

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 22 August 2003

Date Determination notified:18.09.03

Before:

Mr J A O'Brien Quinn, QC (Chairman)
Mrs E Hurst, JP

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. Bulger) who, in a determination promulgated on 28 April 2003, allowed the appeal of the respondent, a citizen of Afghanistan, born on 1 January 1976, whose application for asylum had been refused by the Secretary of State on 12 November 2002.
2. The Secretary of State was represented by Mr S. Walker, Home Office Presenting Officer, while Miss S. Gibbons, of Counsel, instructed by Nathaniel & Co. (464 Kingsland Road), solicitors represented the respondent.
3. The grounds of appeal submitted in this case by the Secretary of State in this matter read as follows:

'1. The Adjudicator has erred in his conclusion with regard to the question of the

appellant's risk of persecution due to being a follower of the Christian religion.

a) At paragraphs 15 to 19 the Adjudicator states that there is “a dearth” of information regarding the position of Christians in Afghanistan, at paragraph 15 he indicates that this refers particularly to Christian converts born into Islam. However in each paragraph he fails to say to what information if any he has referred.

(i) It is incumbent upon the Adjudicator to indicate the information he has considered when forming his conclusions.

b) The Adjudicator (at paragraph 20) indicates that there is a lack of information specific to the issues raised by the appellant in connection with his return to Afghanistan.

i) The Adjudicator then goes on to consider what “common sense” suggests. It is submitted that in doing so the Adjudicator has erred. It is respectfully submitted that the Adjudicator should reach his conclusion on the basis of the evidence before him and not on anecdotal or “common sense” conclusions.

ii) In doing so it is submitted that the Adjudicator has misdirected himself.

iii) At paragraph 25 the Adjudicator discusses the “Accountability Department” in Afghanistan, further he indicates that there is an absence of information with regard to “willingness or ability of the security forces to enforce the policy of religious tolerance”

iv) It is submitted that (given the lack of information indicate above) the Adjudicator has erred in concluding that:

- (1) The appellant would come to the attention of the authorities for converting to Christianity
- (2) The appellant would suffer problems for practising his religion, either from individuals or others in Afghanistan
- (3) The authorities would be unwilling to provide him with protection

- c) At paragraph 25 the Adjudicator indicates that the appellant would be practising his religion entirely in the company of foreigners. However he fails to say the way in which this affects the appellant's case.
 - 2) At paragraph 26 the Adjudicator allows both the asylum and the human rights appeal on the evidence discussed.
 - 3) Permission to appeal is therefore respectfully requested for the reasons outlined above. It is submitted that the grounds raise arguable issue that merit consideration by the Tribunal.
4. Leave to appeal to the Tribunal was granted by the Tribunal (Mr A. Mackey, Vice President) on 16 June 2003.
5. In granting leave to appeal, the Tribunal stated as follows:

‘I have carefully considered the grounds of appeal put forward. They do appear to indicate a basis for an appeal to the Tribunal. It is arguable that the conclusions reached by the Adjudicator were not open to him on the evidence available. In particular, the assessment of risk to the appellant on relocation to Kabul needs closer consideration to ascertain whether it is based on mere speculation or a well-founded conclusion.’
6. When the appeal opened before the Tribunal on 22 August 2003, Mr Walker produced before the Tribunal a document entitled ‘International Religious Freedom Report 2002: Afghanistan,’ two US State Department Reports on Afghanistan, one entitled ‘Country Reports on Human Rights Practices 2002’ and the second ‘International Religious Freedom Reports 2002’, together with Tribunal New Services down loaded from a computer and dated New Delhi on 11 December 2001, while Miss Gibbons submitted four documents, relating to Christians in Afghanistan and a document entitled ‘Precepts Regarding Muslim Converts to Christianity or Apostates’.
7. We were addressed by Mr Walker, on the grounds of appeal as filed.
8. He dealt, first of all, with ground 1, and drew our attention to what the Adjudicator had said at paragraphs 15 and 19 of his determination, namely that there was a ‘dearth’ of information regarding the position of Christians in Afghanistan and indicated that that referred in particular to Christian converts

born into Islam but that the Adjudicator had failed to say what information, if any, he had referred to and that it was incumbent upon him to indicate the information that he had considered when forming his conclusions. He submitted that, looking at the US State Department Reports, it was clear that the Adjudicator was wrong to say that there was dearth of information because it was clear from the document dealing with international religious freedom, that, since 22 December 2001, the legal basis for religious freedom in Afghanistan had been found with the Bonn Agreement of 5 December 2001 and in the 1964 Constitution, which Constitution proclaimed Islam to be the 'sacred religion of Afghanistan' and also stated that the religious rites of the state should be performed according to Hanafi doctrine, but it also proclaimed that 'non-Muslim citizens shall be free to perform their rituals within the limits determined by laws for public decency and public peace'.

8. He also drew our attention to the second paragraph under the heading '(c) Freedom of Religion in the Country Reports on Human Rights Practices in Afghanistan for 2002' where it is stated that reliable sources estimated that 85% of the population were Sunni Muslims and most of the remaining 15% were Shia, that, even among the Muslims themselves, there were differences and that the Shia majority advocated a national government that would give equal rights to citizens, and that there were small numbers of Ismailis living in the central and northern parts of the countries who were Shias but considered the Aga Khan to be their spiritual leader. He also pointed out that there was also a small, extremely low profile, Christian community in addition to small numbers of adherents of other religions and that the number of adherents to claims of conservative Islam was growing. He also pointed out that it was there stated that, in the past, small communities of Hindus, Sikhs, Jews and Christians lived in the country but that most members of those communities had left, and that, even at their peak, those non-Muslim minorities constituted less than 1% of the population. He submitted that, although most of the country's small Hindu and Sikh population which once had numbered about 50,000 persons, had emigrated or taken refuge abroad during the many years of conflict, but that recently some minorities had begun to return and that non-Muslims, such as Hindus and Sikhs, are now estimated to number only in the hundreds.
9. He submitted that it was also stated that Afghanistan's Interior Minister Gounus Qanooni, in the post-Taliban interim government, pressed upon the displaced Sikh and Hindu community to return to their hearth and homes, assuring 'equal rights to all non-Muslims'. He also pointed out that the same Minister had told a delegation of the Sikh community which had

fled to India from Kabul and other parts of Afghanistan because of the troubled and unsettled conditions of that country, that they would have proper representation of at least two members in the Loha Jirga or the Grand Council. He submitted, that in those circumstances, there was sufficient information for the Adjudicator to realise what the situation was in Afghanistan

10. He also pointed out that the appellant had been a Muslim before he left Afghanistan in 1990 because he felt aggrieved by the harsh working demands which his uncle put on him, that his mother had urged him to leave, and that he went to Pakistan where he worked with a Pakistani Christian, and felt himself drawn to Christianity because of his employer's kindness, and had become baptised in 1998.
11. He submitted that, dealing with ground 1(b) the Adjudicator had indicated that there was a lack of information specific to the issue raised by the respondent in connection with his return to Afghanistan and that, in resolving these matters, the Adjudicator, instead of applying a low legal standard, went on to consider what 'common sense' suggests which, he submitted, was an error, and that the Adjudicator should have reached his conclusion on the basis of the evidence before him and not on anecdotal or 'common sense' conclusions. He submitted that the Adjudicator, in paragraph 25, reached the conclusion that the respondent, in practising his religion, would be eminently noticeable as a convert from Islam and, having regard to the objective evidence, he would be practising Christianity entirely in the company of foreigners, but, again, Mr Walker submitted, there was no evidence to support that finding. He submitted that, given the lack of information referred to by the Adjudicator, he had erred in concluding that the appellant would come to the attention of the authorities for converting to Christianity, as there was no evidence to substantiate that, and that he had learned in coming to the conclusion that the respondent would suffer problems for practising his religion, either from individuals or other organisations in Afghanistan and that he had erred in finding that the authorities would be unwilling to provide him with protection.
12. He submitted that, in the letter of refusal, the Secretary of State did not find the respondent to be credible, did not believe that he was a Christian and did not believe that he followed the Christian religion as he claimed.
13. He submitted that Kabul was a large city with many religions being practised by many people and that the situation there was relatively safe. He submitted that the respondent was a

- young man who had worked as a mechanic for a number of years and would have no difficulty in finding employment there and would not have to return to his home area where he may have difficulty with his uncle. He submitted, again, that the respondent had never been a Christian, while in Afghanistan before, and that there was no evidence to indicate that he would be persecuted as a Christian in Iran if he returned there.
14. We then heard Miss Gibbons, in reply, and she submitted that the Adjudicator had found that the respondent was a genuinely converted Christian and that he had been accepted as such. She submitted that all the evidence indicated that he was a properly baptised Christian and a practising one. She submitted that he had practised as a Christian in Pakistan and had left there because of a certain amount of persecution. She submitted and drew attention to the fact that he was a Muslim who had converted to Christianity and that, looking at the documents she had produced, stated that in the Islamic religious jurisprudence, the punishment for an apostate included torture and death. She submitted that under Islam's ideology of supremacy 'Dhimi' there were only three alternatives for dealing with non-Muslims under the Islamic legal system which is that they must be (i) converted, (ii) subjugated or (iii) eliminated. She submitted that, if the appellant were to be returned to any part of Afghanistan, he would face the death sentence for apostasy. She drew attention to the situation in Afghanistan, as mentioned by Mr Walker, when he referred to the Bonn Agreement and the 1964 Constitution, and submitted that, although it stated that non-Muslim citizens would be free to perform their rituals within the limits determined by laws for public decency and public peace, as the respondent would be treated as an apostate, those laws with regard to public decency and public peace would follow the traditions and that the respondent would face death.
15. She submitted that, as could be seen from her documents, the situation of Afghanistan's religious minorities had improved significantly since the fall of the Taliban, but pointed out that religious freedom was not protected to the extent called for by international standards. She pointed out that the country's religious minorities included small communities of Hindus and Sikhs and, although there were no churches, expatriate Christians were reportedly able to meet in informal worship services in Kabul and one or two other major centres. She submitted that that would be over-ridden by the apostasy of the respondent. She drew attention to what was also stated under the heading 'Blasphemy' where it stated that crimes under Sharia law were not codified or defined under Afghan law, but under most interpretations of Sharia, blasphemy was a serious offence sometimes punishable by death and that the respondent, by becoming a converted Christian, would be

considered as having committed blasphemy. She also drew attention to another of her documents, where it was stated that, although there is no visible church in Afghanistan, the number of Afghan believers is increasing in urban and in some, or most, rural areas, but because of fear and suspicion, many believers found it difficult to meet in groups, that some found help and encouragement through Christian radio programmes in the main language of Afghanistan, but that the Taliban religious police were active in seeking out 'converts' who were considered to be apostates. She submitted that, although that applied at the time of the Taliban, the situation had not changed to such an extent that the respondent would be free to practice Christianity in Kabul or elsewhere in Afghanistan.

16. She submitted that, in order for the respondent to practice Christianity in Afghanistan, he would have to practice it secretly and would not have the full freedom to practice his religion, which would be against his human rights. She submitted that, while he was in Pakistan and in Iran he kept a low profile as a Christian, and that if he were returned to either Pakistan or Iran, it would not be safe for him to do so, and that if he returned to Afghanistan, he would be unable to practice his religion and that, as an apostate, he would be at great risk of being killed, particularly as he could not return to his own village where his uncle, for the preservation of the family honour, would have him put to death and that, even in Kabul, he would find it impossible to carry on his religion openly as a Christian. She submitted that the Adjudicator had come to the correct conclusion and that the Secretary of State's appeal should be dismissed.
17. We then heard briefly from Mr Walker, in reply, and, during the course of his submissions, it appeared that certain of the replies given by the respondent to questions asked of him at interview, appeared to indicate that the respondent was unaware of what branch of Christianity he belonged to, and that his knowledge of Christianity was very sparse indeed.
18. We then reserved our determination, carefully considered all the evidence and the submissions made to us, and considered Miss Gibbons' skeleton argument and directed ourselves that the burden of proof lay upon the Secretary of State and that the standard of proof was on the balance of probabilities.
19. This is an appeal by the Secretary of State against the determination of an Adjudicator, who allowed the appeal of the respondent, then the appellant, a citizen of Afghanistan, born on 1 January 1976, whose application for asylum was refused by the Secretary of State.

20. The basis of the respondent's claim was that he had left Afghanistan, as a Muslim, in 1990, as he did not like the terms of employment with his uncle, went to Pakistan, where he worked as a motor mechanic with a Pakistani Christian, who so impressed him that he became a Christian himself and was baptised, but, due to his having been ill-treated in Pakistan, on account of his being a Christian, and due to the fact that, when his uncle visited him in Pakistan, and had discovered that he had converted to Christianity, was shocked and threatened to kill him, the respondent left Pakistan, and went to live for six to eight months in Iran, before leaving for the United Kingdom, where he sought asylum on the basis that if he were returned to Afghanistan, he would face a real risk of persecution on account of his Christianity under both Conventions, both from the state and from his uncles.
21. The Secretary of State, in the first place, was not satisfied that the respondent had genuinely converted to Christianity, but, then went on to find that, if the respondent had converted to Christianity, he would not, after leaving Pakistan, have gone to Iran, but to a country which predominantly practised Christianity and that if he were returned to Afghanistan he would be returned to Kabul where the situation was better than in the rest of the country and there was more security, that he did not have to return to his own area where his uncles lived, and that he could practice his Christianity without molestation.
22. On appeal against the decision of the Secretary of State, the respondent appealed to an Adjudicator and was legally represented. However, the Adjudicator, while he found that the respondent was a genuine Christian, having accepted the evidence of the Reverend Pauline Shelton, the respondent's local vicar in Stoke-on-Trent, and having found that there was a 'dearth' of objective evidence about the position of Christianity in Afghanistan, and, in particular, that of Christian converts from Islam, even though the Home Office Presenting Officer before him had pointed to paragraph 6.23 of the CIPU Assessment with regard to there being a policy of religious tolerance in Afghanistan, having found that it seemed to him that all the Christians who now lived in Afghanistan were foreigners, assigned temporarily to relief work by foreign NGOs, who clearly constituted a special case, and found that, despite the lack of information, it seemed to him that 'commonsense' suggested that, in a traditional Islamic society, like that in Afghanistan, conversion, by someone born into Islam, to Christianity, and in the light of the existence of the Accountability Department, the respondent would face a real risk of being persecuted under both the Refugee Convention and the ECHR on account of his conversion to Christianity.

23. We have heard the submissions of both representatives and have studied the objective evidence before us. As we see the situation of the respondent and the situation where religious practice is concerned in Afghanistan, we must accept that Islam is the traditional religion of the vast majority of the people of the country and that the practice of putting to death those who convert from Islam to Christianity, would, in areas where Islamic law and practices are strictly followed, such as in rural areas and in the respondent's home village, where his uncles live, the respondent may very well face the likelihood of being put to death on that account.
24. However, despite the Adjudicator's findings that there was a dearth of information with regard to the position of Christianity in Afghanistan, there is objective evidence to the effect that, as Miss Gibbons' objective evidence shows, there are Christians living and practising their faith in Afghanistan, and that although there is no visible church in Afghanistan, the number of Christian believers in urban and in some rural areas is increasing, that many believers find it difficult to meet in groups, some find help and encouragement through Christian radio programmes in the main language of Afghanistan, although during the Taliban era, religious police were actively seeking out 'converts' from Islam, who were considered to be apostates. However, with the fall of the Taliban, the seeking out of apostates would appear no longer to be continued.
25. Further, it is clear from US State Department Reports on Afghanistan for 2002, that there is a small, extremely low-profile Christian community, in addition to small numbers of adherents of other religions. And, again, it would appear, from official sources, that the Afghan government is encouraging the return of Sikhs and Hindus, assuring 'equal rights to all non-Muslims'.
26. In the objective evidence, it is also stated that the situation of Afghan religious minorities has improved significantly since the fall of the Taliban, although religious freedom is not protected to the same extent called for by international standards.
27. However, most importantly, it is officially reported that, since 22 December 2001, the legal basis for religious freedom in Afghanistan has been found in the 5 December 2001 Bonn Agreement, and the 1964 Constitution. The Constitution, while it proclaims Islam as the 'sacred religion of Afghanistan' it also proclaims that 'non-Muslim citizens shall be free to perform their rituals within the limits determined by laws for public decency and public peace'.

28. We have noted the objective evidence, and have noted also that despite the demise of the Taliban, under which regime there was no religious tolerance, there is still a certain opposition to the government's active pursuit of its policy of religious tolerance and problems with religious freedom still exist, nevertheless, steps are being taken towards the promotion of religious tolerance, and with the opening in Kabul of the US Embassy, since December 2001, discussions have taken place on religious freedom with Afghan officials, in the context of its overall dialogue on the policy of protection of human rights.
29. In these circumstances, while we appreciate that religious freedom has not reached the standard recognised internationally, and while additional Muslims may resort to extreme measures in the abuse of human rights, we find that Christian communities do live and practice their religion in Afghanistan, mainly in urban areas, that the situation of Christians has improved significantly, that the rights of non-Muslims to practice their religion is governed by the Constitution and by the Bonn Agreement, but subject to laws regarding public decency and public peace, which should not affect the normal practice of religion by Christians, and that, if the respondent were to be returned to Afghanistan, he would be returning to Kabul, the capital, which is a cosmopolitan urban area, there is no reasonable degree of likelihood that the respondent would face persecution for a Convention reason if returned there, and he would be able to practice his religion, albeit at a lower level than in a country in which Christianity was predominantly practised.
30. Accordingly, although we are not wholly satisfied that the respondent is a genuine convert to Christianity, as found by the Adjudicator, we do not intend to challenge that view, as the point had not been raised in the grounds of appeal, and as the respondent's credibility was not challenged either. However, even if we accept that the respondent has converted genuinely to Christianity, we find that we are satisfied that, in the present political and religious climate in Afghanistan, the respondent has not established that he would have a reasonable degree of likelihood of being persecuted for the practice of Christianity, while living in Kabul, and that he has not established that the United Kingdom government would be in breach of its obligations under Article 3 of the ECHR, in returning him to Kabul, where he could practice his religion among the other Christian communities already living there.
31. The determination of the Adjudicator is, accordingly, set aside, and that the appeal of the Secretary of State is allowed.

**J.A. O'BRIEN QUINN, QC
CHAIRMAN**