Asylum and Immigration Tribunal

NM (Christian Converts) Afghanistan CG [2009] UKAIT 00045

THE IMMIGRATION ACTS

Heard at Field House
On 5 December 2008

Before

SENIOR IMMIGRATION JUDGE WAUMSLEY
SENIOR IMMIGRATION JUDGE NICHOLS
MRS W JORDAN

Between

NM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(1) *An Afghan claimant who can demonstrate that he has genuinely converted to Christianity from Islam is likely to be able to show that he is at real risk of serious ill-treatment amounting to persecution or a breach of his Article 3 ECHR right on return to Afghanistan.*

(2) *This decision replaces AR (Christians - risk in Kabul) Afghanistan [2005] UKAIT 00035 only in so far as it deals with Muslims who have converted to Christianity.*

Representation:

For the Appellant: Mr C Jacobs, Counsel, instructed by Howe & Co, Solicitors
For the Respondent: Mr J Gulvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan. On 14 March 2007 his application for asylum was refused by the respondent. His appeal against that decision was heard by Immigration Judge Ross on 11 May 2007 and he dismissed the appeal on both asylum and human rights grounds. The Immigration Judge set out the appellant's immigration history at paragraphs 1-5 of his determination:

> "1. The appellant is a national of Afghanistan, who was born on 1 January 1960. He first arrived in the United Kingdom on 7 February 2000 on board an aeroplane which had been hijacked the previous day. His claim for asylum was refused on 26 February 2000, and subsequently dismissed by an adjudicator on 13 September 2000, and by the Tribunal on 13 February 2003. At that stage the appellant was claiming asylum on the basis that he feared reprisals from a group within Afghanistan connected with the Taliban.
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> 2. On 30 June 2005 those representing the appellant wrote to the respondent seeking asylum, and claiming that to return the appellant to Afghanistan would breach his human rights. On 10 March 2006 the respondent decided that the letter would be treated as a fresh claim since it raised new issues. In the letter his solicitors indicated that the appellant had converted to the Christian faith, and in support statements were tendered from Christian friends of the appellant in the United Kingdom.
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> 3. The appellant was interviewed on 1 February 2007, and asked a number of questions about his new faith. Since it is accepted by the respondent for the purposes of this appeal, that the appellant has indeed converted to the Christian faith, I shall not deal with the questions and answers in any detail. He did indicate however in the interview that he had been threatened by two fellow Afghanis. These men were living in the same house as him, and threatened him because he had changed his religion. They were both deported back to Afghanistan. He said that he did not report these men because he was scared of them. He said that he attempted to convert other people to Christianity. He also said that he told other Muslims that he was a Christian, and that this would put him in considerable danger in Afghanistan.
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> 4. His application was refused on 14 March 2007 on the basis that although it was accepted that he was a Christian, there was no objective evidence that he would be executed for apostasy, or that he would be of adverse interest to either the authorities or the wider Afghan public. Consideration was also given to his claim under Article 8, on the basis that he suffered from low back pay [sic pain], but this was also rejected.
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> 5. The appellant appealed against the decision of 13 April 2007, on the basis that if he was returned he would face persecution, and possibly the death penalty."

2. Mr Jacobs helpfully set out in his skeleton the evidence the Immigration Judge accepted as credible. No challenge is raised to his findings in respect of the appellant's claim. The established facts therefore are as follows:

(i) that a number of fellow Afghan asylum seekers who lived in the appellant's house became aware that the appellant was attending church and Christian meetings;

(ii) that the appellant was threatened by a number of Afghan men, in particular YM and NJK. These men live in the same part of Afghanistan as the appellant and know him well.

(iii) YM and NJK threatened to kill the appellant and force him to stop attending Christian meetings.

(iv) YM and NJK spread rumours concerning the appellant throughout the Afghan community.

(v) The appellant is easily recognisable as he walks with a prominent stoop.

(vi) As a result of the threats the appellant ceased attending the group due to safety fears.

(vii) The appellant resumed attending church bible study meetings and services after May 2004 through the assistance of Dr and Mrs Freeman.

(viii) YM and NJK returned to Afghanistan. Prior to their departure they told the appellant that he would be killed if he returned to Afghanistan because of the appellant's conversion to Christianity.

(ix) The appellant continued to receive threats at his hostel accommodation and on 25 June 2005 fellow residents who are Muslims reacted angrily to Dr and Mrs Freeman's son attempting to collect the appellant to take him to a meeting. The residents identified the car of Dr Freeman, which was parked three streets away from the appellant's hostel.

(x) The appellant has continued to practise Christianity in the United Kingdom. Local Muslims spit at him in the street.

(xi) The appellant has been told by Muslims in his local area that although they cannot harm him in the United Kingdom, he would be killed by "people that they know" in the event of return to Afghanistan.

(xii) The appellant was baptised on 8 October 2005. He regularly attends Hounslow West Evangelical Church.

(xiii) The appellant has no family network in Afghanistan.

(xiv) Contact with the appellant's son ceased after his son was told of his conversion.

(xv) The appellant has no contact with his daughter. As a woman the appellant's daughter could not be expected to protect the appellant in Afghanistan.

3. The Immigration Judge accepted, as had the respondent, that the appellant had converted to Christianity and he also accepted that he would be "viewed with disdain" by Muslims in his own country and that they may be hostile to him. However he concluded there was no evidence that he would be at real risk of serious harm or persecution. He found there was no evidence that the authorities persecuted Christians by prosecuting them, although strict Muslim law does proscribe apostasy. He found that there was no evidence apart from what he described as the 'unusual case of Abdul Rahman,' that Christians are in danger from the Afghan authorities. The Immigration Judge was referred to the Tribunal's country guidance decision in AR (Christians – risk in Kabul) Afghanistan [2005] UKIAT 00035. In that decision the Tribunal concluded that on the objective evidence before it, which it carefully analysed, that it had not been shown that Christians, including Muslims who had converted to Christianity, were at real risk of persecution or Article 3 ill-treatment in Kabul. The objective evidence before the Tribunal at that time showed there was an absence of anecdotal evidence about the problems faced by apostates. It concluded on the objective evidence and expert evidence before it that the evidence of risk did not reach the low standard of a reasonable likelihood nor the severity threshold for persecution or Article 3 ill-treatment.

4. The Immigration Judge in this appeal reached essentially the same finding. In addition, he concluded that the risk that the appellant claimed to face from the two men who had threatened him in the United Kingdom was fanciful bearing in mind that the population in Afghanistan was over 31 million and that the appellant could minimise the risk by avoiding the area from where the men came.

5. The appellant applied for and was granted an order for reconsideration of the Immigration Judge's decision. On 18 January 2008 the Tribunal concluded that the Immigration Judge had materially erred in law in reaching his findings. In relation to his finding as to the lack of evidence of the persecution of Christians by the Afghan authorities and in particular Muslims who had converted, the Senior Immigration Judge concluded as follows:

> "I agree with Counsel that the IJ failed to take account of the material evidence that was before him both in the appellant's reading schedule and in the submissions made by the appellant's Counsel which the IJ recorded at paragraph 11. According to the grounds the IJ was referred to paragraph 19.42 of the Country of Origin Information Reports (COIR) for April 2007 which refers to the UN Secretary General reporting that there had been three similar cases to that of Abdul Rahman in which Afghan citizen [sic] were accused of apostasy by local religious leaders and were forced to leave the country.

I also agree with Counsel that in assessing the risk to the appellant, the IJ focused on the risk to Christians rather than converts. The IJ also failed to consider that because the two men had been deported to Afghanistan, the appellant's conversion is now known in Afghanistan.

We know from paragraph 3.13.7 OGN, which is cited by SIJ Jordan in his order for reconsideration that where the appellant's fear is either at the hands of the state or of societal or non-state persecution, sufficiency of protection should not be considered to be available for apostates in Afghanistan.

Therefore the issues in this case are:

1. Is there objective material to support the appellant's claim that because of his conversion to Christianity he faces a real risk of persecution either from the two men who have been deported to Afghanistan or from society generally; and

2. whether the appellant can relocate within Afghanistan in order to avoid persecution."

Documentary Evidence before the Tribunal

6. The Tribunal has set out the documentary evidence before it in the appendix to this determination.

Witness Evidence before the Tribunal

The Report of Dr Antonio Giustozzi

7. We set out first in summary the contents of Dr Giustozzi's report to the Tribunal followed by his oral evidence, again in summary. It is accepted in this case that Dr Giustozzi is qualified to give the Tribunal an expert opinion on the issues in this appeal. No challenge was raised to this by Mr Gulvin. The Tribunal was referred to its comments as to the expertise of Dr Giustozzi in the country guidance decision of PM and Others (Kabul – Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089. It is not necessary for the Tribunal to repeat the comments made in that decision however we adopt the same in terms of our approach to Dr Giustozzi's evidence. This does not mean that we accept without question everything he has told the Tribunal; we approach his evidence on the basis that he is an expert; his evidence does warrant significant weight however the Tribunal clearly has a duty to undertake a critical analysis of Dr Giustozzi's opinion which can only be done in a context of the evidence as a whole.

8. We do not therefore repeat Dr Giustozzi's qualifications and experience, which we note from paragraph 1 of his report, save to say that he is currently a Research Fellow at London School of Economics and Political Science.

9. In his report Dr Giustozzi said the appellant would not be able to practise his Christian faith openly if he returned to Afghanistan. He states that the small community of Afghan converts to Christianity practises exclusively underground. The appellant would not be able to proselytise as he would then expose himself to a much greater risk of detection. The appellant could avoid detection by maintaining a low profile and avoiding discussing his beliefs however he would have to outwardly behave as a Muslim, i.e. fast during Ramadan at least. The appellant would have to identify an underground Christian network in order to practise Christianity. Dr Giustozzi said that although such networks are alleged to exist, seeking one out would entail a degree of risk of detection. The chance of finding such a network outside of Kabul would be negligible. He is of the opinion that even if the appellant chose to worship underground there would always be the risk of detection sooner or later. This would arise from two sources: the judiciary and extremist Islamic groups.

10. Dr Giustozzi dealt with judicial and government attitudes towards converts. The Afghan constitution does recognise the rights of non-Muslims to practise their faith but does not recognise the right of Afghans to abandon Islam. Conversion to another religion or simply renouncing Islam is considered to be apostasy and is not allowed.

11. Dr Giustozzi refers to the statements of Supreme Court Chief Justice Shinwari to the effect that he wished Sharia Law to remain the basis of the Afghan justice system and that he would continue to enforce it. The Tribunal notes that this evidence was considered by the Tribunal in AR. Dr Giustozzi states that the Supreme Court repeated the claim that whatever Afghanistan's law codes might say, Sharia Law overrules them. The Supreme Court advocates harsh sentences, including the death penalty for crimes such as blasphemy and apostasy. The official position of the Afghan cabinet however is that the Constitution is the supreme law of the country but that is silent on the issue of apostasy. Article 1(30) of the Constitution states that Hanafi (i.e. shariat) jurisprudence applies wherever the law is silent. Dr Giustozzi opines therefore that the Chief Justice was right when he said that he invokes the supreme punishment for apostasy and that the possibility of a death sentence being passed on someone in those circumstances is strong:

> "Although it is not clear whether it would effectively be implemented."

12. Dr Giustozzi then deals with the case of Abdul Rahman who was a returnee from Germany and who was accused by his own family of having converted to Christianity. President Karzai had to use a ruse following heavy pressure from Germany and the US to prevent Abdul Rahman being tried according to the shariat. President Karzai eventually obtained the release of Abdul Rahman from protective custody under a technicality and Mr Rahman had to be transferred abroad immediately before a new arrest warrant could be issued or he was harmed by Islamic radicals. He was subsequently offered asylum in Italy. President Karzai came under significant criticism in the country for having taken this action. This included street demonstrations demanding Mr Rahman's return to Afghanistan for trial and the criticism of fellow Afghan MPs. Dr Giustozzi says that if an Afghan

convert to Christianity was to be sentenced in Afghanistan President Karzai was now widely expected not to countersign a death sentence and instead to convert it to a prison sentence.

13. Dr Giustozzi states that the Afghan government does not have an active policy of seeking and identifying apostates however neither does it interfere when individuals are executed by their own family or community because of apostasy. He cites two cases of March 2006 where local authorities allegedly arrested two individuals accused of being Christian converts, but nothing more is known of what happened to them. In February of the same year the houses of alleged apostates were raided by the police in various locations although no further evidence is given as to what happened. During the summer of 2007 another Christian convert was arrested in Afghanistan but was then released by the Attorney General because of political considerations. He cites another case of an Afghan Bahá'í arrested on 9 April 2007 by the police. This man was born a Bahá'í and therefore not a convert but was still arrested because of a ruling of the Supreme Court in May 2007 on the status of the Bahá'í faith, declaring it to be distinct from Islam and a form of blasphemy. Again this man was released after one month because of pressure from the international community but he had to flee to another country with other family members. The man's Muslim wife is seeking a divorce from him on the grounds that their marriage is not legal in Afghanistan.

14. Dr Giustozzi confirms that the number of cases of conversions brought to the judiciary is few and the number of converts is low but he considers that many have fled the country of their own initiative. Those who do remain must be aware of an extremely hostile climate and must do all they can to avoid detection. He states that it is out of the question that any Afghan converts to Christianity would be able to practise their religion openly without risk in the foreseeable future. He says there is a strong presence within the army, the police and the National Security Directorate of Islamist organisations. Such persons are not likely to show much sympathy for Christian converts and the appellant could not rely on police protection. Dr Giustozzi is of the opinion that there is a serious problem of arbitrary arrest and detention in the country. Access to legal Counsel and the use of warrants and bail are inconsistently applied. Lengthy pre-trial detention remains common as does detention even after an individual is found innocent. Bribery is also widely reported.

15. Dr Giustozzi deals with the threat from extremist Islamic movements and individuals and states that from 2003 there have been a number of cases of attacks on individuals accused of being converts to Christianity, mostly by Taliban guerrillas. The US State Department Religious Freedom Report of 2005 reports the killing of at least five converts that was reported in the press. The Taliban had also claimed that two NGO workers were killed by them in 2003 and that they were involved in proselytising. He was unable to say whether these cases involved genuine conversions but in his view the fact that the Taliban publicised the executions showed that they hoped to gain support among the population by showing their contempt for converts. He was of the view that it was possible that other murders of

apostates had taken place in remote parts of the country, without being reported in Kabul.

16. Dr Giustozzi states that the population's hostility towards converts runs very high and extends well beyond the Islamic fundamentalist circles. Afghan Christians are reported to live in fear of attacks by extremists, even outside the areas of influence of Taliban insurgents. This hostility has been worsening over the summer of 2006 as a result of growing xenophobia among the Afghan population in the wake of an attempt by a South Korean evangelical Christian group to celebrate a "peace festival" in Afghanistan. The Afghan government was forced to deport hundreds of South Koreans following protests and threats.

17. Dr Giustozzi describes one personal example of hostility towards converts when he was staying in Kunduz as a Political Affairs Officer for UNAMA. In early 2004 he received complaints by locals about the activities of two South Korean Christian NGOs, who were accused of trying to convert Afghans to Christianity by distributing religious material. He was warned that some action might be taken and warned the two NGOs and their staff, although he left Kunduz shortly afterwards so was not able to follow up the outcome of this incident.

18. He also describes the incident in July 2007 when a group of 23 South Korean missionaries arrived in Afghanistan. An official from Kandahar Airport informed a Taliban commander of their presence and they were captured on the highway in Ghanzi Province. He opines that news of the appellant's conversion is very likely spreading from the Afghan diaspora in the UK to Afghanistan, given the evidence that at least two returnees are aware of his conversion. When the appellant returns he would have to urgently look for a job and accommodation, both of which would prevent him from hiding in order to avoid detection. He would be asked for references and information about his place of origin and his family background. If he failed to provide those details that would hamper his chances of finding a job or a place to live and Dr Giustozzi states that employers and landlords are able to check information through networks of acquaintances and regularly do so. His background would eventually be checked and his whereabouts would therefore be known and he would be exposed to the risk of targeting by Muslim zealots and possibly the Afghan security agencies too.

19. Dr Giustozzi was unable to say whether there was any real risk that the appellant's family might report him to the judiciary. However the fact that his son no longer has any contact with him suggests that denouncing his father to the police could be an option. This is what had happened in the Abdul Rahman case who was reported to the police by his own family and the Bahá'í had also been denounced by his own wife.

20. He states that the Afghan judiciary remains dominated by ultra conservatives. It could not be taken for granted the appellant would be given a fair trial. The State Attorney still has the right to send individuals for trial by the Special Security Court

and in those cases no Counsel is available and the trial is held in secret. He cites a further example of a journalist, Syed Perwiz Kambakhsh who was accused of blasphemy and was sentenced to death in Mazar-I Sharif in January 2008 by the Special Security Court in a secret trial where he had no access to Counsel. President Karzai has refused to intervene in the case despite appeals by multiple sources in Afghanistan and abroad. His crime was to distribute copies of an article commenting on verses of the Koran about women.

The Oral Testimony of Dr Giustozzi

21. Dr Giustozzi adopted his report. He told us details of the persons with whom he has contact in Afghanistan. He repeated his evidence that no Afghan Christian would be able to practise their faith openly in Afghanistan. He told us there were no official churches; that the only church in the country was at the Italian Embassy where Afghans were not allowed to practise. A convert would only be able to practise his faith underground, however if that was known to the public it would be highly problematic.

22. In relation to underground networks of Christians, Dr Giustozzi said that it was widely assumed that such organisations existed. They were probably more common in Kabul than anywhere else; however he had not been able to detect any such network. He had only come across one single Afghan convert to Christianity who had not provided any other information about other converts or networks.

23. He thought the appellant would have to meet and worship secretly because there were no churches although it would be possible for houses to be used for meetings. However, he would have to be careful about proselytising and about revealing his beliefs to his friends and relatives or anybody. Even if he worshiped underground there was definitely a risk if either the appellant or the network he was with tried to proselytise. Dr Giustozzi was aware that the appellant's son knew that he had converted and he thought that the best chance for the appellant to live in Kabul undetected would be if a sympathiser hosted him and protected him by giving him accommodation and food. However he would still not be able to openly practise his faith but in those circumstances he did not think he would be detected unless the network itself was detected for some reason. Dr Giustozzi did not think the appellant faced a high risk of being recognised because of his pronounced stoop: he was not originally from Kabul; it was a large city with a population of five million. If the appellant was able to live in a neighbourhood away from where he originally lived and he had been away for a while the chances of him being recognised were not very high. The appellant would however have to look for accommodation and employment and Dr Giustozzi did not know if he could easily find work. Accommodation is expensive. There is an issue as to how he would cope financially. Even assuming he could work the problem would be that if he found a job the chances of him being detected would be that much higher. People would ask for references and he would have to contact people who used to know him such as employees, friends and landlords and the information that he was present in

Afghanistan would start to spread. Dr Giustozzi was of the opinion that the appellant was not likely to meet someone he knew from his home area in Kabul because it is such a large city or at the very least he was certainly not going to bump into someone that he knew everyday but clearly the more often he went out into the community the greater that risk would be. He would essentially have to live in hiding.

24. He said that the Afghan people were quite conservative and strongly religious and most favourable to the application of Islamic law. He explained about Article 1(30) of the Constitution to which we referred earlier. He said there was some debate in Afghanistan about the likely constitutional protection from the death penalty for apostasy. The judiciary are of the view that Islamic law applies however some lawyers train abroad and have rejected this interpretation. However the interpretation so far has been in the direction of allowing the application of Islamic law in these cases. He said the Rahman case is unique insofar as it is the only one which has been brought to public attention. He said there were other cases: he could personally only identify three others but they had been dealt with discreetly by the authorities. In two of the cases he was not sure what happened to the converts who had been arrested by the police. In the third case the Attorney General decided not to prosecute for political reasons. It was unique that that case was publicly discussed. It was rare for criminal cases in Afghanistan to be discussed in public. There was a tendency to try people charged with this type of offence in special courts because they were believed to be less corrupt and it was faster and more controllable by the government. He said there were very few converts to Christianity in Afghanistan and that they mostly lived in the cities. There were only a few living in the villages and Dr Giustozzi did not think there were a lot of cases where converts had been discovered there. He said that increasingly criminal cases were not in any event referred to the courts: people went to clerics who applied a very conservative interpretation of Islamic law. He did not know of any such cases personally. He said he was only able to comment that there had been reports of killings of converts and individuals accused of proselytising by the Taliban. The Taliban had recently made these claims. The case of the NGO worker Gail Williams was one in point: she and her organisation had been accused of trying to proselytise among the Afghans. The kidnapping of the 23 South Korean NGO workers in Southern Afghanistan, was justified on the basis that they were involved in proselytising and two of those people were executed.

25. Dr Giustozzi said that if it became known that a man had converted to Christianity in Afghanistan it was likely to spread widely. What would happen to that individual would depend on where he was and how far he was from his original community but it would at least be reported to the police. He repeated his evidence that he did not think the President would want to attract adverse publicity particularly when there were elections in 2009. Since the case of Rahman and the fact that he was allowed out of the country, public opinion had become more conservative. He thought the President would be thinking of his chances of being re-elected if he prevented the judiciary from applying strict Islamic law: however he remained under

pressure from foreign governments. He thought it would be very difficult for the President to help in the future, however, if a convert came into the public domain in Afghanistan he thought foreign governments might still be proactive but he did not think the President would intervene. In the last few months he had made a number of statements to show hostility to excessive foreign influence in the country. He thought it likely the President would try to prevent such cases from coming into the public domain. He was not sure if he had intervened in the three cases that he knew about after the case of Rahman.

Cross-Examination

26. Dr Giustozzi stated that he was not aware of any cases in the last five to ten years of the death penalty being carried out in relation to an apostate. There were allegations that there had been executions carried out in the villages. This would have been through customary law i.e. from the local population going to mullahs for the application of Islamic law or in some parts of the country they would use Taliban courts. He obtained this information from the US State Department Report covering human rights in Afghanistan. Essentially the evidence was that when such executions were carried out the government did not intervene. He thought it was not likely the government would know about such cases because much of the country was very remote particularly in the mountainous regions. Anything could happen in these areas: it was not likely to be reported as there was nobody there largely to report the facts. He personally received a lot of information about incidents of executions or disappearances which was very difficult to verify. He thought this was the likely basis of the information in the US State Department Report. He could not speculate on what had happened to the person who had been arrested for apostasy that he had mentioned in his report i.e. in addition to Rahman and thought he had probably been released under pressure from the government trying to avoid the case reaching the courts but that was speculative on his part. In relation to the raids on houses of suspected apostates, Dr Giustozzi said that his understanding was that houses were searched for evidence but he was not aware of any arrests. He said the Christian convert who had been arrested in the summer of 2007 had been released because of political considerations and he understood this to be in Kabul but was not completely certain. This was what a political officer had told him at the time. After he had written his report the Attorney General resigned from his job and announced that he was a candidate in the general elections. This led Dr Giustozzi to think that there might have been political considerations in the release of this man because the Attorney General wanted to retain the support of the Western embassies. He described how the President would have to play a game of brinkmanship in balancing public opinion against the need not to compromise the support of the American Embassy.

27. Dr Giustozzi agreed that his opinion that suspected apostates would not be handed over to the Afghan authorities now but would be executed outright was speculative but there was a general trend not to go to the judiciary, mainly because of corruption and because they were seen as not serving the population he accepted however, that

was his opinion. He thought that the numbers of Christians living in Afghanistan must be in the low thousands but it was not possible for him to be accurate. He was referred to an article published in the Sunday Telegraph dated March 26 2006 concerning the Rahman case in which the author had spoken to a Christian convert in Kabul. The report stated that up to 10,000 Afghans had secretly converted to Christianity in recent years. Dr Giustozzi said that the report also indicated that a substantial number had left the country or converted abroad. The interviewee had mentioned that there were churches in Kabul; however Dr Giustozzi said there were no official churches. What would happen is that these individuals would find a place or perhaps a private house and call it a church but it would not be recognisable as a church, it was just a place to meet.

28. Dr Giustozzi said his evidence as to the need for landlords to obtain references whenever anybody wanted to rent accommodation was based on his own experience in Afghanistan. He had been asked for references. He said it was all down to the need to protect the landlords' interests because there were many cases of illegal occupation of flats in Kabul that were still to be sorted out. He conceded however that the biggest risk to a convert would be actual proselytising and that could apply not just to the individual but to anyone connected to him and the whole network of Christians could be uncovered. He agreed that there were very few examples of individuals proselytising in Kabul or Afghanistan as a whole. He said many of these conversions took place not on Afghan soil. In most cases the whole family would convert to Christianity because it was much easier to live in that way.

29. Dr Giustozzi told the Tribunal that the first Christian conversions began in the 1960s when Afghanistan started to open up. Before that there were no Christians in Afghanistan. Any native Christian now would be the son or daughter of someone who had converted at that time. He accepted there could be some innate Christians but the majority would be converts. He was also of the opinion that not only would a convert have to avoid detection by fasting during Ramadan ,he would also have to ignore the Christian festivals and celebrations; he would have to work on Christmas Day and would of course have to abstain from any proselytising. He repeated his evidence that he did not personally know of any executions on the grounds of apostasy although he did know of some as the result of adultery or homicide. He clarified that even if the appellant did not attend the local mosque that would not necessarily single him out as many people did not attend the mosque to worship. Dr Giustozzi also said that he believed that most of the people who would have converted to Christianity in the 1960s and 1970s would have left the country. He confirmed that there were definitely no open apostates in Afghanistan.

30. Dr Giustozzi confirmed that he also continued to rely on what is recorded at paragraph 134 of the Tribunal's decision in PM and Others as to the nature of Afghanistan society. It is helpful if we set it out as follows:

> "134. The risk, according to Dr Giustozzi, would arise after a period following their return. He argues that it is in the nature of Afghanistan society that relationships are based on trust and that for the appellants to obtain work or accommodation

> they would need to reveal something about themselves to their prospective employer or landlord. He said that would give rise to checks being made into their background. He said that is easier now, with the advent of mobile phones and other communications, and that their pasts would become apparent. It would not thereafter take long for the people and therefore the authorities to hear about them. Not only would the authorities hear about them, through their sources, but it could be assumed that after a relatively short number of weeks or months they would have re-established themselves and become part of informal networks of family and friends. Dr Giustozzi said that the security forces may well then think that they are worth interrogating, because of knowledge they may pick up from those family or friends."

Submissions

Submissions on behalf of the Respondent

31. Mr Gulvin began by reminding the Tribunal that the appellant had arrived in the United Kingdom as a passenger on the infamous hijacked plane and he had claimed asylum because he had a fear of the Taliban. It was clear from the evidence that the Tribunal cited in the decision dismissing his appeal, (which is not contested by the appellant) that he worked in a hotel for fifteen years in Kabul. He submitted that this fact would be relevant to any issue of internal relocation. It was now about fourteen years since the appellant had lived there. In fact when he took the hijacked plane he was on a visit to Kabul from his home village. The appellant has a stoop which is thought to be of some significance because it marks him out; however it had to be remembered that he had been afflicted with this for a number of years and yet he had worked at times in Kabul. The appellant also claimed to be aged around 60.

32. Mr Gulvin conceded that the appellant had developed an interest in the Christian religion whilst he was in the United Kingdom and it was accepted by the Secretary of State and the Immigration Judge that he had converted. If the appellant went back to Afghanistan he would have to go to a place where to be openly Christian is not possible. However it was clear from the objective evidence and confirmed by Dr Giustozzi that there are Christians in Afghanistan possibly numbering in the thousands. They have to operate underground but there is nevertheless Christianity in Afghanistan. Mr Gulvin accepted that the appellant could not be expected to act in a particular way which would adversely affect his very being i.e. if he had to worship underground, keep to himself and live his life, faith and undertake worship privately however the essential question here was how the appellant would in fact behave. His activities in the United Kingdom would need to be considered. It was clear from the letter from Dr and Mrs Freeman that had been taken into account by the Immigration Judge that the appellant was a man who takes Christianity seriously and he had made it his business to spread Christianity to other Afghans in the UK. He submitted that paragraph 2 of their letter gave an indication of how the appellant might behave. In the letter Dr and Mrs Freeman say as follows:

> "2. [M] continues to experience hostility from Muslims who take exception to his Christian faith. During festivals such as Ramadan he has experienced difficulty in visiting our home and has had to walk a long way around to avoid being seen by those attending the mosque, as he was himself was not attending. He is conscious that there are people who want to cause him trouble and so tries to 'keep his head down' wherever possible. He used to be concerned about people looking through the open church door and recognising him, for example, but now he says that Jesus helps him feel strong."

Mr Gulvin submitted that this was exactly what the appellant would do in Afghanistan: he would keep his head down and avoid trouble. It was open to him to live in Kabul because he had lived there for a period of time; he had not heard from his family and does not keep in contact with them and there was no need for him to go back to his home area. Five million people lived in Kabul. The appellant was capable of employment as he had clearly done different jobs in the past. Generally it was recognised that Kabul was a place where internal relocation was possible. It is not disputed that conditions in Kabul would not violate the appellant's Article 3 rights.

33. He submitted that there would be no real risk from the two people who had gone back to Kabul who knew about his conversion. The appellant's fears in relation to them were speculative.

34. Mr Gulvin submitted that on the facts of this particular case it was the respondent's position that the appellant could return and practise his Christian faith because it was likely that he would keep his head down. It was possible he would find likeminded people in Kabul because it appears that there is a significant if small underground Christian community. Mr Gulvin was unable to inform the Tribunal how the appellant would establish contact with such people. There was very limited evidence as to what happened to apostates when they were discovered. He accepted that if the appellant engaged in proselytising then he did face a real risk. However it remained the case that there was a lack of evidence of any problems for apostates and certainly none from the government. He submitted that in reality there was no evidence apart from the Rahman case that there had been serious problems for apostates in Afghanistan. He submitted that at most the appellant could establish that there was a possibility, no more, certainly not a real risk that he would be targeted as a convert. He accepted he would have to live his private life in difficult circumstances but rejected any submission that this would violate the appellant's Article 8 or 9 rights under the ECHR.

<u>Submissions on behalf of the Appellant</u>

35. Mr Jacobs relied on the skeleton he had prepared for the Tribunal and which we have summarised where necessary. Mr Jacobs said it was particularly relevant that in this case the appellant was a genuine convert; he was a known apostate in the United Kingdom and was a committed Christian. If anyone was likely to be recognised it was this appellant because he was bent double with his back problem.

He had attained some notoriety because he was a passenger on the hijacked plane that came to the United Kingdom. He said that the appellant was not able to return to his home area. He had received threats at the hostel where he was staying in the United Kingdom and there had been an angry reaction from local Muslims when Dr Freeman had come to collect him to go to church. The evidence that the appellant had given was that his son had called him from Afghanistan and had stopped contact with him on finding that he had changed his religion. He had no contact with his daughter and she could not in any event be expected to provide him with any protection. The evidence was that the appellant's family knew about his conversion. The Immigration Judge had received a letter after the hearing in which a written submission was made that the appellant was known in his local area and to which he had referred at paragraph 11 of his determination. He submitted that the appellant was at risk in his home area and could not return there. He noted from paragraph 11 of the Immigration Judge's determination that there was evidence before him that after the Rahman case there had been demonstrations in the city of Mazar-i-Sharif in which people were shouting "Death to Christians!" and "Death to America!" This was the appellant's home town.

36. Mr Jacobs addressed the Tribunal as to whether the appellant could safely return to Kabul. He said it was accepted that it was fourteen years since the appellant had last been to Kabul. He was working at a hotel in Kabul at the time the Taliban accused him of selling alcohol and arrested him. It was the case that if he could be provided with accommodation and food on return and if he did not engage in activities that might bring him to the attention of the authorities he might be able to slip under the net. However he would have to look for accommodation and work on return. He would have no support network in Kabul. He submitted it would be impossible for the appellant to find a Christian network because they were very secretive about their existence because of the extent of the threat against them. This evidence was indicative that the appellant would be living in hiding as a member of a persecuted group and he submitted that it followed there was a real risk of persecution if he was discovered. The Tribunal had accepted his evidence in previous cases. In order to survive the appellant would be required to have links with others, he would need to find some person he could trust.

37. Mr Jacobs said it was accepted that there was a real risk to anyone who proselytised the Christian faith. In fact it would be suicidal for him to openly proselytise. The appellant had kept his head down in the United Kingdom because there were people here who knew what he was doing. This would not apply in Afghanistan because the appellant would not be in a position of being able to keep his head down and in any event he would have to pretend that he was a Muslim. He would have to fast. He would not be able to celebrate any Christian festival. He would have to look over his shoulder at all times in case he was recognised. Background evidence showed the government did not want to get involved. Mr Jacobs said the appellant was not at risk from the government or the judiciary as such but could not look to them for protection. He submitted that the recent case of Kambakhsh, referred to by Dr Giustozzi in his report indicated that matters were getting worse for apostates

because the President was now committed to becoming more conservative. This would enable the judiciary to take a more conservative approach in the knowledge that the President was not likely to intervene.

38. Mr Jacobs said it was common ground between the parties that to be openly Christian was not possible. It was not enough to say that he would be able to avoid detection particularly since the police could not protect him if it became known that he was a convert in Afghanistan. He submitted it was simply not reasonable for the appellant to be expected to modify his behaviour in this particular case.

39. Mr Jacobs referred the Tribunal to the comments of Lord Justice Sedley in MT (Afghanistan) [2008] EWCA Civ 65 at paragraphs 14 and 15 where he said that because of the Rahman case it clearly was possible at the material time on the facts of MT for a Christian convert in Afghanistan to be tried and sentenced to death for apostasy by a shariat court. His execution had been avoided because the President at the time was willing to challenge the religious extremists and there had been international pressure on him. However what required further careful analysis on the background materials was whether what happened in the Rahman case could happen again i.e. that there could be similar persecution on religious grounds and that similar inhuman treatment might await other apostates, especially those who evangelised.

40. Mr Jacobs said that the Rahman case was not isolated it was simply very public. There were the other three cases referred to by the UN Secretary General and the other evidence of raids of the households of suspected apostates.

41. He turned to two BBC news internet articles dated 21 October 2008 relied on by the respondent. The first reported on the abduction and the sentence of Kambakhsh, who had been convicted of blasphemy for downloading material from the internet on women's rights in Islam. His controversial death sentence was commuted to twenty years in jail at an appeal court in Kabul. The report states that the appellant's brother had criticised the President for not intervening to pardon his brother Kambakhsh. The second is a report about the murder of the British volunteer Gail Williams. The report indicates that the Taliban had admitted killing her for spreading Christianity. As a result the offices of the aid agency for which she worked had been closed down. Mr Jacobs then referred the Tribunal in more detail to the background material on which he relies and we deal with this below.

Background Material before the Tribunal

42. Article 2, Chapter 1 of the Constitution of Afghanistan, at pages 35-70 of the appellant's bundle, states:

> "The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam.

Followers of other religions are free to exercise their faith and perform their religious rites within the provisions of law.

Article 3, Chapter 1 states:

"In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam."

43. The respondent's Operational Guidance Note on Afghanistan published on 20 April 2007, which is the current Guidance Note deals with converts to Christianity at Section 3.13. We note the following:

"**3.13.2** ***Treatment.*** Although Article 2 of the 2004 Constitution states that the followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law, the boundaries of the law are open to interpretation. The Constitution makes no specific provision for converts and guarantees of religious freedom generally would appear to be subject to the constitutional catch-all that 'no law can be contrary to the beliefs and provisions of the sacred religion of Islam.'

3.13.3 Conversion from Islam is considered apostasy and is punishable by death under Shari'a. However, the new constitution makes no reference to Shari'a, and Article 7 commits the state to abide by the international treaties and conventions that require protection of this right. The judicial system in Afghanistan is largely comprised of conservative Islamic judges who follow Hanafi or Jafari doctrines recommending execution for converted Muslims, however, there are no recently reported cases of any Afghan being executed by court order for conversion or apostasy. This is possibly because converts will tend to keep a very low profile and small communities of Afghan converts are believed to practice Christianity in secrecy.

3.13.4 In March 2006, Abdul Rahman was charged and tried in Kabul for converting from Islam to Christianity and could have faced the death penalty unless he re-converted. Mr Rahman actually converted sixteen years earlier, but he came to the attention of the authorities when his estranged family denounced him in a custody dispute over his two children. Following increasing pressure from the international community and intervention from President Karzai, however, Abdul Rahman's case was reviewed by the judiciary and he was deemed mentally unfit to stand trial. Abdul Rahman was subsequently freed from prison and the United Nations helped arrange his emigration to Italy where he was granted asylum. In September 2006, the UN Secretary-General reported that following the case of Abdul Rahman there have been three similar cases in which Afghan citizens were accused of apostasy by local religious leaders and were forced to leave the country.

3.13.5 There has been a great deal of speculation about the level of societal discrimination which apostates would face and in 2005 there were some unconfirmed reports that converts to Christianity were threatened and even killed. Immigrants and non-citizens are free to worship in private locations and Christian affiliated international relief organisations generally operate

throughout the country without interference. What evidence there is tends to point to proselytising being the greater risk than conversion in itself, however, there was some publicly displayed anger over Abdul Rahman's release from prison in March 2006 and it was reported that around one thousand people protested in the Northern city of Mazar-e-Sharif with calls for him to be tried and executed. Abdul Rahman's release was also criticised by the leader of the lower house of parliament, Yunus Qanuni and Chief Justice Fazl Hadi Shinwar."

44. At paragraph 3.13.7 of the Guidance it states:

> "Where the treatment feared is at the hands of the state, the question of sufficiency of protection does not arise. However, even where the claimants fear is of societal or nonstate persecution, given Islamic law on apostasy and the conservative Islamic nature of the Afghan judiciary, apostates may reasonably be unwilling due to the state's position on apostasy to seek the protection of the Afghan authorities. Therefore, in either case, sufficient protection should not be considered to be available for apostates in Afghanistan."

45. The Tribunal was referred to the UNHCR's eligibility guidelines for assessing the international protection needs of Afghan asylum seekers dated December 2007 and published 3 January 2008. The UNHCR considers that internal flight or relocation for those fleeing persecution or generalised violence is generally not available in Afghanistan. The report comments on support structures within Afghan society as follows:

> "Extended family and community structures within Afghan society are the predominant means of obtaining protection and economic survival, including access to accommodation. Thus, it is very unlikely that Afghans would be able to lead a relatively normal life without undue hardship upon relocation to an area to which they have no effective links, including in urban areas of the country."

Later in the same report under the heading "Freedom of Religion", the report states:

> "The constitution defers to Sharia Law for issues on which the constitution or the penal code are silent (such as conversion and blasphemy). As such, conversion from Islam is considered apostasy, and is, under some interpretations of Sharia Law, punishable by death.
>
> The imprisonment of Abdul Rahman reflects concerns regarding the tensions between sharia and statutory laws, the capacity of the judiciary, the role of clerics in the judiciary and the application of the death penalty. He was imprisoned in March 2006 for converting from Islam to Christianity and threatened with the death sentence. Abdul Rahman was later released on findings and mental instability and granted asylum in Italy. Conservative religious clerics organised a demonstration of over 700 protestors in Mazar-e-Sharif calling for Rahman's death and denouncing international involvement in the case.

> According to the report of the UN Secretary General, following the highly publicised case of Abdul Rahman, there have been three similar cases of harassment of Afghan Christians. In two of the cases, Afghan families in which some of the members had converted to Christianity reported being harassed by their community and eventually decided to leave the country. In a third case, a Christian convert was jailed on unrelated allegations of homicide. While in jail, another inmate who came to know of his religious belief reportedly killed him.
>
> Although not strictly forbidden by the constitution or other laws, proselytism is viewed by the authorities and society in general as contrary to tenets of Islam. As such, it is practised discreetly. In August 2006, 1,000 members of a South Korean Christian aid group were deported from Afghanistan after Islamic clerics accused them of trying to convert Muslims to Christianity."

46. The report makes it clear that the UNHCR accepts that Christian converts do face a risk of persecution. At paragraph 4 under the heading "Considerations concerning Inclusion for Refugee Status under the 1951 Convention Criteria" and the sub-heading "Converts from Islam to other Faiths" it states:

> "As explained in the section on freedom of religion in this paper, the constitution of Afghanistan is silent on the issues of conversion and while calling for the respective human rights and fundamental freedoms, defers to Sharia Law for matters not explicitly dealt with by the constitution. Under Sharia Law, conversion is punishable by death. As such, the risk of persecution continues to exist for Afghans suspected or accused of having converted to Christianity or other faiths."

47. The Tribunal was referred to the annual report of the United States Commission on International Religious Freedom dated May 2008. At paragraph 163 under the heading of "Afghanistan" one of the countries on the Commission's watch list, the report addresses the new constitution adopted in Afghanistan in January 2004 and the fact that it does provide for the freedom of non-Muslim groups to exercise their various faiths. It contains no explicit protection to the right of freedom of religion or belief and would extend to every individual, including individual Muslims who are the overwhelming majority of Afghanistan's population. The report comments on this as follows:

> "The absence of a guarantee of the individual right to religious freedom and the inclusion of a judicial system instructed to enforce Islamic principles and Islamic law mean that the new constitution does not protect individual Afghan citizens who dissent from state-imposed orthodoxy against unjust accusations or religious 'crimes' such as apostasy or blasphemy."

The report then goes on to quote the examples, which the Tribunal has already detailed above of the cases of Kambakhsh and Abdul Rahman.

48. The report further states:

"In May 2007, the General Directorate of Fatwas and Accounts under the Supreme Court issued a ruling on the status of the Bahá'í religion and declared it distinct from Islam and a form of blasphemy. The ruling also noted that Bahá'ís would therefore be treated similarly to Christians and Jews. According to the State Department, while the ruling is not expected to affect the expatriate Bahá'ís in Afghanistan, it may create problems for the country's tiny Bahá'í community, primarily in issues involving marriage. Many Afghan Bahá'ís are married to Afghan Muslims, and the ruling could invalidate those marriages. Converts to the Bahá'í religion would face the same consequences as other converts from Islam."

Later in the report it details the concerns the Commission has raised about the deteriorating conditions for freedom of religion or belief and other human rights in Afghanistan, which the Tribunal noted.

49. The Tribunal was referred to the US Commission on International Religious Freedom, "Anti-Conversion Laws and Religious Freedom in South Asia and the Middle East: The Case of Abdul Rahman" and the testimony by Felice D.Gaer, the Vice Chair of the United States Commission on International Religious Freedom on 7 April 2006 before the Congressional Human Rights Caucus. The Tribunal has noted his evidence to the Caucus and his opinion that the Abdul Rahman case points to the weak state of human rights protections in Afghanistan and his view that cases such as that of Abdul Rahman will continue to be treated in Afghanistan as criminal acts meriting the most severe punishment.

50. The Tribunal was referred to paragraphs 19.24-19.35 of the Country of Origin Report on Afghanistan dated 29 August 2008. This repeats much of the evidence that the Tribunal has already cited above. At paragraph 9.19.26 the Report states:

"19.26 The Foreign and Commonwealth Office (FCO) noted in a letter dated 17 March 2008 that practising Christianity in Afghanistan is considered extremely dangerous and is not discussed openly. However, in Kabul there may be small pockets of Afghan Christians who risk worshiping together in secret places.

19.27 The FCO further noted that Christianity is still not accepted. Christians are regularly discriminated against and face verbal and physical abuse from the authorities, former friends and also family members. Authorities do not generally investigate allegations of harassment or ill-treatment or bring those responsible to justice."

51. At paragraph 19.33 the Report states:

"On 22 March 2006, Radio Free Europe/Radio Liberty (RFE/RL) reported that:

'The constitution also provides little legal guidance about how other faiths can live or operate in this Islamic republic. While followers of other religions enjoy the right to freely exercise 'their faith and perform their religious rites within the limits and the provisions of law,' neither the constitution nor the country's law set those limits. For example, there is no law that makes it clear whether a church can operate in the

country. The unstated understanding seems to be that churches can operate inside diplomatic missions or in military bases but not publicly.'"

52. At paragraph 19.34 it states:

> "On 11 September 2006, the UN Secretary-General reported that following the case of Abdul Rahman in March 2006:
>
> 'There have since been three similar cases in which Afghan citizens were accused of apostasy by local religious leaders and were forced to leave the country. Those cases highlight the obstacles to the enjoyment of freedom of conscience and religion that exist in Afghanistan and the necessity of the Government to take proactive measures to protect those rights. In that regard, the proposal to reinstate the Department for the Promotion of Virtue and Prevention of Vice within the Ministry of Hajj and Religious Affairs is a development that will need to be closely monitored.'"

53. At paragraph 19.35 of the Report it details the case, recorded in the UNHCR's "Eligibility Guidelines" paper of 2007 of the two Afghan families who converted to Christianity and had reported being harassed by their community and eventually decided to leave the country. It also mentioned the case of the convert who was murdered while in jail.

54. At paragraph 32.01 of the Country of Origin Information Report the UNHCR guidelines on Afghans who may be at risk is considered and this includes converts from Islam to other faiths. Quoting from this report it states:

> "Afghans suspected or accused of having converted from Islam to Christianity or other faiths risk persecution. The risk emanates from family and/or tribe members as well as the broader community. Severe punishment within the legal system is also possible for those who do not recant their conversion."

55. The Tribunal was referred to the US Department of State Report "International Religious Freedom Report 2008: Afghanistan" dated 19 September 2008 (the International Religious Freedom Report 2008). This is the most recent evidence before the Tribunal. In the introduction to this report it states that non-Muslim minority groups faced incidents of discrimination and persecution and:

> "Due to societal pressure, most local Christians hid their religion from others."

At Section 2 entitled "Status of Religious Freedom" the Report mentions that although there are no laws forbidding proselytism it is viewed by many authorities and most of society in Afghanistan as contrary to the beliefs of Islam. The Report states that there were unconfirmed reports of harassment of Christians thought to be involved in proselytism. Under the section headed "Restrictions on Religious Freedom" the Report states:

> "As discussed above, under Islamic law, conversion from Islam is punishable by death. In recent years this sentence was not carried out.

> Immigrants and non-citizens were free to practise their own religions. In Kabul 200 to 300 expatriates met regularly at Christian worship services held in private locations due to the existence of only one Christian church in the country. This church, located within the Diplomatic Enclave, was not open to local nationals. Buddhist foreigners were free to practise in temples established for the Buddhist immigrant community.
>
> There are an unknown number of foreign missionaries in the country who work discreetly to avoid harassment. There were no overt foreign missionaries or other non-Islamic religiously orientated organisations in the country. Proselytism was practised discreetly, since it is viewed as contrary to the teachings of Islam. During the period covered by this report, there were a few reported incidents involving individuals attempting to proselytise."

Later under the same section the Report deals with the Sikh community's schools and states that there are no Christian or Jewish schools.

56. Under the heading "Abuses of Religious Freedom" the Report deals with the case of Syed Kambakhsh, the details of which the Tribunal has referred to earlier in the determination. It also details the case of the member of the Bahá'í faith and that of Abdul Rahman and to the other cases the Tribunal has already cited above.

57. Under the heading "Improvements and Positive Developments in Respect for Religious Freedom" the Report states that the government continued to stress reconciliation and cooperation among all citizens although in this regard it was primarily concerned with reconciliation of former Taliban combatants. It has also expressed concern about religious intolerance. The Report does not identify any specific measures taken by the government in this respect.

58. Mr Jacobs referred the Tribunal to the decision in RQ (Afghan National Army – Hizb-i-Islami – risk) Afghanistan CG [2008] UKAIT 00013. At page 21 of the report the Tribunal quoted paragraph 28.08 of the COIR dated April 2007 which is a quote from Dr Giustozzi in his publication "Afghanistan Notes" of 28 June 2006 where he said:

> "It is not difficult to track people down in Afghanistan, although it might take time. Neighbours and landlords will check people's backgrounds, because everyone thinks in terms of security, and so they would want to check a newcomer's background in their home area. Further, messages are sent across the country via chains of communications based on personal contacts, and it would be natural to investigate where someone was from in order to see what role they could play in such a network. The postal service is unreliable and only delivers to the district centres, not to the villages, so that travellers are often used to deliver messages and goods to relatives and friends."

The Tribunal in PM accepted much of Dr Giustozzi's opinion as to the operation of this type of community network within Afghanistan. At paragraph 109 of the Tribunal's decision in RQ it concluded, in relation to internal flight, and for this purpose it is only necessary to quote the following from paragraph 109:

"The country background evidence did not as yet suggest that domestic protection in Kabul is sufficient to meet the *Horvath* standard where an individualised risk exists; the Afghan authorities did not have the resources to protect individuals, and ISAF's remit is generalised and not individual protection."

Our Findings

General Findings on the Expert Evidence and Background Material

59. We start by making it clear that this decision does not deal with the position for Afghans who have been Christians from birth or in respect of the immigrant Christian population in Afghanistan. We have not considered in any detail any background material in respect of these groups in Afghan society. We are concerned solely with assessing the risk to an Afghan Christian living in Afghanistan who has converted from Islam, an apostate. The burden is on the appellant to establish that he is a refugee as defined in Regulation 2 of the Refugee or Person in Need of international protection (Qualification) Regulations 2006 and that he is entitled to the grant of asylum pursuant to paragraph 334 of HC 395 or that there will be a violation of his human rights if he is returned to Afghanistan. The standard of proof in both cases is one of real risk. We have considered the categorisation of fundamental rights explained by Hathaway in his publication: *The Law of Refugee Status*. The right to freedom of thought, conscience, and religion is one of the first tier rights in the hierarchy identified by Professor Hathaway, from which, in accordance with the International Bill of Rights, there can be no derogation by the signatory states. Whilst this does not include Afghanistan it is appropriate to use this as a benchmark for determining whether there is a real risk of serious ill-treatment amounting to persecution or a violation of Article 3 of the ECHR on the established facts and background evidence in this case. We bear in mind that for the purpose of the Refugee Convention, persecution is serious ill treatment coupled with a lack of effective state protection.

60. It is clear from the background material and the expert opinion before us that any individual who is a Christian living in Afghanistan whether he was born a Christian or is an immigrant foreign national working in the country or a convert cannot practise their faith in public in Afghan society. There are no Christian churches in Afghanistan and the evidence is that Christians either practise their faith in private i.e. when they gather together to worship, or there is provision for foreign nationals to worship in the Diplomatic enclave, but not Afghans. We accept that it is reasonably likely that most of the underground networks of Christians worshipping in Afghanistan can be found in Kabul and very rarely elsewhere in the country although we have noted there is no actual evidence before us of any particular network operating in Kabul. We should say at this point that we are unable to attach any weight to the Sunday Telegraph report of March 26, 2006 and to the recorded conversation with a Christian convert in Kabul. We know nothing about the person who it is claimed gave the information that there were churches operating in Kabul and there were up to 10,000 Afghans who had secretly converted to Christianity. We

are not prepared to attach weight to a comment of this kind. However, we note that even this person is reported as saying that the conversions had been secret, which is an indicator in itself of the difficulties that might be faced by publicising any such conversion. The reported comment that there are churches operating in Kabul is directly contradicted in the remainder of the background material before us. We accept the evidence therefore that there are no Christian churches openly operating anywhere in Afghanistan and that the only place where Christians can worship is subject to diplomatic protection and is in any event not accessible for Afghans. There is no evidence that the Afghan government has any policy of seeking out those who actively practise some faith other than Islam. However, in accordance with the Constitution, although other religions are free to exercise their faith and perform their religious rights, it must be within the provision of the law and hence the reason why Christians worshipping in Afghanistan must do so in private.

The Position for Apostates in Afghanistan

61. We turn then to consider the evidence before us, which remains limited, as to the position for apostates in Afghanistan.

62. It is clear that the Afghan Constitution does not provide any protection for those who abandon Islam and convert to another faith. Under Sharia Law apostasy is considered a serious crime which should attract the death penalty. The Afghan Constitution as we understand it is completely silent on what should happen to apostates. We have noted Dr Giustozzi's evidence that where the law is silent Shariat jurisprudence applies, which in this case would mean that a person whose conversion from Islam becomes public in Afghanistan is liable to be dealt with under Sharia Law. The Tribunal in AR had no evidence of what might happen to an apostate in Afghanistan whose conversion became public. There is now evidence namely the case of Abdul Rahman. The government was clearly not able to prevent him from being charged and initially having to face the prospect of a trial according to Sharia Law simply because he had converted to Christianity. That it seems to us was itself an act of persecution: it was serious ill-treatment i.e. the deprivation of liberty and the threat of a trial before a Sharia court and ultimately the possibility of the death penalty, because of religious belief. President Karzai was forced to take action in that case because of international pressure and he was able to secure Mr Rahman's release for the reasons the Tribunal has already set out. What he was not able to do however was to offer Mr Rahman any kind of protection within Afghanistan. Mr Rahman had to be assisted to leave the country and was eventually granted asylum in Italy. This evidence demonstrates that once it became known that he had converted to Christianity, his life was at risk wherever he went in Afghanistan because his position was not tolerated by fundamentalists or Afghan society in general and the government could offer no practical level of protection. He was at risk from Islamic fundamentalists and the demonstration organised by clerics following his release shows, albeit on a relatively small scale, how easy it is for the fundamentalists to whip up public support for their view.

63. We have noted that much the same happened to the Baha'i man who was arrested again simply because of his religion: although he was released, he also had to leave the country because he was not safe.

64. In respect of evidence of any other cases, many of the examples quoted by Dr Giustozzi were not cases where he had been able to verify the information he had received. He accepted that he was forced to speculate in respect of the possible outcome of these cases. We note too that some of the examples he gave within his personal knowledge involved foreigners (individuals employed with NGOs) working in Afghanistan who had been accused of proselytising, although he was unable to say what happened to them if anything. These cases do not assist in reality in respect of the position for apostates. The only verifiable evidence that was before us of the treatment of apostates was that of the UN Secretary General who reported on three cases of converts in September 2006. In two of those cases the converts were forced to leave the country and in the third the individual was murdered whilst in jail, on an unrelated matter, because it became known that he was a convert. It strikes us that in none of theses cases was there an adequate level of protection available from the state.

65. It is impossible in our view to say whether in the event that another individual was found to have converted from Islam in Afghanistan, that the president, whoever that may be given the elections this year in 2009, would intervene in the way that President Karzai did in respect of Abdul Rahman. What is clear from the evidence is that any apostate who is discovered to be so will not be tolerated. In the light of the lack of protection under the current Constitution and what happened to Abdul Rahman when he was exposed, any such individual would face at the very least a real risk of arrest and detention and ultimately punishment before a Sharia court. There is no guarantee of any political intervention but there is a guarantee that such behaviour would not be tolerated, certainly by powerful fundamentalists in the country.

66. We do not think this is an issue as to whether or not an individual in these circumstances is reasonably likely to be discovered on return. The plain fact on the evidence before us is that a genuine apostate, and here we are dealing specifically with conversion from Islam to Christianity, simply would not be able to openly express his change of faith without running a real risk of persecution. The individual would have to keep his faith completely secret; he would have to live a lie; he may be forced to forego contact with others of his faith because of the danger and, significantly, would be constantly looking over his shoulder to avoid discovery in fear of the consequences. In the event it would matter little whether such an individual had family support or not; if discovered the evidence does show that there would be inadequate level of protection available from the Afghan authorities against those who would seek to punish for that conversion. In our view an apostate could not reasonably be expected to tolerate living in this way in Afghanistan in order to reduce the risk of discovery, and it would be persecutory to expect such an individual to modify his behaviour to that end. It may well be that in some societies

solitary and or private worship of another faith may be viable because for example although the background evidence reveals a general intolerance in society toward that belief it does not reach a level where there would be a real risk of ill- treatment on discovery. This is not the case for Afghan converts; there is no evidence that they would be able to conduct themselves in this way. In reaching this conclusion we have borne in mind the Tribunal's guidance in SZ and JM (Christians – FS Confirmed) (CG) [2008] UKAIT 00082 and HJ (Homosexuality: reasonably tolerating living discreetly) Iran [2008] UKAIT 00044, the latter was approved by the Court of Appeal in XY (Iran) v SSHD [2008] EWCA Civ 911.

67. We have concluded that an Afghan national who can demonstrate to the appropriate standard that he is a genuine convert to Christianity from Islam is likely to be able to demonstrate a real risk of persecution and/or a violation of his rights under Article 3 of the ECHR on return to Afghanistan.

68. Such claims will always require careful assessment and analysis of the evidence that is presented on the appellant's behalf as to the conversion. Immigration Judges will need to bear in mind the guidance given by the Tribunal in previous appeals (see e.g. Dorodian (01/TH/1537-) in reaching a conclusion on the evidence as to whether or not there has been a genuine conversion from Islam.

Application of these Findings to the Appellant's Case

69. It has already been found that the appellant is a genuine convert to Christianity. In his statement he says that he has been attending the Hounslow West Evangelical Church since 2001, and every Sunday since May 2004. He regularly attends Christian bible study meetings and receives instruction in the Christian faith in Farsi. He cannot read and relies on other Christians to tell him about the faith. The members of his church are his family and he treats the church as his home. He states that he would not be able to abandon his faith: he could not be a Muslim again because he is a Christian who loves God. He could never pretend to be a Muslim as he would be lying in his heart to God. He has no family in Afghanistan with whom he has any contact. His son is aware of his conversion. Therefore if the appellant were to return to his home area there would be an obvious source of information against him i.e. his son and quite possibly the two Afghan nationals from his home area who have now returned. In that event, there is clearly a real risk the appellant would face the immediate wrath of religious zealots in his home area and generally of the population. He is from Mazar-i-Sharif, the town where there were large-scale demonstrations after the Rahman case. The evidence is clear in our view that the appellant would face a real risk of persecution and a breach of his Article 3 rights if he had to return to his home area.

70. We consider that a real risk remains wherever the appellant goes in Afghanistan. Initially the respondent would return him to Kabul. We do not accept that in a city with a population of approximately five million, there is a real risk that the appellant would come into contact again with the two men who threatened him in the UK.

However he would need to engage in the social networks that operate within Kabul in order to find employment and accommodation simply to be able to live. This would necessitate, as the Tribunal has found previously in PM, investigations into his background and we think there must be a real risk that that would lead to enquiries in his home town and so back to his son and possibly to others who know him. We think via that route alone, sooner or later, there is a real possibility the appellant's conversion would become known with the same consequent risk in Kabul as in his home town.

71. However, even if we are wrong in our assessment of that risk the appellant would immediately place himself at risk if he sought to make contact with other Christians in Kabul especially since he has no family for support there. Christian worship amongst groups can only be undertaken underground or secretly. We are unable to see how the appellant would be able in reality to make contact with others of the same belief without placing himself at great risk. This would mean the appellant would be forced to worship by himself and, as we have indicated, before, to live a complete lie but with the constant fear that he might one day be discovered and ousted. We take into account that he is presently a member of an evangelical church and we accept that a significant part of his faith does encompass the ability to share his belief and to develop his faith with others. In this regard we take into account his personal circumstances. We do not think it is reasonable to expect the appellant to pretend that he is something that he is not and if it were discovered that he is a convert the evidence demonstrates that his conversion will not be tolerated; he faces a real risk of at the very least of detention because of his religion and at worst trial before a Sharia Court and harsh punishment unless the appellant recanted his conversion. The appellant could not rely on any intervention by the Afghan authority in that process and would not in any event be safe in Afghanistan even if the government were able to intervene.

72. In the light of the evidence of the appellant's commitment to the Christian faith, in our view he cannot be expected to modify his behaviour on return to Afghanistan and it is not reasonable to expect him to tolerate living his life in a manner which would involve a significant suppression of his religious belief. This would be the position wherever the appellant went in Afghanistan.

73. We have concluded therefore that the appellant's return to Afghanistan would expose him to a real risk of persecution and would subject him to a real risk of inhuman or degrading treatment in violation of his rights under Article 3 of the ECHR.

74. The appeal is therefore allowed on refugee and human rights grounds but dismissed on humanitarian protection grounds.

Signed

Senior Immigration Judge Nichols

Appendix – List of background material considered by the Tribunal

1.	US Commission on International Religious Freedom, "Anti-Conversion" Laws and Religious Freedom in South Asia and the Middle East: the case of Abdul Rahman: (Testimony by Felice D. Gaer, Vice Chari, USCIRF)	07/04/06
2.	Compass Direct	22/03/06
3.	Radio Free Europe/Liberty	22/03/06
4.	The Guardian	20/03/06
5.	From the Telegraph article "Afghan Court Resists Karzai's Overture to Spare Christian's Life"	26/03/06
6.	UKBIA Operational Guidance Note Afghanistan	20/04/07
7.	UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum Seekers	December 2007
8.	Extracts from Country of Origin Information Report Afghanistan	April 2008
9.	US Commission Religious Freedom – Extract from Annual Report	May 2008
10.	The Independent	26/05/08
11.	The Independent	31/01/08
12.	The Independent	31/01/08
13.	UKBIA Country of Origin Information Report Afghanistan	29/08/08
14.	US Department of State "International Religious Freedom Report 2008: Afghanistan"	19/09/08
15.	BBC News Internet item "Afghan Man Spared Death Sentence"	28/11/08
16.	BBC News Internet item "Charity Shuts Office After Murder"	28/11/08
17.	Translation of the Constitution of Afghanistan	