

LSH

Heard at: Field House

MW (National passport: re-availment of
protection) Pakistan [2004] UKIAT 00136

On 26 April 2004

IMMIGRATION APPEAL TRIBUNAL

Corrected transcript of decision given at hearing

Signed: 28.04.2004

Issued: 04 May 2004

Before:

Mr J Freeman (vice-president)

Mrs W Jordan

Mr A Smith

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the appellant:

Mr S Khan, counsel instructed by HSK Solicitors, Manchester

For the respondent:

Mr J Wyatt

DETERMINATION AND REASONS

This is a Home Office appeal from the decision of an adjudicator, Mr J S Law, sitting at Manchester on 14 August 2003, allowing on both asylum and human rights grounds an appeal by someone who claims to be a citizen of Afghanistan; but who the Home Office said was a citizen of Pakistan. They said so on the basis that he arrived on a Pakistani passport, which was later examined by the Immigration and Nationality Department Forgery Section and found to be apparently genuine. The appellant's case was that this passport had been fraudulently obtained for him by an agent, and was not genuine at all, as he never had been a citizen of Pakistan. For good measure the appellant after his arrival here went to the Afghan Embassy and got himself an Afghan passport.

2. The adjudicator dealt with the claimant's history and a video which he produced and went on at paragraph 18:

The respondent had produced no clear evidence substantiating the claim that the passport under which the appellant travelled was genuine therefore giving rise to the claim that he was from Pakistan. We are always directed with regard to being careful on considering experts evidence advices but in this particular case no evidence was provided to substantiate the main claim. The fact that he

travelled on a Pakistani passport I believe does not indicate that he is a Pakistani national if he placed himself into the hands of an agent upon whose expertise in claiming asylum. Whilst in the United Kingdom the appellant has been to attend the consulate of Afghanistan and there obtain an Afghanistan passport having clearly satisfied the authorities of his rights so to obtain such passport. This being case and on the totality of the evidence made available I find that the appellant was born and brought up in Afghanistan and the rest of my determination is based upon that fact.

3. The Home Office challenged those findings in their grounds of appeal on the basis that the adjudicator was bound to accept the forgery reports. That cannot of course be right. It must be said that the adjudicator gave very little in the way of reasons for not accepting them. However, the reports themselves were fairly short of reasons. On the other hand what the passage we have just set out does show is that the adjudicator in effect reversed the burden of proof on this point. Possession of an apparently genuine national passport must raise an inference that the holder possesses that nationality, and it is for him to rebut that, if he wishes.
4. Mr Khan has argued that the claimant had rebutted any such presumption to the satisfaction of the adjudicator; but we return to what the adjudicator actually said: *“But in this particular case no evidence was provided to substantiate the main claim.* Really the adjudicator was regarding failure to produce any further evidence to show the genuineness of the passport by the Home Office as a most, if not the most important factor on this issue. That must amount to a mistake of law, and who knows what the adjudicator might have decided on this point if he had applied the correct burden of proof? On this point alone the appeal would in any event have to be allowed, and in that case a fresh hearing would have been directed.
5. However, there is a more fundamental objection to the result reached by the adjudicator, which we pointed out at the hearing, although it is quite apparent on the face of his decision, in the passage we have set out. What was the effect of this claimant getting an Afghan passport after arriving in this country? International law on this point is set out in the Refugee Convention, article 1 C(1):

This Convention shall cease to apply to any person falling out of the terms of Section A if;

(1) he has voluntarily re-availed himself of the protection of the country of his nationality.


6. That is explained in the UNCHR Handbook at paragraph 121:

In determining whether Refugee status is lost in these circumstances a distinction should be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities. If a refugee applies for and obtains a national passport or is renewal it will in the absence of proof to the contrary be presumed that he intends to avail himself of the protection of the country of his nationality. On the other hand, the acquisition of documents from the national authorities for which non nationals would likewise have to apply such a birth or marriage certificate, or similar services cannot be regarded as a re-availment of protection.

7. Some exceptions are made to that rule. Paragraph 120 refers to cases where the person concerned is instructed to obtain a national passport by the authorities of his country of refuge, or where he is obliged to do so by circumstances beyond his control; and paragraph 121, as we have already seen, makes an exception for documents which are not passports, and so not exclusive to nationals of the country in question. However, this was a regular Afghan passport.
8. There may not be much in the way of formalities required to obtain such a document. As we saw from paragraph 6.231 of the October 2003 CIPU report, to which our attention was drawn by Mr Wyatt:

The Minister of Interior stated there are no fixed in what is required to obtain a passport or an ID card and no specific papers are required to obtain a passport.

9. Mr Khan has argued that the claimant had been complaining to the adjudicator all along of lack of protection by the Afghan authorities, which the adjudicator had apparently accepted. But even if the adjudicator had been right to find that the claimant was an Afghan national, this was a clear case of someone getting a national passport voluntarily for his own purposes, and there is nothing in the facts of the case to show that he did not intend to avail himself of the protection of the Afghan authorities.
10. Here that process may have amounted only to getting the Afghan authorities to accept him as a citizen and to certify him as such, for what that was worth on the evidence referred to at 8. However, it clearly falls within the principles of article 1 C(1), as explained in paragraph 121 of the Handbook. This was a point of law which was obvious on the basis of the adjudicator's decision. In our view there is no reason why the principle of re-availment of national protection should not apply to the human rights grounds as to the asylum ones, and even this point does not appear to have been noticed by the **Home Office** in drafting their grounds of appeal, it must result in that **appeal** being **allowed**.



John Freeman