IN THE IMMIGRATION APPEAL TRIBUNAL

KK (evidence - late filing - proper notice) Afghanistan [2004] UKIAT 00258

Heard: 16.07.2004
Signed: 17.08.2004
Sent out: 16 September 2004

NATIONALITY, IMMIGRATION AND ASYLUM ACTS 1971-2002

Before:

John Freeman (vice-president)
HH Judge N Huskinson (vice-president) and
Professor BL Gomes da Costa JP

Between:
appellant

and:

Secretary of State for the Home Department,
respondent

Miss A Jones (counsel instructed by Bhogal Lal) for the appellant
Mr A Sheikh for the respondent

DECISION ON APPEAL

This is an appeal from a decision of an adjudicator (Professor A Grubb), sitting at Cardiff on 18 December 2003, dismissing an asylum and human rights appeal by a Sikh citizen of Afghanistan. Permission to appeal was given on the basis that the Tribunal needed to give general guidance to adjudicators on the situation facing such persons on return. For reasons which will become all too clear, it has not been possible to do this: the present decision is *not* a 'country guidance' case, and, while it will be reported as a contribution to the continuing debate, neither adjudicators nor other panels of the Tribunal will be expected to follow it as such. The main reason it is being reported, as the "key-words" make clear, is on what we have to say about the filing of evidence. The potential error of law on the part of the adjudicator relates to whether his general approach to the risks faced by Sikhs as such in Afghanistan was correct or not: for the reasons which appear at **2-3**, his decision, and ours, turn entirely on that approach.

2. There was an issue taken in the refusal letter as to whether the appellant was from Afghanistan at all. Given the remarkable ignorance of that country she displayed at interview (see the adjudicator's §§ 36-40), she might be considered extremely

lucky to have secured even the limited credibility finding in her favour she did on that point. All the adjudicator was prepared to say at § 42 was that there was no reason to doubt she was a Sikh, and she might at some point have lived in Afghanistan. Contrary to Miss Jones's energetic submissions, there is no finding of fact that she came from Jalalabad as she claimed; nor can there be any place for the contentions advanced by Mr Sheikh based on the individual case comprehensively rejected by the adjudicator.

3. This in fact is the irreducible minimum case of a Sikh woman facing return to Afghanistan, without any other individual factors to be considered at all. It should have been an ideal vehicle for dealing with the general risk for such persons there, and particularly in Kabul, as the point of return. This has already been comprehensively, and recently treated by the Tribunal (Barnes and Perkins VPP) in **IB & TK [2004] UKIAT 000150**, to which we shall refer as **IB 150**. **IB 150** featured two appellants, B from Jalalabad and K from Kabul.

4. The Tribunal there found no well-founded fear of persecution for Sikhs in Kabul generally (see § 40); and consequently (§ 41) none there for B on his individual history, which did not relate to that city. K's individual history in Kabul was considered at § 46; but not found to raise any real risk on return there for him either; so his appeal was dismissed. The only basis on which B's succeeded was that, since it had been conceded by the Home Office before the Tribunal (see § 41) that he did have a well-founded fear of persecution in Jalalabad, he was entitled to, and did show that it would be 'unduly harsh' for him to return to Kabul. Apart from – or it might as easily be said because of - his not having any personal connexions there, the basis for the Tribunal's decision in his favour on that point (at §§ 43-45) was the general situation facing Sikhs in Kabul.

5. How far a general finding of that kind (as opposed to one on the claimant's individual circumstances) on the 'unduly harsh' (**Robinson [1997] Imm AR 568**) point as to return to a particular location may accord with a general finding that persons of the class in question are not at any real risk there, in terms of **AE & FE [2003] EWCA Civ 1032**, is something the Tribunal might have had to consider in this case; but, as will shortly become clear, that must be for another day, and perhaps another place.

6. We had better start by saying that we heard no argument or evidence which in any way led us to differ from the very thorough analysis of the background evidence in **IB 150** as it stood then; nor was anything put before us that has since emerged from the public domain that could have led us to do so. That made it all the more important that proper notice should have been given of the one piece of evidence bearing on the general situation for Sikhs (and Hindus) in Kabul on which this decision turns.

7. The general directions on filing evidence in cases before the Tribunal are given in the notice of hearing, which in this case went out to the appellant and his solicitors on 7 April, for 16 July. That required them to file with the Tribunal and serve on the Home Office all the documents on which they proposed to rely, no later than 14 days before the hearing. The evidence with which we are dealing consists in a typed English statement by Mr Ravinder Singh, dated, and apparently faxed to the solicitors on or about 14 June. (Mr Ravinder Singh had made previous statements, one of which was considered by the Tribunal in **IB 150**: we shall return to the details of that, and this one in due course).

8. What the solicitors did with the 14 June statement when they got it was to confirm its contents, with one significant addition, in a telephone conversation between their Mr HK Caleechurn (see his statement of 12 July) and Mr Ravinder Singh, through an interpreter, on 18 June. Why it should have required the use of an interpreter to confirm a statement made in perfect English was something that concerned us. Miss Jones explained, on instructions, that the English statement was something Mr Ravinder Singh had produced through another person in Kabul who knew the language.

9. We should make it clear that it is *not* acceptable practice to put forward statements as the original work of the maker, when a third party has been involved in that way: there should be at least some endorsement by that person. However, as a solicitor has confirmed the contents of this one, we were not prepared to reject it on that ground. It is what was then done with it that concerns us. There can clearly be no good reason, in the face of the directions in the notice of hearing requiring all evidence at latest by 2 July, for why a telephone conversation had by a solicitor on 18 June should have to wait till 12 July to be confirmed in a statement from him, or till that same day to be filed or served on the Home Office.

10. This was a point of serious concern to us when it emerged: it had been compounded by the solicitors' failure to list the 14 June statement by Mr Ravinder Singh in the index to the bundle served on the Home Office on 12 July (though it did appear as an index item in the supplementary bundle in which it came to us). That meant that the existence of the 14 June statement did not become apparent to Mr Sheikh till Miss Jones took us through it, in some detail: we should make it clear that this was not the result simply of his not taking the trouble to read his papers, but of an unfortunate misunderstanding by him as to the terms on which permission to appeal had been granted, and in consequence of what material could be relevant to the issues. It is a pity he did not take that point when Miss Jones began to go through the statement, when we could immediately have disillusioned him, and considered, very much earlier, what should be done about it.

11. In our view that lack of any description in the bundle provided to the Home Office is, on the most charitable view, a most inadequate practice. Not only should all evidence filed be properly indexed and paginated; but when, as here, it is a question not of evidence from the public domain, but of that of a single private witness, it ought to be the subject of an immediate application to a vice-president for leave to adduce it, which should ensure that the Home Office are properly put on notice, not only as to its existence, but as to its potential significance.

12. In view of our concern about this, we gave Miss Jones the chance to take instructions over the lunch adjournment as to why the 14 June statement was not filed or served till 12 July. The best that she could do to excuse the solicitors was by saying that their file on this case, with others, had been with the Legal Services Commission for audit at the time in question: the solicitors were said to have made a number of urgent requests to have it back before they got it. We are aware of the dependence of a number of organizations in the legal field on paper files; but we still cannot understand why a potentially crucial piece of evidence, in an imminent case before the highest body with jurisdiction to consider its

factual merits, should have been left to languish on some pending tray while its mother file was called for.

13. Miss Jones's explanation for this, on behalf of those instructing her, was that this was not the only pending case they had about the safety of Sikhs in Kabul. While that may well be so, it was certainly the first one to be listed before the Tribunal, and they ought to have realized that it was likely to be treated as the leading decision on the point. (The Tribunal now has a system for identifying such points, and listing cases in which they arise, so as to ensure consistency of decisions). If we thought the solicitors had been deliberately holding back the 14 June statement in order to spring it on the Home Office at the last moment, then their conduct would have been, in lay terms, a professional foul; and, in ours, the subject of an immediate, and very serious complaint to the Office for the Supervision of Solicitors.

14. We are however prepared to accept in the solicitors' favour, on the strength of the assurances we were given about their dealings with the Legal Services Commission, that their failure to serve the 14 June statement within the time given in the notice of hearing, or within any reasonable time, was not deliberate, but the product of sheer incompetence and inefficiency on the part of those dealing with the case, and, on the part of the firm as a whole, the lack of any proper system for dealing with cases when a file is called for by that body. We find it a little hard to understand why the Legal Services Commission should have to conduct a physical audit of a file during the month before a second appeal is pending; but we realize that the funding of asylum and human rights litigation is a matter of grave public concern, and that must be a matter for them.

15. Especially given that grave concern, a mere expression of disapproval from us cannot be the end of this: what we are going to do is to send a copy of this decision to the Legal Services Commission, with the suggestion that they should take what we have said into account when assessing the solicitors' remuneration for the case. No doubt if the Legal Services Commission accept the blame for keeping their file when asked to send it back, then they will refrain from penalizing the solicitors to that extent. If so, it will be for the Legal Services Commission to make their own peace with the National Audit Commission, and we are not concerned with that. It is always important for proper notice to be given of any fresh evidence; but the reason why it was of such importance in the present case is that it was to be the first, and leading one in a series for which it was to provide general guidance.

16. We now turn to the 14 June statement itself. It has to be considered against the background of what was said about Mr Ravinder Singh in **IB 150**. The Tribunal reviewed his previous statement (3 December 2003) at §§ 29-30, and evidence from an Afghanistan émigré organization called APAMR at §§ 31-32. At § 33 they said this:

We have taken into account that the testimony of members of the Sikh community here and the statement of Mr Ravinder Singh cannot be regarded as disinterested sources of evidence but the detailed evidence which they, like APAMR, provide, is not generally inconsistent with the thrust of the international reports which we have considered.

17. That is very far from the general acceptance which Miss Jones suggested Mr Ravinder Singh's previous evidence had received; but it does show that his existence, as (see **IB 150** § 29) "… a member of the emergency Loya Jirga in 2002 and a representative of the Hindu and Sikh communities based in Kabul …" had emerged into the public domain in this country, in rather a prominent context, in which the Tribunal had certainly not rejected his evidence out of hand. It had not of course, as it then stood, led them to regard Kabul as generally unsafe for Sikhs; and as we have already said, we see no reason whatever to differ from them on that score, as the evidence stood before them.

18. The crucial difference between that situation, and the one before us, comes in the 14 June statement. The significant part of this relates a series of incidents involving Sikhs or Hindus in Kabul, and Mr Caleechurn's note of the telephone conversation adds the important detail that they had all happened within the six weeks before the statement was made. Mr Ravinder Singh says the information is "within his own personal knowledge": it is obvious enough from the context that he must mean that he has heard about the incidents first-hand from those involved for us not to suspect him of claiming to have been an eye-witness. He says those persons "… wish to have their identities concealed for sake of their safety", and refers to them by letters A-H.

19. Each of these cases involves casual street violence by Muslim Afghans on a Sikh or Hindu. In each case, except for E, there is some indication in the conduct of the aggressors that they have either selected their victim on that basis, or that the victim's traditional dress (wearing a turban in the case of a man, or not wearing a veil in the case of a woman) has formed the basis for some particular humiliation. Mr Sheikh suggested that they amounted to no more than discrimination: we do not agree. While only D, a Hindu, was knocked out, and none of the victims suffered any serious physical injury, these were very nasty incidents of street hooliganism with a religious or racial pretext, which would have been regarded as of grave concern if they had happened in this country.

20. While we accept from Mr Sheikh that such incidents are by no means unknown here, that does not mean they are tolerated, and that is the crucial point. Mr Ravinder Singh says

> *… the families of these victims are very frightened to report these practices to the authorities and although I have tried to encourage them, they have refused because they have lost trust and confidence in the new administration and also because of the important factor that the police force consists of former members of the Mujahideen. Additionally they fear reprisals from their assailants.*

This is of course an easy explanation for members of any minority in difficulties to give for not enlisting the protection of the state authorities; and lack of protection is an essential ingredient of persecution: see **Horvath [1999] INLR 7**.

21. There is evidence in the CIPU report as to the numbers of police under recruitment, and we do not accept Miss Jones's suggestion that those numbers were in themselves inadequate, because we think she failed to realize the distinction being drawn between commissioned and non-commissioned officers: clearly the Afghan police has been set up on what we should consider a military, rather than a police model. The real point, however, concerns the attitude, and not the numbers of the police, and on this there is no background evidence. We think

what Mr Ravinder Singh says, although inevitably it relates to their attitude as seen by the Sikhs, and not as it really is, does give cause for concern, which has not so far been dealt with.

22. So far as ISAF [International Security Assistance Force] is concerned, the Tribunal in **IB 150** at § 38 make clear that they do not intervene unless asked to do so by the interim administration, and there is no evidence of any such requests. While so far the street violence suffered by Sikhs and Hindus is not too serious, the fact that it occurs at all in the form related by Mr Ravinder Singh suggests at least a perception on the part of Muslim hooligans that their victims will not receive any effective protection from the State authorities; and without that perception, such incidents might not happen. It certainly does not show any deliberate systematic persecution on the part of those authorities; but it does show a real risk of lack of effective protection from the system in place. To use a perhaps rather superficial analogy, this is not by any means Germany 1941; but it may be Germany 1936.

23. If Mr Ravinder Singh's evidence had been capable of direct verification or the reverse by either British or Afghan authorities in Kabul, then we should at least have adjourned our hearing so Mr Sheikh could arrange for that to be done. We could not however see how it could be achieved. There may be some answer to what he says, and we gave leave for further evidence or submissions to be filed, with which we shall now deal.

24. Mr Sheikh's answer to Mr Ravinder Singh is in four parts:

a) the evidence is unsourced, undated, unlocated and uncorroborated;
b) even if it is accepted, the examples given do not amount to Convention persecution or ill-treatment;
c) the report of the Danish fact-finding mission of 20 March – 2 April 2004 (attached) suggests that Sikhs who are not converts from Islam have no problems in living in Afghanistan; and
d) they are indeed going about their daily lives, as appears from the background of Mr Ravinder Singh's letters.

25. Miss Jones's reply to that (also served on the Presenting Officers' Unit) is at much greater length. In view of the quite inexcusable conduct (see above) of her solicitors in not serving Mr Ravinder Singh's evidence till three days before the hearing, we find it hard to understand how she can complain of the Danish report being served at the present stage, when she has had full opportunity to deal with it. We were quite ready to entertain any material with a bearing on Mr Ravinder Singh's evidence, and shall discuss the Danish report on its merits, together with the other issues in the case.

26. The first, at a) in Mr Sheikh's submissions, is on the credibility of Mr Ravinder Singh's evidence. While we note what Mr Sheikh says about the lack of supporting detail, we accept, as we have already made clear at **18**, that a non-lawyer might quite reasonably use "within my personal knowledge" as meaning "told to me direct". The incidents are all placed in Kabul, which is Mr Ravinder Singh's home area, and, according to Mr Caleechurn's statement, happened within the last six weeks before the letter of 14 June. That is perhaps the least

satisfactory feature of this evidence; but this on the other hand is a point where only a lawyer might have realized the importance of precise dates.

27. The Tribunal in **IB 150** did not exactly make a positive finding of credibility in Mr Ravinder Singh's favour; but they did treat his evidence as acceptable. It is presented in an attractively moderate way; until more is known about him, we think it would be wrong to dismiss it as not even doubtfully true (see **Karanakaran [2000] Imm AR 271**).

28. So far as b), the persecution or "inhuman or degrading treatment" issue is concerned, we do not regard it as so self-evident as Miss Jones suggests. Some at least of incidents A – H may be on the borderline, viewed in isolation in terms of the victim's individual case. However that is not how we have to look at them. The question for us is whether, taken together, they show a real risk of serious violence directed at Sikhs generally, with no effective protection from the authorities. For the reasons we have given at **22**, we take the view that they do.

29. The next question, on c), is whether the Danish report is sufficiently authoritative to negate the picture shown in Mr Ravinder Singh's evidence. (Dr Lau's report was not referred to in any detail before us, and, before serious reliance is placed on it, we think it should be tested by cross-examination, as is to happen in another forthcoming 'country guidance' case). While we do not think the charge of repeated unwarranted optimism levelled against the Danish Foreign Ministry by Miss Jones is made out, she might have been on stronger ground with their reliance on the 'Co-operation Centre for Afghanistan' (CCA), if they had said no more about that body than appears in Mr Sheikh's own submissions.

30. However, if Miss Jones had looked as far as the list of 'Persons, organizations and authorities who were consulted' at p 75 of the Danish report, she would have seen the following entry for the CCA, under a list of names and qualifications of its officers:

The CCA is an Afghan NGO, which is supported by a number of international aid organizations including Netherlands Organisation for International Development, Norwegian Church Aid, Church World Service, USAID and various UN organizations. The organization was founded in 1990. Since 1994 the CCA has managed the human rights program [sic]. *The organization is involved in activities concerning women, education and human rights. The organization has offices in Afghanistan, and specifically in Kabul …*

31. We do not think the CCA can by any means be written off as a body with no substance: there is no reason why its views should not be treated with respect, so far as they relate to its particular areas of concern. However, there is nothing to show that these include the position of Sikhs or other minorities; and, bearing in mind at the same time the danger of partiality on the part of those (such as Mr Ravinder Singh) who do concern themselves with the affairs of a particular minority, our view is that more attention needs to be paid to detailed accounts of a particular kind of problem, such as he gives, than to general assurances that all is well with the minority in question, such as the Danish report provides.

32. Turning finally to d), it clearly is true that the incidents described in Mr Ravinder Singh's evidence take place against a background evidence of Sikhs going about the ordinary business of life. That might be incompatible with serious current persecution of the community as a whole; but is it necessarily so with the

existence of a real risk of it in any individual case? That is the question we have to decide.

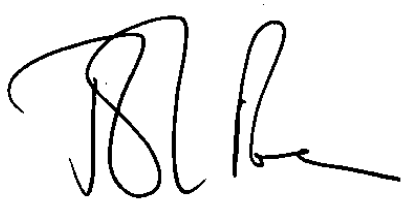
33. Again we return to the analogy, we hope not too facile a one, which we drew at **22.** In real life, we suspect people do go about their ordinary business for as long as they possibly can. Only at times of crisis do, or can they withdraw to a state of siege. No doubt the Jews in pre-war Germany, subject to the various restrictions on employment, commerce and the professions, were going on with their ordinary lives as best they could. The situation facing Sikhs in Afghanistan is clearly, even on a basis of potential risk, nothing anywhere near as bad as what happened to that most unfortunate minority.

34. However, Mr Ravinder Singh's evidence, which for present purposes we have decided we ought to accept as passing the **Karanakaran** threshhold, does appear to show three things. First, there is a reasonable likelihood of at least moderately serious violence against Sikhs because they are Sikhs; second, that is encouraged, and not guarded against by the perpetrators' perception of the authorities' attitude to it; third, there is nothing to show any specific commitment by either the international forces, or the Afghan authorities, to the protection of minorities generally, or the Sikhs in particular. In our view those add up to a real risk of persecution at the present time: that is certainly not to say that all Sikhs are being persecuted; but, on the evidence available to us (which was not in its present form before the Tribunal in **IB 150**), any of them who are identifiable as such run a real risk of it.

35. We did canvass the question, not raised by the adjudicator, as to whether this claimant in particular would be so identifiable. While it is not the custom for Sikh, as for Muslim women in Afghanistan to wear the veil, there is no religious prohibition (any more than there is for Christian women) against their doing so. However we saw this claimant present in court, and have no doubt (from many years' joint experience of hearing both Afghan and Punjabi cases) that, without the veil, she could be identified as either a Sikh or Hindu, and not an indigenous Muslim lady. The question of whether she could reasonably be expected to take the veil for her own safety (if that is the right way of putting it) raises complicated and far-reaching issues, with which we do not think it right to deal in this appeal, since they were not taken before the adjudicator.

36. Until Mr Ravinder Singh's evidence has been authoritatively confirmed or disproved from some official source, it would be wrong to give our decision (which, so far as it differs from that in **IB 150**, relies on it entirely) the status of a 'country guidance' case; but we have to do the best we can with the individual case before us, and, for the reasons we have given at § 34, we do think there was a real risk of Convention persecution or ill-treatment in this case, even on the minimal findings of fact made by the adjudicator in the appellant's favour.

Appeal allowed



John Freeman

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