

IN THE IMMIGRATION APPEAL TRIBUNAL

Heard at: Field House Decision number: _K (Risk – Sikh - Women) Afghanistan CG [2003] UKIAT 00057
Heard on: 25th July 2003 Appeal number:
Date typed: 27th July 2003
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The IMMIGRATION ACTS

Before:

MS. D. K. GILL (CHAIRMAN)
MRS. M. L. ROE

Between:

The Secretary of State for the Home Department

Appellant

And

Respondent

DETERMINATION AND REASONS

Representation:

For the Secretary of State: Mr. A. Hutton, Senior Home Office Presenting Officer.
For the Respondent: Mr. J. Patel, of Counsel, instructed by Malik & Malik Solicitors.

1. The Secretary of State has appealed, with leave, against the determination of Dr. A E Thorndike, an Adjudicator, who (following a hearing on 20th February 2003 at Rotherham) allowed the appeal of Mrs. K (who we shall hereafter refer as the Claimant) on asylum and human rights grounds against the Secretary of State's decision of 15th October 2002 to give directions for her removal to Afghanistan as an illegal entrant.
2. The Claimant is a Sikh national of Afghanistan. The Secretary of State proposes to remove her to Afghanistan. Her niece and her son (who are both under the age of 10 years) and her widowed mother-in-law (who is in her late 60s) claim as her dependants.
3. The Claimant and her three dependants arrived in the United Kingdom together, on 5th September 2002. At the start of their journey from Afghanistan, they had been separated by their agent from the remaining three members of their family – namely, the Claimant's husband, her young daughter and her brother-in-law - because the agent was not able to arrange for all seven to travel together. The evidence before the Adjudicator was that the Claimant did not know where her husband or the others in his group were.

- 4.1 The basis of the Claimant's claim before the Adjudicator was that she and her family had suffered persecution in Kabul, where they had lived, on account of their Sikh religion. They had been persecuted by members of the Northern Alliance after the fall of the Taliban. In November 2001, her father-in-law was beaten by members of the Northern Alliance. He was told to convert to Islam. The same men went to their house in December 2001 to see if he and other male members of the family had converted. When they learnt that they had not done so, they bludgeoned the father-in-law and brother-in-law to death. The Claimant feared returning to Afghanistan because she still feared persecution on account of her religion / ethnic background. In addition, she would have to be a prostitute in order to support her dependants. This is the fate of women who have no male support.
- 4.2 The Adjudicator allowed the appeal on asylum and human rights grounds. He found the Claimant to be entirely credible. He stated that his "consuming concern" was that, as a woman without male support in Kabul, without a husband and a father-in-law, she would suffer persecution and treatment contrary to Article 3. He considered that her only real option would be prostitution. He noted the Human Rights Watch World Report and the Womankind Report in the Claimant's bundle. He noted that, in paragraph 4 of the UNHCR's note, the UNHCR had stated that "also deserving of particular attention are asylum applications of members of certain groups with protection vulnerabilities". He considered that the Claimant comes within the Refugee Convention "as a woman without male support". He considered that the prospect of her parents being in Afghanistan was only a possibility.
5. The grounds of application for leave to appeal to the Tribunal assert that:
- i) the Adjudicator had erred in finding that there was an applicable Refugee Convention reason. Furthermore, if he considered that she was a member of a particular social group, he erred in not giving sufficient reasons.
 - ii) the Adjudicator had erred by speculating as to what would happen on return to Kabul. He had not taken into account the fact that her parents were still in Kabul when she left, that the Sikh community is tight-knit in Kabul and that she would be able to seek assistance from her own community, if not her family.
 - iii) that the Adjudicator had erred in not considering the objective evidence fully. It is asserted that this shows that there are 40,000 widows in Kabul alone, that 36 % of the population in Afghanistan as a whole are widows and that the NGO (non-governmental organisation) community are beginning to recognise the needs of widows.
6. Permission to appeal to the Tribunal was granted because the Vice-President granting permission considered that the grounds were arguable.
- 7.1 At the commencement of the hearing before us, Mr. Patel informed us that he had not received any instructions as to the whereabouts of the Claimant's husband. Before the hearing got underway, Mr. Patel raised a separate issue.
- 7.2 Mr. Patel contended that there was no appeal before us, because the application for leave to appeal was lodged out-of-time. He had only become aware of this after his arrival at the hearing, when Mr. Hutton informed him that the Home Office received the Adjudicator's Determination on 11th March 2003. This means that the time limit

expired, according to Rule 18(2) and Rule 48(2)(a) of the 2000 Procedure Rules, on 25th March 2003. The application for leave to appeal was only faxed to the Tribunal on 26th March 2003. Mr. Patel submitted that the provisions of Rule 49 were not applicable because the Claimant had not suffered any prejudice by the late application for leave to appeal. He could not refer to any authority for the proposition that the grant of leave by the Vice President could be set aside by the Tribunal. He asked for the proceedings before us to be stayed, so that he could make an application to the High Court for the grant of leave to be quashed. He confirmed that the Claimant had not been prejudiced by the late application and that the Claimant, his instructing solicitors and he himself had proceeded to prepare themselves for the hearing on the assumption that there would be a full substantive hearing before Tribunal at the hearing. He only realised that there was an out-of-time issue after he had spoken to Mr. Hutton on his arrival at the hearing centre.

- 7.3 Decision on the out-of-time issue raised: Given that leave had already been granted, the Tribunal has jurisdiction to hear the substantive appeal. The Vice-President who granted leave had jurisdiction to extend the time for the lodging of the application for permission to appeal. There was no reason to suppose that he had not directed his mind to the fact that the application was one day late. However, in the event that he had not directed his mind to this issue, the time limit for lodging the application was extended at the hearing, for the following reasons:
- 7.4 The relevant Rule in this regard is Rule 16(2) of the 2003 Procedure Rules, given that the time limit was extended at the hearing at a time when the 2003 Procedure Rules were already in effect. The fact that the application was lodged only one day out of time does not, of itself, amount to a special circumstance within the meaning of Rule 16(2). However, it is a relevant factor. Furthermore, the Claimant and her advisers had proceeded on the assumption that leave had been validly granted at all times since they were notified of the grant of leave until just before the hearing got underway. If the situation had been reversed and it was the Secretary of State who was seeking to rely on the timeliness issue in similar circumstances, it is difficult to conceive that the time limit would not be extended, since otherwise the applicant would be deprived of a hearing which he or she had been led to believe that he/she was going to have. The same considerations apply when it is the Secretary of State who stood to lose out on a hearing which he (and indeed, the Claimant) was led to believe would take place. Mr. Patel confirmed that the Claimant had not suffered any prejudice by the late application. Whilst it is accepted that the provisions of the rules for curing defects do not apply, the fact that the Claimant had not suffered any prejudice was also a relevant factor in deciding whether the time limit should be extended.
8. We then proceeded to hear submissions from both parties on the substantive appeal.
9. Mr. Hutton relied on the grounds of application. The Adjudicator had to give any reasons for finding that there was an applicable Refugee Convention reason. Women returning to Afghanistan without male support are not a particular social group. There has been an improvement in the security situation in Kabul. He referred us to the October 2002 CPU report – paragraphs 6.76 and 6.78 and paragraphs 5.31 to 5.32. He also referred us to the CIPU report dated April 2003 – paragraphs 5.40 to 5.49. He submitted that, in the event that the Claimant did experience any problems on return to Kabul, there would be sufficiency of protection. The Adjudicator had speculated in considering that the Claimant would be forced to prostitute. This appeared to be based on page A96 of the Claimant's bundle. However, page A94 of the Claimant's bundle states that women are permitted to work outside the home.

The Adjudicator also speculated in considering whether her parents would still be in Kabul. There is simply no evidence about this. Paragraphs 6.36 to 6.39 of the CIPU report of April 2003 deal with the position of Sikhs in Afghanistan. The Claimant would be able to find work in the Sikh community. The general humanitarian condition in Kabul is dealt with paragraphs 6.160 to 6.164 of the CIPU Report dated April 2003. Mr. Hutton also relied on the Tribunal's Determination in Mohamed Arefi v. SSHD [2002] UKIAT 05683.

- 10.1 In reply, Mr. Patel carefully took us through the objective evidence. He asked us to bear in mind the fact that the Claimant would be returning to Afghanistan with her dependants, none of whom would be able to help her to support them. He also asked us to bear in mind that the Claimant and her family had experienced problems at the hands of the Northern Alliance since the fall of the Taliban – that is, they had experienced problems at the hands of the current regime in Kabul. The Adjudicator's finding that the Claimant would have to resort to prostitution was not speculative, because he had heard oral evidence from the Claimant as summarised at paragraph 18 of the Determination. This weighed heavily in the Adjudicator's mind, as paragraphs 24 and 25 of the Determination indicate. The Claimant had stated at paragraph 2 of her witness statement which was before the Adjudicator (page A17 of the appeal's bundle) that she did not know where any of her family are.
- 10.2 Mr. Patel asked us to note that the sources referred to in paragraphs 6.38 and 6.39 of the CIPU Report were hopelessly out of date and relate to the period when the Taliban were in control. Paragraph 6.42 refers to a report of June 2002 which indicates that as few as 1,000 Sikhs remained in the country. Half of this number were concentrated in Jalalabad, about 15 Sikh families were in Kandahar and a further 15 to 20 families in Helmand province. On simple mathematics, this means that possibly only about 200 individual Sikhs (as opposed to families) were in Kabul – which means that the Sikh community in Kabul is very small. In the grounds of application, it is asserted that there are 40,000 widows in Kabul. In Mr. Patel's submission, a large number of these women must be from the mainstream population - that is, the Pashto and Tajik population. These 40,000 widows are supported by the communities to which they belong. There are no figures which show the proportion of Sikhs in Kabul who are single women or widows. The Claimant would be returned to Kabul and not to Jalalabad, because the Interim Administration in Kabul has limited reach outside Kabul.
- 10.3 The Claimant had said in paragraph 5 of her statement at page R18 of the Claimant's bundle that she had never been to school. This would affect her prospects of employment in Kabul. The report which the Secretary of State seeks to rely on in asserting that the Sikh community is close-knit is out of date. Pages A62 and A63 of the Claimant's bundle shows that the Sikh community in Kabul is not financially strong and therefore would not be able to provide assistance to a Sikh family returning to Kabul.
- 10.4 Mr. Patel submitted that the only way the Claimant would be able to live safely in Kabul would be to wear a *burka*, or a headscarf, in order to blend with the Muslim population. Page A69 of the Claimant's bundle mentions two incidents of women getting into difficulties. Reference was made to pages A70 and A87. The quality of protection in Kabul is "suspect". The police are themselves committing human rights abuses. Mr. Patel referred us to the Women's section of the CIPU Report of April 2003. He also referred us to the UNHCR's recommendations in a paper dated July 2002 issued in April 2003 set out paragraph 6.94, which is that the categories of

women set out at paragraph 14.3 below should be considered to be at risk and exposed to possible persecution, if returned to Afghanistan.

- 10.5 In Mr. Patel's submission, the Claimant falls in both categories. All of this goes towards the Refugee Convention reason issue. The Claimant would have to move away from her ethnicity to blend with the Muslim population and secure protection. She would otherwise be transgressing social mores. In Mr. Patel's submission, the Claimant does belong to a particular social group – namely, a Sikh woman without male support in a predominantly Muslim population.
- 10.6 Mr. Patel referred us to the Danish Fact-Finding Report at pages E144 to E147 of the Claimant's bundle. This states (at page E147) that even the UNHCR had given up moving female staff from other areas to a better job in Kabul if they do not have relatives, with whom they could live and that it is not possible to be a female breadwinner for a family. This is relevant evidence with regard to the Claimant's prospects of employment in Kabul.
- 10.7 Mr. Patel submitted that the Arefi case does not assist in this particular appeal, because that case relates to a Muslim person.
- 10.8 In the event that we decided that the Claimant did not belong to a particular social group, then Mr. Patel submitted that the Claimant's return would be in breach of Articles 3 and 8. Mr. Patel accepted that, if we found that there would be no breach of Article 8, the judgement of the Court of Appeal in Ullah and Do [2002] EWCA Civ 1852 means that the Article 8 claim could not succeed, since this is based solely on the treatment the Claimant would face in Kabul. However, he asked us to record the fact that he had raised Article 8 before us.
11. We reserved our Determination.
12. We have decided to allow the Secretary of State's appeal. We now give our reasons.
13. Firstly, we decided that the Adjudicator's Determination is not sustainable, not least because he fell into speculation in considering that the Claimant would have to resort to prostitution in order to survive. Furthermore, he did not give sufficient reasons for finding that there was an applicable Refugee Convention reason. This is important, given that he allowed the appeal on asylum grounds. He did not consider whether the Claimant would be able to obtain sufficient protection, in the event that she did experience any problems "as a woman without male support".
- 14.1 In the remainder of this Determination, references to the CIPU Report are references to the report of April 2003.
- 14.2 Paragraphs 6.38 to 6.39 of the CIPU report show that Sikhs in Afghanistan did not, in general terms, experience persecution under Taliban rule. This is borne out by the Claimant's own experiences, since it is clear, from her accounts, that the problems of her family began with the fall of the Taliban. The Adjudicator found the Claimant credible. He accepted that the events of November 2001 and December 2001 had occurred and that her father-in-law and brother-in-law were bludgeoned to death. Whilst we have every sympathy for the Claimant, it has to be borne in mind that there were security problems after the fall of the Taliban. In October 2001, the USA and the United Kingdom launched air strikes Afghanistan. It was in November 2001 that the opposition forces marched into Kabul and other cities (see the chronology at the back of the CIPU Report, page 75). It is generally known that there was looting and

serious security concerns following the fall of the Taliban. Since then, the security situation in Kabul has improved greatly. On 22nd December 2001, the Interim Administration took office following the signing of the Bonn Agreement (paragraph 5.5 of the CIPU report). A Military Technical Agreement was signed by the Afghan Interim Administration on 4th January 2002 on the deployment of an International Security Assistance Force (ISAF) in Afghanistan. The ISAF reached its full operating capacity of 4,500 troops on 18th February 2002 (paragraph 4.59 of the CIPU report). In late April 2002, ISAF reported that the security situation in Kabul had improved significantly since their arrival. In late May 2002, further evidence of the improvement in the security situation in Kabul was provided when night time curfew was reduced, so that the curfew only ran from 2300 hours until 0400 in the morning (paragraph 5.42 of the CIPU Report). A Danish fact-finding mission to Kabul in May 2002 reported that the security situation in Kabul was generally good, although in certain areas (particularly districts 5, 6 and 7) civilian security was poor. The Director of the Danish Committee for Aid to Refugees did not believe that there was any ethnically motivated violence in Kabul. The Deputy Director of Police in Kabul stated that there were no security problems in Kabul; he attributed the crime rate to economic problems. In September 2002 during a Danish fact-finding mission to Afghanistan, most sources stated that the presence of the ISAF in Kabul had the effect of ensuring good security in the capital. According to the Co-operation Centre for Afghanistan, the situation in Kabul is generally good, as there is no harassment or political arrests (paragraph 5.43 of the CIPU report). This is also attributed (according to footnote 8c to paragraph 5.43) to the Danish fact-finding mission report on Afghanistan from 22nd September to 5th October 2002. We noted that the Secretary-General to the UN Security Council, in his report dated 11th July 2002 covering the period from 18th March 2002, reported that, in Kabul, the ISAF has continued to have a very positive impact on security in conjunction with the Afghan police and other domestic security forces (paragraph 5.45 of the CIPU report). We noted that, in a quarterly report on ISAF operations covering the period from 1st November 2002 to 10th February 2003, the Turkish commander General Zorlu reported that Kabul continued to enjoy vastly improved security during the reporting period. Crime rates remain low and a full sense of normality has returned. He described the atmosphere as calm and peaceful, with a thriving commercial and social life. The night curfew was lifted on 3rd November 2002 for the first time since 1979 (paragraph 5.49 of the CIPU report).

- 14.3 We have noted that paragraph 5.54 of the CIPU report quotes from an Amnesty International Report dated March 2003, in which Amnesty International states that members of the NSD (National Security Directorate) have committed human rights violations including arbitrary detention and torture. Amnesty International also reported a widespread perception that the police are responsible for perpetrating human rights abuses rather than preventing or addressing them. However, it is not clear whether, according to Amnesty International, these problems are said to occur in Kabul or outside Kabul. If they are said to occur in Kabul, then this is at odds with the other reports which are referred to in the preceding paragraph. It is also at odds with paragraph 5.53 of the CIPU report which quotes from the Danish fact-finding report of September/October 2002 and in which UNAMA is quoted as saying that NSD does carry out random arrests but could not be said to systematically violate human rights. For these reasons, we do not place much weight on what is attributed to Amnesty International in paragraph 5.54 of the CIPU Report.
- 14.4 In general terms, the picture we have of the security situation in Kabul is that it is good. We conclude on the evidence before us that there is, in general terms, sufficient protection in Kabul.

- 14.5 We were referred to pages A62 and A63 of the Claimant's bundle. However, in the main, this document relates to the problems of Sikhs in a place called Khost in Afghanistan. There is reference, on page A63, to the Sikh community leader in Kabul (Autar Singh) saying that "in terms of freedom" their lives were much better now and that they had good relations with the officials in Kabul. Although it is true that he is quoted as lamenting the lack of financial support for the Sikh community, as compared to other communities, there is nothing which suggests that Sikhs are a persecuted ethnic group in Kabul. Indeed, we note that, according to the last sentence of paragraph 6.42 of the CIPU report, four Hindu and Sikh delegates who attended the Loya Jirga in June 2002 reported that they were no longer repressed and felt free to practise their religions. Further, in September 2002, the UNHCR-Kabul and Co-operation Centre for Afghanistan confirmed that the situation for Hindus and Sikhs was generally good; there is religious tolerance of these groups and they have the right to practise their religions. The source for this information (according to footnote 8c to paragraph 6.43) is the Danish fact-finding report from September to October 2002. The Amnesty International Report dated 23rd June 2003 in the Claimant's bundle (which starts at page E17) refers (on page E25) to three Sikh asylum seekers who were forcibly returned by the United Kingdom and who were forced to seek shelter in a Sikh temple in Kabul as they had nowhere else to go. They reported that they were "singled out for abuse" in a market place in Kabul three days after their return. Whilst we have noted this, this does not amount to evidence of treatment which is sufficiently severe as to amount to persecution or treatment in breach of Article 3.
- 14.6 Although we agree with Mr. Patel that paragraphs 6.38 and 6.39 of the CIPU report are, in general terms, based on out-of-date sources, we have come to the conclusion, by considering the objective evidence relating to the current situation which is before us, that Sikhs are not a persecuted ethnic group in Kabul. We have concluded, on the evidence before us, that there is no real risk that the Claimant would face treatment amounting to persecution or in breach of her Article 3 rights, simply on account of being a Sikh.
- 14.7 We agree with Mr. Patel's submission that, if one does the mathematics, then the fourth and fifth sentences of paragraph 6.42 of the CIPU report indicate that the Sikh community in Kabul is now very small, numbering possibly about 200 in total.
- 14.8 It is generally accepted that the situation of women has improved in Afghanistan. Women and girls in Afghanistan have gained greater freedom to participate in public life and access to education, health care and employment. This is the case particularly in Kabul where ISAF has helped to bring much needed security. However, even in Kabul, women faced constant threats to their personal security from other civilians as well as from armed men belonging to various political factions (paragraph 6.88 of the CIPU report). We noted that this states that, whilst there were no reports of physical attacks in Kabul, there were reports of instances of *harassment* (our emphasis). The May 2002 Danish fact-finding report reported that women can now move around without fear of the Taliban religious police. However, generally, women continue to wear the *burka* for their own safety (paragraph 6.90 of the CIPU report). There are indications, according to paragraph 6.92 of the CIPU report which cites a Human Rights Watch Report of December 2002, that restrictions on women and girls are again increasing all over Afghanistan. In Kabul, a reconfigured Vice and Virtue Squad is now operating. A team of some 90 women under the Ministry of Religious Affairs has reportedly been *harassing* women for "un-Islamic behaviour", such as wearing makeup. Women have also been reportedly

harassed by unidentified men for discarding particular aspects of the Taliban-mandated dress code. This trend gives some cause for concern. However, there is no suggestion that the problems experienced by women as a result of the increasing restrictions amount to persecution or in breach of Article 3. Furthermore, we noted that the Norwegian Ambassador is reported in the Danish fact-finding mission report of September 2002/October 2002 as saying (page E145 of the Claimant's bundle) that this initiative should not simply be seen as an indication of suppression and control of women but rather as an attempt at guiding women in terms of dress standards, etc.

- 14.9 Our attention was drawn to the report at pages A87 to A89 of the Claimant's bundle. However, it is clear that the problems mentioned in the column entitled "Negative" from the third paragraph onwards on page A87 relate to areas outside Kabul, although we recognise that the second paragraph of the same column refers to security being poor even in *parts of* Kabul.
- 14.10 We have carefully considered the extracts of the Danish September 2002/October 2002 report, at pages E145 to E147 of the Claimant's bundle. Regrettably, we were only supplied with extracts of this report. It would have been helpful to see the whole report and, in particular, the conclusions of the mission on the evidence gathered. Various sources are quoted in the extracts at pages E145 to E147. For example, the Chief of the Afghan Women's Association (AWA) said (at page E145 of the Claimant's bundle) that no serious changes in the lives of women have taken place and that women are still being mistreated for not wearing a burka. On page E145, AWA are quoted as saying that there is no security for women at any level, that if women go to the bazaar without wearing a burka, they risk threats or – if nobody interferes – actual physical punishment. These assertions by AWA run counter to the objective evidence and what is known about the situation of women under Taliban rule. It is also at odds with the observation of the Norwegian Ambassador (on the same page) that he believed that he had noticed significant changes in the overall street picture in the last 6 months as regards the situation of women. Other sources are quoted as saying that the situation of women in Afghanistan has improved. If women are being attacked in Kabul in any systematic way as to amount to persecution, it is inconceivable that there would be no reference to this in the reports we have referred to in paragraph 14.8 above.
- 14.11 On the whole of the evidence before us, we have concluded that the Claimant is not at real risk of treatment amounting to persecution simply because she is a woman.
- 14.12 The Danish fact-finding report of September 2002/ October 2002 also refers to observations made to the mission about the situation of women without male relatives or without access to a network in their neighbourhood to protect them. On page E146, an international source is quoted as advising that women who have no male relatives for protection have serious problems, that it is necessary in the cities to have a network in the neighbourhood in order to get protection. However, we are not told who this source is. We have already stated, in paragraph 14.10 above, that we considered that the observations of AWA are at odds with the rest of the objective evidence. In the absence of any information as to the identity of the international source cited, the weight we are able to attach to their advice is necessarily limited. We have noted that the UNHCR, Kabul, stated that women are unable to move without male relatives. However, this appears to be within the context of UNHCR's efforts to move female staff from other areas to a better job in Kabul. This paragraph also states that it is not possible for women to be a female breadwinner for a family. We are not sure if this is attributed to the UNHCR. We assume it is.

14.13 Paragraph 6.94 of the CIPU report states that, in a paper dated July 2002 which was issued in April 2003, the UNHCR stated that the following categories of women should be considered to be at risk and exposed to possible persecution, if they return to Afghanistan:

- i. Single women without effective male and/or community support.
- ii. Women perceived to be or actually transgressing prevailing social mores.

14.14 This refers to the return of women to Afghanistan, whereas the Claimant will be returning to Kabul, where the situation, as shown by the objective evidence, is much better than the rest of Afghanistan. In any event, the UNHCR's advice falls short of saying that women who fall within either or both of these categories are at real risk of treatment which amounts to persecution. It is inconceivable that if they are at such risk, the UNHCR would not say so. We therefore conclude that the mere fact that a woman would be returning to Kabul without male and/or community support does not, *of itself*, mean that she faces a real risk of treatment amounting to persecution. We do consider, however, that UNHCR's advice should be seen as advice to consider each case individually, to which matter we now turn our attention.

14.15 With regard to category i, we note that the Claimant's husband's whereabouts are not known and therefore she would be returning to Kabul with her three dependants without any male relatives accompanying her back to Kabul. However, when she left Afghanistan, her parents were still in Kabul. Although she states that she does not know where they are now, there is simply no evidence that they have left Kabul. Although it has been asserted on the Claimant's behalf that, equally, there is no evidence that her parents are in Kabul, the burden is on the Claimant to prove her claim. Given that there is no evidence that they have left Kabul, it would be pure speculation to suppose that they have left Kabul. In any event, the Claimant is a member of the Sikh community in Kabul. It does not follow, simply because paragraphs 6.38 and 6.39 of the CIPU Report are based on out-of-date references, that the Sikh community in Kabul is no longer close-knit. Sikhs are in germ terms, a closely-knit community. There is no reason to suppose that, following the fall of the Taliban and the reduction in their numbers in Kabul, the ties in the Sikh community have broken down and the community fragmented. It is interesting to note that the three Sikh asylum seekers referred to in paragraph 14.5 above were not originally from Kabul; they were from Jalalabad. Although they were not formerly residents of Kabul, they were able to seek shelter in the Sikh temple in Kabul – which supports our conclusion that the Sikh community in Kabul, albeit diminished in numbers, is still a close-knit community. If returned to Kabul, there is no reason to suppose that the Claimant would not be able to obtain the support of the Sikh community there.

14.16 With regard to category ii., we are satisfied that there is no real risk that the Claimant would be perceived to be or actually transgressing prevailing social mores. In this connection, we noted that, during the Taliban regime, she was on one occasion only (in 1999) beaten on her way to the temple for wearing nail varnish. The lack of any other problems on account of transgressing social mores shows that she did not in general terms transgress social mores in the past and is not reasonably likely to do so in the future. It may well be that she may decide to wear a *burka*. In the event, however, that she faces problems as a result of not wearing a burka, we are satisfied that she would be able to obtain sufficient protection.

14.17 On the whole of the evidence before us, we have concluded that there is no real risk that, if the Claimant is returned to Kabul with her dependants, she would face

treatment which is sufficiently severe as to amount to persecution or in breach of her rights under Article 3 on account of being a Sikh female who would be returning to Kabul without make support, although we accept that she may well face discrimination falling short of persecution. Of course, guarantees cannot be given. But we make it clear that we have assessed the likelihood of risk on the low standard of a reasonable likelihood. In the event that she does experience problems, we are satisfied that she will be able to turn to the security forces in Kabul for sufficient protection. In the circumstances, it is not necessary for us to consider whether she is a member of a particular social group, for the purposes of the Refugee Convention. In any event, even if she is a member of a particular social group, she has not shown that she would receive treatment amounting to persecution *by reason of* her membership of the particular social group.

- 15.1 We now consider the Article 3 claim to the extent that is based solely on the conditions which the Claimant will face in Kabul on her return. We recognise that the general humanitarian condition in Kabul is still very poor, as compared, for example to standards in Western countries. However as the Tribunal stated in Arefi, this is not the test. Paragraphs 6.160 to 6.164 of the CIPU report state that the situation in Kabul has improved greatly. In June 2002, journalists reported on the general return to normal life within the city. A report in June 2002 has confirmed the availability of food and water in Kabul. However, we acknowledge that conditions are still very difficult. There are references to the water table running very low, to the absence of an urban sanitation system and the absence of sewage treatment. There is reference to a local water crisis in September 2002 (paragraph 6.161). Accommodation is available in Kabul although housing is increasingly limited as more families arrive. Aid officials in Kabul have raised concerns about the huge influx of returning refugees which have placed strains on the city's housing and infrastructure. Although we note that reconstruction is under way in Kabul and that over 30 aid agencies are currently working within Afghanistan on shelter and housing projects, we note also that it is said that thousands get by in tents inside commercial containers with holes cut for windows and that, mostly, people get by through extended family networks.
- 15.2 The Adjudicator considered that the Claimant's only option would be to turn to prostitution. This may or may not have been based on page A96 of the Claimant's bundle, which refers to girl children of widows being more likely to be found working in informal sector undertakings, and being more vulnerable to prostitution. Reference is made in the grounds of application for permission to appeal to the situation of widows. The parties before us also made submissions on the position of widows. The Claimant is not a widow, although it is true that one of her dependants is a widow. Although we have no reason to doubt that employment opportunities are, in general terms, limited (see for example, the first bullet point under the heading "negative" on page A94 of the Claimant's bundle), there is evidence that there are jobs for women (see the section under the heading "positive" on page A94 of the Claimant's bundle). Paragraph 6.101 of the CIPU report also refers to hundreds of women working as civil servants and professionals in hospitals, courts, government and non-governmental institutions, the United Nations and the private sector. We recognise that the Claimant is not educated. This will make it even more difficult for her to obtain employment. We do not underestimate the difficulties she will face but we do not accept that her only option would be to turn to prostitution. She would be able to turn to the aid agencies in Kabul, although we recognise that their resources are stretched. She would also be able to turn to her own Sikh community for help. Nevertheless, we recognise that life will be very difficult for her. We bear in mind that she has three dependants. It may well be that she and her dependants may face

poverty. We bear in mind also that the Claimant had witnessed her father-in-law and brother-in-law being murdered.

15.3 However, on the whole of the evidence before us, we are of the clear opinion that the conditions the Claimant would face would not be of such severity as to reach the threshold for a breach of Article 3. The Article 3 threshold is a high one. Any case such as this must be judged in the light of the decision of the European Court of Human Rights (ECtHr) in Bensaid v. The United Kingdom [2002] INLR 325. In that case, the ECtHr said (paragraph 40 of the judgement):

40. *The Court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standard of Article 3. It does not disclose the exceptional circumstances of the D. case (cited above) where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts.*

15.4 Of course, in the appeal before us, the Claimant does not rely on any medical condition. However, the principle in Bensaid is also applicable in this case.

16. We are also satisfied that the severity threshold for treatment to amount to persecution or in breach of Article 3 is not reached even if any discriminatory problems which the Claimant might experience (paragraph 14.17 above) are taken cumulatively with the general conditions which she and her dependants would face in Kabul.

17. The effect of the judgement of the Court of Appeal in Ullah and Do [2002] EWCA Civ 1852 is that, given that the Claimant's claim under Article 3 has not been established, any claim under Article 8 must also fail, because this is based solely on the situation which the Claimant would face in Kabul. However, Mr. Patel asked to record the fact that he had raised Article 8 at the hearing before us. We also record the fact that the Article 8 claim was not mentioned at any stage until the hearing before us. It was not mentioned in the S. 74 Notice, nor in the grounds of appeal attached to the Notice of appeal to the Adjudicator. The Adjudicator's Record of Proceedings makes no mention of Article 8 having been raised before him. The Skeleton Argument before the Adjudicator makes no mention of Article 8.

18. For all of these reasons, the appeal of the Secretary of State is allowed.

Decision

The appeal of the Secretary of State is ALLOWED.

Ms. D. K. GILL
Vice President

Date: 8th August 2003