant's favour. That principle only applies where, after all of the evidence has been considered, a doubt remains as to whether the claimant is at real risk of persecution. This is not a case where there is such a doubt. This is a case of the claimant failing to discharge the burden of proof to the low standard.

14.1 Accordingly, it is not strictly speaking necessary for us to consider the fresh evidence which has been adduced to the Tribunal. However, even if it had been open to the Tribunal to consider the fresh evidence, we would have reached the same conclusion for reasons which we now give.

The CIPU report of April 2004:

- (a) We do not consider that there is any inconsistency, as Mr. Saville appeared to suggest, between paragraph 6.93 of the CIPU report of April 2004 (which quotes UNHCDR as saying that there are no Christians in Afghanistan) and paragraph 6.55 of the same report (which refers to a small, extremely low-profile Christian community). The latter is attributed to a 2003 Report, whereas the former is attributed to a 2002 report. We conclude that, whilst there were no Christians in Afghanistan in 2002, there now is a small low-profile community.
- (b) Paragraph 6.94 states that the UNHCR Geneva refers to "the risk" continuing to exist for Afghans suspected or accused of having converted from Islam to Christianity. We are not told what UNHCR regards is "the risk" faced and whether "the risk" is "a risk" or a "real risk". There is a further quote from Judge Shinwari in paragraph 6.94. In this quote, he is clearly referring to those who proselytise. Furthermore, there is nothing to suggest the likelihood of someone who proselytises actually being brought to court.

The 2004 Danish Fact-Finding Report (pages 166, 167, 172 and 173 of the Appellant's bundle):

- (c) We agree with Mr. Saville that, when pages 166 and 167 are read as a whole, the picture which emerges is that, whilst Sharia law in theory does provide for draconian penalties for apostates and those who proselytise the Christian faith

in Afghanistan, this does not mean that such penalties are applied in practice, or that it is reasonably likely that the authorities will take action against an apostate. There is reference to the fact that amputations and stonings have not been carried out in the last two years. We have already referred above to the power struggle between those who would lead Afghanistan to being a more tolerant society and those who are more radical. Further evidence of this can be seen from the final sentence of the fifth paragraph of paragraph 5.2.2 of the 2004 Danish Fact-Finding Report (see the penultimate paragraph on page 166 of the Appellant's bundle), which states that the informal legal system can play an important role in pacifying the fundamentalists. We are therefore fortified in our view that it is important to consider not only what Sharia law states in principle, but what happens in practice.

- (d) We once again acknowledge the difficulty posed by the fact that the Christian community in Kabul is very small, and only recently emerged. This is evidence we take into account. It is also relevant, as we have said above, to take into account the absence of any evidence of any problems by apostates in Kabul.
- (e) The CCA states (page 173 of the Appellant's bundle) that it is aware of people who have converted from Islam to other religions. It then goes on to state that it assumes that a convert would in the first instance have problems with his own family and social network, which would not accept the conversion, and later that he would have problems with his surrounding community. Taking this evidence at its highest, we make two comments. Firstly, it does not indicate that apostates face ill-treatment which is sufficiently severe as to amount to persecution or Article 3 ill-treatment. In the second place, it does not show that the risk of any ill-treatment is such as to reach the low standard of a reasonable likelihood.

Dr. Wardak's report

- (f) Mr. O'Callaghan relied on the fact that Dr. Wardak obtained a law degree in 1978 from a university in Kabul. We make the following points. His curriculum vitae indicates that he is the holder of a B.A. degree in "Law / Jurisprudence", obtained in 1978. In other words, he studied law 26 years ago, when he was 18 years or younger. Since then, he has obtained qualifications in another discipline. He is now a Chartered Psychologist. We do not accept that the fact that he obtained a BA Degree in "Law /Jurisprudence" in 1978 from Kabul makes him an expert on the question of whether an apostate faces a real risk of persecution or Article 3 ill-treatment in Kabul at the present time.
- (g) In the third paragraph from the bottom of page 2 of the report, Dr. Wardak states that, since the fall of the Taliban regime and the take-over of the transitional administration, "there has been no significant progress, in the reconstruction of the country" This sweeping statement is simply not borne out by the objective evidence. It cannot be said that, in Kabul at least, there has been "no significant progress, in the reconstruction of the country". This is evidence of a one-sided view of events. However, and in any event, there is nothing in Dr. Wardak's report which in fact shows that apostates are at real risk of persecution or Article 3 ill-treatment, for reasons given below.
- (h) The explanation by Dr. Wardak of the Hanafi school of jurisprudence is useful, as it does indicate that Judge Shinwari, in the quote in the CBN article (on page

85, the reference to the three ways of dealing with non-Muslims) was probably referring to apostates. However, this still does not change our observation in paragraph 13.3 (g) above that we do not know whether Judge Shinwari was referring to what could happen under Sharia law or what would happen in practice.

- (i) We now quote the following relevant extracts of Dr. Wardak's report (which begin from the last paragraph on the third page of his report) (we have supplied the paragraph-numbering for ease of reference):
 - (i) Under the prevailing circumstances, a person accused of apostasy will be regarded as an outcast by the great majority of the fanatical groups commanding a great deal of influence in society. Although people in general do not possess fanatical attitudes towards a wide range of social and religious issues, there is nothing to stop extremist elements from taking the law into their own hands and committing an act of violence. This can happen in the capital as well as in provincial towns and provinces. The killing of the Minister of Aviation in February 2002, in day light under the watchful eyes of the Ministry of Interior and secret police is a vivid example.
 - (ii) Similarly, the assassination of the vice president, Haji Qadeer in July 2002, in daylight in front of his office is another example, of atrocities committed by the war lords. Furthermore, there have been few attempts on the life of the president, the last of which was a few weeks ago in Paktia province this year.....
 - (iii) Once a person is accused of apostasy, the rumours will gradually reach his/her community. Once the rumours reach the community then the issue will become a matter of public knowledge and will reach many places quickly, which will make the person concerned vulnerable to the consequences. They may also be repercussions to the family of the persons concerned.
 - (iv) In conclusion, the life of someone accused of apostasy from Islam may not be safe in Afghanistan On a personal level, Mr. Rastah being in a hostile environment with no sociofamilial support, may find it difficult to live and function as a normal person. This may lead to the development of a multitude of psychological problems.....
- (j) In the first place, we agree with Mr. Saville that the examples of the killings quoted in paragraphs (i) and (ii) do not help us to any significant extent to assess the issue which we have to decide. Dr. Wardak quotes the killings by war lords of persons involved in politics. The political power struggles in Afghanistan are well known. The fact that the Minister of Aviation and the Vice President were killed / assassinated by war lords does not help us decide whether a convert is at real risk of persecution in Kabul, whether or not at the hands of war lords.
- (k) The report does not give any anecdotal evidence of problems experienced by any converts. The absence of such evidence is (again) evidence on which we can place some weight.
- (l) It is interesting to note what Dr. Wardak himself believes would happen to a convert. Paragraph (i) states that an apostate will be regarded as an outcast by the great majority of the fanatical groups which he says command a great of influence in society. This does not help us to determine the likelihood of a person being regarded as an outcast and the practical ways in which the life of such a person would be affected. Paragraph (i) also states that there is nothing to stop extremist elements from taking the law into their own hands. We note that the reference is to extremist groups. We are not given any indication of the prevalence of extremist groups. The sentence goes on to refer to the commission of "an act of violence" by such extremist elements. The reference

to “an act of violence” does not help us to decide whether a convert is at real risk of persecutory ill-treatment. Paragraph (iii) refers to rumours spreading about an apostate. However, even where a rumour becomes public knowledge and has “reached many places very quickly” the apostates is said to be “vulnerable to the consequences”. Paragraph (iii) states that “there may also be repercussions to the family”. Paragraph (iv) states that the Appellant “may find it difficult to live and function as a normal person”. We draw two conclusions from these quotes, even if they are taken at their highest. In the first place, nothing in these quotes indicates ill-treatment which is sufficiently severe as to amount to persecution or Article 3 ill-treatment. In the second place, the risk of any such ill-treatment as described in these extracts is not such as to reach the low standard of a reasonable likelihood.

- 14.2 We have referred to the absence of anecdotal evidence of the problems faced in practice by apostates. We have said that we make allowance for the fact that the community is very small. It is also relevant to note that the Christian community, small as it is, has only relatively recently emerged. We recognise therefore that, to some extent, the CCA and Dr. Wardak are having to hypothesise on the risk. However, even taking at their highest what they have to say about the risk, they do not say that Sharia law would be applied. What they do say about the risk neither reaches the low standard of a reasonable likelihood nor the severity threshold for persecution or Article 3 ill-treatment.
- 14.3 Nothing we have said in his Determination should be taken as an acceptance of Dr. Wardak’s expertise. We have indicated our reservations about his so-called expertise to opine on the issue before us.
15. It follows that the Adjudicator’s finding that the Appellant is not at real risk of persecution or Article 3 ill-treatment is one which was fully open to him on the evidence which was before him, and simply cannot be said to be wrong in law. On the totality of the evidence which is before the Tribunal, we are satisfied that the Appellant is not at real risk of persecution or Article 3 ill-treatment.
16. It follows that we must dismiss this appeal.
17. This Determination is being reported because we have considered additional material to that which was considered by the Tribunal in RR (Risk-Christian) Afghanistan CG [2003] UKIAT 00081. The additional material we have considered is described in paragraphs 6.1 and 6.2 above. We have concluded that the objective evidence before us does not show that Christians (including Muslims who have converted to Christianity) are at real risk of persecution or Article 3 ill-treatment in Kabul.

Decision

The appeal is DISMISSED.

Ms. D. K. GILL
Vice President

Date: 10 December 2004

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