

KH
Heard at Field House

SD (Afghanistan - Sufficiency
of Protection in Kabul)
Afghanistan [2003] UKIAT
00114

Date: 10 October 2003

IMMIGRATION APPEAL TRIBUNAL

notified:

Date Determination

29.October 2003

Before

:

**Mr J A O'Brien Quinn QC (Chairman)
Mr P Rogers JP**

Between

Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

DETERMINATION AND REASONS

1. The appellant, the Secretary of State for the Home Department appeals against the determination of an Adjudicator (Mr A C B Markham David) who, in a determination promulgated on 22 January 2003, allowed the appeal of the respondent, a citizen of Afghanistan, born on 1 January 1976, against the decision of the Secretary of State, made on 30 September 2002, to give directions for his removal from the

United Kingdom and to refuse his application for asylum under paragraph 336 of HC395 (as amended).

2. The Secretary of State was represented by Mr A Sheikh, Home Office Presenting Officer, while Mr A Stedman, of Counsel, instructed by Asghar & Co (Southall) solicitors.
3. The grounds of appeal in this matter submitted by the Secretary of State read as follows:-
 - "1. The adjudicator has erred in his approach to the objective situation. At paragraph 18 of his determination the adjudicator states that "having considered the objective evidence I am of the opinion there is not a sufficiency of protection." It is submitted that in Kabul the town that the respondent would be returned to, there is sufficient protection against non-state agents. This is borne out by paragraphs 5.31 and 5.32 of the October 2002 Cipu report. Paragraph 5.32 quotes a report from the Danish fact-finding mission which states that "the security situation in Kabul was (in May 2002) generally good". Reliance is placed on the case of **No. 14** (2002 UKIAT 05345) in which (at paras 52 and 53) the tribunal considers this and other evidence and makes a positive finding regarding the security situation in Kabul. It is submitted that if the respondent were to be returned to Kabul the authorities would be both willing and able to offer him protection.
 2. The adjudicator has failed to consider whether the option of internal relocation is open to the respondent. It is submitted that, given that the respondent fears non-state agents in his home area, the option of internal relocation is open to him. It is further submitted that it would not be unduly harsh for the appellant to relocate within Afghanistan. Reliance is placed on the tribunal's findings regarding the possibility of internal relocation at paragraphs 55 to 57 of No. 14."
4. Leave to appeal to the Tribunal was granted by the Tribunal (Mr D K Allen, Vice President) on 7 March 2003.
5. When the appeal opened before the Tribunal in 10 October 2003, we had before us the determinations of the Tribunal in Sedeqi [2002] UKIAT 06598, and in No. 32 [2002] UKIAT 08360, the Afghanistan CIPU Report for April 2003, the Tribunal determination in No. 14 [2002] UKIAT 05345, and a bundle of documents submitted on the respondent's behalf, which contained a number of documents relating to the situation in Afghanistan.

6. We then heard submissions by both Mr Sheikh and Mr Stedman and were directed to certain parts of the determination which were before us, with particular reference to the situation at present in Afghanistan, the situation in Kabul, and the status and power of the Hezb-e-Wahdat.
7. We considered the submissions of both representatives, and having considered all the evidence before us, and the various authorities referred to, we directed ourselves that the burden of proof lay upon the Secretary of State as this is his appeal, and that the standard of proof is on the balance of probabilities.
8. This is the Secretary of State's appeal against the determination of the Adjudicator claimed that the Adjudicator had erred in finding that, while he came to the opinion that, while the respondent (then the appellant) had a well-founded fear of being killed or seriously harmed by members of the Hezb-e-Wahdat, a Commander of which group of the Hazara Tribe, had been captured by the Taliban in 1999, while staying at the respondent's father's hotel, who had threatened him with death as it was believed that he had told the Taliban that the Commander had been staying at the hotel, he, the Adjudicator, had come to the conclusion that the respondent was clearly not entitled to refugee status, nevertheless, under Article 3 of ECHR found that he was satisfied that the respondent faced a real risk of suffering ill-treatment if returned to Afghanistan, as there was not a sufficiency of protection anywhere in the country.
9. The facts of the matter, as summarised by the Secretary of State in his letter of refusal, and as set out in the determination by the Adjudicator, read as follows:

"You claim that as an Hazara and Shia Muslim you and many others faced difficulties under the Taliban's rule and your religious activities were restricted. You claim that in 1999 a Hezbe-e-Wahdat Commander stayed at your hotel and he was arrested. You claimed to have received threatening messages which stated that there would be severe consequences if you were ever found as they believed you had told the Taliban the Commander was in your hotel. You claimed to have been hiding in different places. You claimed your brother was arrested by the Taliban in late 2000 due to his religion and ethnicity and escaped after 26 days. You claim to have gone into hiding and your house was searched by the Taliban as they wanted you and your brother but arrested your father, who later died in custody due to being tortured. You claim that when the Taliban lost control and the Northern Alliance gained power in November 2001 your house was searched by

the Commander's men, who had stayed at your hotel, but you were not at home. You claimed to have decided you needed to leave Afghanistan and so paid 9,000 dollars for an agent who brought you to the United Kingdom via unknown countries."

10. In his determination, having heard the evidence and the submissions made by the respondent's Counsel but not having heard any submissions by the Home Office, as there was no representative present, the Adjudicator dismissed the respondent's appeal on Refugee Convention grounds, as it was accepted by the respondent's representative that, even though the Hezbe-e-Wahdat were part of the Government of Afghanistan, the government would not sanction a hostile attack on the respondent because he allegedly informed on Commander Adozar and that any attack on him would be by non-state actors, in respect of which, the respondent would not have a sufficiency of protection, but that he had established that he would face a real risk of being inhumanly and degradingly treated if returned to Afghanistan.
11. Mr Sheik's submissions were that the Adjudicator had erred in finding that there would not be a sufficiency of protection for the respondent, as it was clear, from the CIPU Report for October 2002, and the report of the Danish Fact Finding Mission that the security situation in Kabul (in May 2002) was generally good, that the Tribunal, differently constituted, had made a positive finding that the security situation in Kabul was sound, and that, as the respondent would be returned to Kabul, the authorities there would be both willing and able to offer him a sufficiency of protection. It was also argued that the Adjudicator had failed to consider the internal flight alternative open to the respondent who, while he may have had a real risk from non-state agents, in his own area, the province of Bamian, it would not be unduly harsh for him to relocate elsewhere in Afghanistan, particularly in Kabul.
12. In the course of his submissions, Mr Sheik drew our attention to paragraphs 52 and 53 and paragraphs 55 to 57 of No.14 and paragraphs of the CIPU Report for April 2003, where it was stated that the security situation in Kabul had improved significantly since the arrival of the ISAF, that crime rates had decreased across the city by as much as seventy per cent, with some eighty per cent of the population saying that they were happy with the presence of that force.
13. Mr Sheik also drew attention to other parts of the respondent's bundle, which were to the effect that, while the security of Afghanistan was undermining all aspects of life, this was particularly outside of Kabul, that the central government had no real control outside of Kabul and that, while increased lawlessness, factional fighting, repression and continued

human rights abuses prevailed, despite numerous calls to expedite the UN mandate for peace keeping operations, the International Security Assistance Force (ISAF) was present only in Kabul. Mr Sheik's contention was that, if the respondent were to relocate to Kabul, he would be able to avail himself of the protection of the ISAF, which protection would be sufficient to obviate any danger from members of the Hezbe-e-Wahdat. He submitted that the Adjudicator had not properly considered the situation in Afghanistan generally, and in Kabul, in particular, and did not consider the internal flight alternative of the respondent's relocating to Kabul in the light of the findings of the Tribunal in No. 14, and the CIPU Report on the improving security situation in Kabul which was found by the Danish Committee for Aid Refugees.

14. He submitted that the Adjudicator's determination should be set aside and the Secretary of State's appeal allowed.
15. In reply, Mr Stedman submitted that the essential point to be remembered is that the Adjudicator had found the respondent, at paragraph 15 of his determination, to be credible, that the Hezbe-e-Wahdat had called at his house looking for him and that they wished to cause him harm. He also contended that the CIPU Report before the Adjudicator had dealt with the situation in 2002, but that, since then, in more up-to-date reports, the situation had disimproved. He drew our attention to various documents and extracts in the bundle provided by him, which included reports from Amnesty International and Human Rights Watch, which indicated that many of the abuses documented had been committed by soldiers belonging to militias and other forces under the command of high level officials and political leaders, throughout Afghanistan, and that not enough is being done at a national or international level to address the causes of Afghanistan's abuses of human rights and sectarian problems. He pointed out that such violations were taking place, not just in the hinterland of Afghanistan, but were taking place in areas near to the capital, Kabul, and even in Kabul itself. He pointed out that several key ministerial posts in the transitional government were held by representatives of different warlords and militia, including, among them, the Hezbe-e-Wahdat, and that Afghanistan's first interim government from December 2001 to June 2002, had been made up, predominantly, of representatives of military factions, and that the leader of the Hezbe-e-Wahdat, had, at one stage, been a vice president.
16. In addition, he drew our attention to what was stated, with regard to the military police and intelligence forces in Kabul which were now under the control of commanders and officials who had previously served in the Northern Alliance, which included, among others, the Hezbe-e-Wahdat. In these

circumstances, he argued, there would not be a sufficiency of protection for the respondent, if he were to relocate to Kabul.

17. Mr Stedman placed reliance on the Tribunal determination in Sedeqi, and, in particular, drew our attention to paragraph 16, where it was stated that the UNHCR were of the opinion that there is no official protection against attacks by armed local groups. He also referred us to paragraph 15, where it was stated that the ISAF was not able to assist in enforcing security but was there to provide a stable and secure environment for the political process in support of the interim and transitional administration. He also pointed out that in that determination, it had been found that that particular appellant would be at risk of persecution in contravention of Article 3.
18. Mr Stedman also drew our attention to No. 32, particularly at paragraph 34, where the Tribunal, there, had considered the situation in Kabul, and the report of the Danish Committee for Aid to Refugees, as well as the expert opinion of a Mr Marsden, and found that the policing in Kabul was essentially done by Jamiat militia, and had come to the conclusion that that claimant would face a real risk if he were returned to Kabul, on account of his fear of the Jamiat.
19. He submitted that, in the light of the precarious circumstances in Afghanistan, and in Kabul, in particular, and the fact that the respondent would be at risk of reprisals by members of the Hezbe-e-Wahdat, he would not receive a sufficiency of protection from being inhumanly and degradingly treated, if he returned to Kabul, and that the Adjudicator had come to the correct conclusion in allowing the respondent's appeal.
20. We have given full consideration to all the points raised and argued before us, as set out above, and, as we see the situation, while the Adjudicator found the respondent to have been credible and had accepted that members of the Hezbe-e-Wahdat wished him harm, he was not satisfied that the respondent was entitled to refugee status. However, the Adjudicator then went on to find, without taking any account of the internal flight alternative, which the respondent had, but did not exercise, by relocating to Kabul, that the respondent faced a real risk of being inhumanly or degradingly treated.
21. The main points for consideration before us are whether, while the respondent may be at risk of a revenge attack on him by independent members of the Hezbe-e-Wahdat, acting without the knowledge or consent of the authorities, outside Kabul, he would face a real risk of persecution by such members of the Hezbe-e-Wahdat, if he were to relocate, or to be returned to Kabul, and whether or not he would be provided with a

sufficiency of protection, which would be sufficient to bring him within the terms of Article 3 of the UNHCR.

22. In the course of submissions before us, we were referred to numerous reports and documents relating to the situation in Kabul, in which different points of view were expressed as to the safety of the respondent if he were returned or sought relocation there. Reliance was placed on different Tribunal determinations which took different views on the matter also. However, in looking at the Tribunal determinations brought to our notice, we have come to the conclusion that, whereas each Tribunal has given the fullest consideration to the particular issue before it, essentially their individual determinations turned on the particular facts of each individual case. For example, No. 32, which had been heard on 4 September 2002, but had not been promulgated until 28 April 2003, turned on the fact that that appellant's claim was based on his fear of the Jamiat-e-Islam, and that, as the policing in Kabul was essentially done by the Jamiat militia, and as the Secretary of State had accepted in that appeal, that the appellant would face a risk from the Jamiat in Mazar-i-Sherif, he would face a real risk on return to Kabul, where, as the instant respondent's fear is of individual members of the Hezbe-e-Wahdat, who, while that party was part of the interim administration, it had not, by any means, the same power as the Jamiat. Further, in the Tribunal determination in Sedeqi, which had been heard on 31 October 2002, and promulgated only on 18 February 2003, the basis of the appellant's claim, there, was that his mother was a Tajik, his father was a Pashtu, and his brother had been a Commander in Ahmed Sheik Massoud's, militia who had been killed in fighting, and that the appellant, himself, had openly encouraged people to be pacifists, refused to join the Northern Alliance Force, and was, according to the Tribunal, likely to find himself at odds with influential Commanders in the Shira-i-Nizar, whereas the instant respondent was not, by any means, prominent in any fighting between military forces and whose only reason for coming to the notice of the Hezbe-e-Wahdat, was a suspicion that a Commander of the organisation had been captured by the Taliban, at his family's hotel in 1999, and that it had been found by the Adjudicator that any attack on the respondent would be without the knowledge or consent of the authorities.
23. Likewise, in the Tribunal determination in No.14, it, again, turned on its own particular circumstances.
24. We, therefore, find that we cannot apply what was held in any of those determinations, with any particular confidence, where the circumstances differ from those before those in the instant case.

25. We are, accordingly, driven to consider the objective evidence, which, while it points to the general situation in Afghanistan being a serious and precarious one, where, if the respondent were to return to his home province, there could well be reason for him to fear some act of reprisal, the situation in Kabul, the capital, to where the respondent would be returned, the situation is different, and, as we see it, the Adjudicator, while he found that the respondent would not have a sufficiency of protection in Afghanistan, and, it would seem, in his own province, he had not addressed his mind to what the respondent's situation would be, were he to be returned to Kabul.
26. Mr Sheik's contentions were that, on the objective evidence, as set out in the CIPU Reports for October 2002 and April 2003, there would be a sufficiency of protection for the respondent, while Mr Stedman's contentions were that, as the transitional government of Afghanistan had its head office in Kabul, and as the administration comprised, among other military factions, members of the Hezbe-e-Wahdat, and as elements of that faction would be seeking revenge against the respondent, the respondent could not seek the protection of the authorities in Kabul and would not get a sufficiency of protection, if he did seek their protection, in all the circumstances.
27. As we view the situation of the respondent, in the first place, we are not satisfied, that, while some members of the Hezbe-e-Wahdat faction may, possibly, be looking for him now, some four years after the incident alleged, the nature of his offence is not so serious that if he were to relocate in Kabul, where, as a Hazara, the same tribe as that of the Hezbe-e-Wahdat, and of which tribe a large number lived in Kabul, we do not consider that he would be persecuted (paragraphs 4.70 to 6.78 of the CIPU Report for April 2003), and we consider that he would be able to seek and obtain a sufficiency of protection. Further, in this regard, we note that the Adjudicator, in paragraph 18 of his determination, when coming to his conclusion, regarding sufficiency of protection, relied upon there being clear evidence that the Hezbe-e-Wahdat had been involved in violence against ethnic Pashtuns, but, as the respondent is not a Pashtun, but a Hazara, the likelihood of violence being done to him by the Hezbe-e-Wahdat is not anywhere as likely as if he were a Pashtun, as, while the Hezbe-e-Wahdat may attack the Pashtun or members of other military factions, there is nothing to indicate that they would attack individual Hazaras such as the respondent, unless for some particularly serious reason, which would not be the case here.
28. Further, although from the reports referred to by Mr Stedman, it would appear that a number of previously warring military

factions had come together and had been put in charge of the running of Afghanistan with headquarters in Kabul, it would appear that, while the Loya Jirga had commenced, in 2002, in Kabul to pick a transitional government to rule until the 2004 elections, and in the meantime increase civilian influence in government, Afghanistan's military factions and warlords, instead, decided to legitimise their power during the Loya Jirga and that the army and the police officials threatened, imprisoned and even killed candidates to stop them from running the Loya Jirga or in order to intimidate them from acting independently.

29. In our considered opinion, while the situation in Afghanistan, as a whole, is precarious, the situation is somewhat better in Kabul, but that the various military factions, while outwardly they are in agreement to run the country and maintain some sort of peace and understanding, pending the elections in 2004, there is the underlying clash between the various military factions, with the Jamiat-i-Islam being the most powerful, with the Hezbe-e-Wahdat being among the other groups but with only limited shared power.
30. The respondent's fear that he would be looked for and, if found, would face a real risk of being persecuted by the representatives of his own party, the Hezbe-e-Wahdat, with impunity, in Kabul, and would not be sufficiently protected by them, has not been fully analysed by the Adjudicator, and the objective evidence, particularly as to what the respondent would face if he relocated to Kabul has not been fully gone into, sufficiently for the Adjudicator to have reached the conclusion that he did, namely, that the respondent would face a real risk of suffering ill-treatment under Article 3, at the hands of the Hezbe-e-Wahdat, in the light of the efforts being made by the ISAF to bring about a state of calm and order in Afghanistan, and that that is so, particularly in Kabul.
31. Accordingly, we have come to the conclusion that the Adjudicator has not fully considered all aspects of the matter before him, particularly in the light of the relative lack of seriousness of the basis of the respondent's claim, which is now four years old, the relatively low situation of the Hezbe-e-Wahdat in Kabul, and in Afghanistan generally, in relation to all the other military factions in the Transitional Administration, and the success of the ISAF in bringing about some semblance of order in Kabul, we are of the opinion that the appeal should be remitted for a fresh hearing before a different Adjudicator so that the whole matter can be looked at in the light of the most up-to-date information, and a fully reasoned determination reached both on the subjective and objective evidence.

32. This appeal of the Secretary of State is, accordingly, allowed, but only to the extent of the appeal's being directed that it be heard afresh before an Adjudicator other than Mr A C B Markham David.
33. This appeal of the Secretary of State is, accordingly, allowed, but only to the extent as stated above.

**J A O'Brien Quinn QC
Chairman**