REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76305

REFUGEE APPEAL NO 76306

REFUGEE APPEAL NO 76307

REFUGEE APPEAL NO 76308

AT AUCKLAND

Before:	B A Dingle (Member)
Counsel for the Appellants:	C Curtis & I Uca
Appearing for the Department of Labour:	S Blick
Dates of Hearing:	2 June, 21, 22 & 23 September and 4 November 2009
Date of Decision:	30 June 2010

DECISION DELIVERED BY B A DINGLE

INTRODUCTION

[1] This is an appeal pursuant to s129O(2) of the Immigration Act 1987 ("the Act") against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) cancelling the grant of refugee status to the appellants pursuant to s129L(1)(b) of the Act, on the ground that the grant of refugee status was improperly made.

[2] The appellants are citizens of Afghanistan. They comprise the father, *(Refugee Appeal No 76305),* the mother, *(Refugee Appeal No 76306),* the first son, *(Refugee Appeal No 76307),* and the second son *(Refugee Appeal No*

76308). The father and mother also have children who were born in New Zealand and are New Zealand citizens.

[3] The father arrived in New Zealand in November 1998 and claimed refugee status on arrival. He included the mother and two children in the Application for Refugee Status in New Zealand form (hereafter "the application form" or "the refugee application"). One of the children was his eldest son and the other was his nephew who it was agreed would travel to New Zealand under the guise of being the father's child. The father's second son was born in 1999 and was added to the refugee application during the Refugee Status Branch interview.

[4] For reasons outlined below, it was decided in 1999 that the nephew would not travel to New Zealand with the mother and sons. To explain to the New Zealand Immigration Service (NZIS) why the third "child" would not now be travelling, the father said that the child had died in an accident in Kabul. The visa applications proceeded accordingly. The mother and sons arrived in New Zealand in 2000 having been granted residence visas.

[5] On 19 December 2008, a refugee status officer determined that the appellants would no longer be recognised by New Zealand as refugees because the original recognition may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information (hereinafter "fraud"); and also because the appellants did not presently meet the definition of a refugee in Article 1A(2) of the Refugee Convention.

[6] From this decision the appellants have appealed to this Authority. Before the Refugee Status Branch and at the time the appeal was lodged at this Authority the appellants were all represented by Ms Curtis.

[7] On 25 June 2009, the Authority was provided with an Authority to Act in which the mother authorised Ms Uca to act as her representative, presumably so that her interests and the sons' interests could be advanced separately from those of the father. This was necessary because the mother and sons have advanced an argument that they should not be subject to these cancellation proceedings because they were not in fact ever recognised as refugees in New Zealand. Notwithstanding Ms Uca's representation, Ms Curtis has, at times, made submissions and arguments on behalf of the mother and sons in the course of her submissions in support of the father. These are all accepted as part of the case for the mother and sons.

[8] The appeal was heard over five days in June, September and November 2009. Some explanation of the procedural history is helpful.

[9] The appeal was set down to be heard by two members of the Authority. On 2 June 2009, the hearing convened but was adjourned before any substantive matters were addressed because the interpreter retained for the hearing was a Farsi speaker and it became clear that a Dari speaker was required. The hearing was rescheduled for 21, 22 and 23 September 2009. The mother was excused from attendance on 21 September and the full day was spent hearing the father's evidence. The father continued to give his evidence on 22 September but the hearing was adjourned during the afternoon session when the mother, who was waiting outside the hearing room, became ill. The father resumed his evidence on 23 September but the mother was not well enough to appear.

[10] A further date on which to hear the mother's evidence could not be scheduled until 4 November 2009. By that time, the term of office of one of the panel members had expired. Pursuant to Schedule 3C, para 1(3) of the Immigration Act 1987, the member could not be deemed to be a member of the Authority for the purpose of deciding this matter because the appeal was not wholly heard before the expiry of the term of office. On that basis, and with the express consent of all counsel, the appeal continued to be heard by the remaining member.

[11] By consent, the appeals were heard together, the evidence of each appellant being treated as evidence in the appeal of the others. The sons were represented by the mother pursuant to s141B of the Immigration Act 1987.

[12] Prior to considering the substantive merits of the appeal against the decision to cancel the recognition of refugee status for the appellants, this decision makes a determination as to whether there is jurisdiction to hear the appeal for the mother and sons.

PRELIMINARY ISSUE – WHETHER THE MOTHER AND TWO SONS SHOULD BE PARTY TO THE CANCELLATION PROCEEDINGS

[13] A preliminary issue has been raised by Ms Curtis and Ms Uca as to whether cancellation proceedings can be brought against the mother and sons. In short, counsel contend that the mother and sons were never formally recognized as refugees (for reasons outlined more fully below) and were, rather, the recipients of permanent residence visas on the grounds that they were the family members of a recognized refugee (the father). It follows, they submit, that it is an error of law to

include them as parties to these cancellation proceedings. The DOL opposes those submissions and seeks inclusion of the mother and sons in the cancellation proceedings on appeal.

[14] Because the DOL evidence addresses the detail of Refugee Status Branch practice and process at the time the refugee claim was made, it is logical to set out that evidence first.

DOL evidence and submissions on preliminary issue

[15] DOL called Mr John Boggs as a witness. Mr Boggs has been employed by the DOL since 1990 and held the position of Refugee Status Officer from 1992 until 2003. He is the refugee status officer who interviewed the husband in relation to his refugee claim in 1999 and who delivered the decision to recognise him as a refugee. At the cancellation appeal hearing Mr Boggs gave evidence both as to the general RSB practice in relation to the processing of refugee claims for family groups and as to specific circumstances of the refugee claim now under consideration. He was also able to give detailed information about the DOL Application Management System (AMS) data records system because he has previously worked within DOL as an AMS trainer.

[16] Mr Boggs' evidence can be summarised in the following way:

(a) The decision to recognise the appellants as refugees was made on 12 August 1999.

(b) On 1 October 1999, amendments to the Immigration Act came into force which established the current framework for determining refugee claims (and the cessation and cancellation thereof) and appeals. Prior to that, the practice of the RSB was, in some respects, different to the current system.

(c) Prior to 1 October 1999, the usual practice of the RSB in determining refugee claims was to include family members of the applicant in the refugee claim as secondary applicants, whether or not the family members were in New Zealand and notwithstanding that they may not be present for the interview. Mr Boggs confirmed that this was how he processed family groups. The practice was established at a time when the RSB processed both refugee and residence applications.

(d) The process was:

(i) The applicant completed a document headed "Application for Refugee Status in New Zealand" which was similar to the current Confirmation of Claim Form in that it sought information about the applicant, the applicant's family, travel to New Zealand, and the basis of the refugee claim. In the section "About Your Family", the applicant was asked to identify family members and their current location. For each family member there was a question "Included in this application?" to which the answer could be ticked either "yes" or "no".

(ii) The business day following lodgement of the application form with the Refugee Status Branch, some of the information contained in it was entered into the AMS data system. At the same time, each applicant, including family members included in the application form, would be assigned a client number. Each application (whether for a refugee claim, residence or other visa) would also be assigned a unique number and those individuals who were included in the application would have the application number noted in their AMS file.

(iii) During the Refugee Status Branch interview, the refugee status officer would confirm the information in the application form, including the individuals to be included in the application. If there were changes to the family members included, those would be noted on the application form and then later amended in the AMS system.

(iv) At the time of determination of refugee status, the decision was noted in AMS for each individual who was part of the application – the notation in relation to the application number being either "declined" or "approved".

(e) In relation to these appellants, the documents on the DOL file (including the original claim form and the AMS records) reveal the following:

(i) The refugee application form included information about the mother and two children. The second son who was born in February 1999 was added as a secondary applicant at the time of the Refugee Status Branch interview.

(ii) For the mother, the question “included in this application?” was ticked “yes”.

(iii) For the two children, the question “included in this application?” was not answered. That question as well as the section underneath it relating to further children was left blank and had a single line drawn through it presumably to indicate that the questions were not relevant (there being no further children).

(iv) NZIS client numbers were assigned to the mother and the three named sons following the lodgement of the refugee application.

(v) The AMS record relating specifically to the refugee application, lists, under the tab “applicants”, the father (as principal applicant) and the mother and the two sons as secondary applicants. Under the heading “lodgements”, the word “Done” appears for all four.

[17] DOL also identifies the following documents which, it says, indicate that the mother and sons were granted refugee status in 1999.

(i) RSB decision, dated 12 August 1999 which is in the name of the father and includes a line “Family included in Application:” where the names of the mother and three children are recorded (the third child being the nephew who did not travel to New Zealand).

(ii) Letter from NZIS to Mr Simon Laurent (the father’s lawyer), dated 13 August 1999, which states:

> We are pleased to advise that your client’s application for refugee status in New Zealand has been approved. This approval includes: [list of names of father, mother and three children].

The letter goes on to explain how an application for residence should proceed.

(iii) Letter from Marshall Bird Immigration to NZIS, dated 14 December 1999, which begins as follows:

> Dear [name]
>
> Please find enclosed documents to process [the father’s] application for residence in New Zealand. [The father] was recognised as a refugee by the New Zealand Refugee Branch in their letter dated 13 August 1999. [The mother and three children] were included in that decision.

(iv) Letter from NZIS to the father c/- Marshall Bird Barristers and Solicitors in which the NZIS referred to the applications for all of the appellants being processed under the Residence Permit 1995 Refugee status category.

(v) Letter from Marshall Bird Immigration to NZIS, dated 18 January 2000, which repeated the heading in [iii] above and explained that the nephew had died.

(vi) New Zealand Department of Internal Affairs client record for the mother, which includes a summary of the applications that have contained her as an applicant. The first recorded application is the refugee claim made in 1998 and approved in August 1999. The second recorded application is the permanent residence application which is recorded as being of application type "Permit, residence, 1995 Refugee status".

(vii) Application for citizenship for the mother which includes the question "On what grounds did you obtain permanent residence? (e.g. business migration, family reunification)". The handwritten answer is "refugee status". The same question in the sons' citizenship applications has been left with no answer – as have many other sections in the sons' citizenship applications.

The appellants' evidence and submissions on preliminary issue

[18] In summary, it is submitted that the following matters establish that the mother and sons were not recognised as refugees.

(a) The mother and sons were not in New Zealand at the time the father's refugee claim was processed and they did not submit individual refugee application forms.

(b) The refugee status officer does not appear to have turned his mind to the particular circumstances or predicament of the mother and sons during the RSB refugee claim interview.

(c) New Zealand law and policy did not permit the grant of refugee status to people outside New Zealand.

(d) The DOL Manual relating to Refugee Policy, Legal and Procedures ("the Manual"), effective 1 July 1998, which, in the section "Lodgement of

Applications for Refugee Status - Policy", states that a refugee applicant must be in New Zealand at the time of the application.

[19] Counsel submits that the inclusion of the mother and sons in the approval letters (see [18](ii) and (iv) above) was simply an exercise of the immigration powers of a refugee status officer in relation to the grant of residence visas to family members of a refugee rather than an indication that the mother and sons were themselves recognised as refugees. She states that this is supported in part by the operations manual which indicates that dependants of successful refugee claimants can apply for residence in accordance with residence policy. See Manual POL 4-10.

[20] Further, Ms Curtis also submits that in none of the RSB or Authority decisions that she has been involved in was a person granted refugee status able to immediately bring their family to New Zealand. The process is that the refugee applies for permanent residence and once that is approved then applications for the family – either visitor's visas or permanent residence – can be made. In this case, the father was approved permanent residence on 2 February and then the mother and children were able to travel to New Zealand on visitor's visas.

[21] However, with respect, Ms Curtis is mistaken as to the process in this case. The applications for permanent residence for the father, mother and sons were all made and approved simultaneously. The mother and sons arrived in New Zealand with residence visas which are recorded as having been made on the basis of the Refugee 1995 category, approved along with the father's on 1 February 2000. The permits were approved on 7 February 2000. No further weight is given to this point.

DISCUSSION AND FINDINGS ON PRELIMINARY ISSUE

[22] The argument for the mother and sons is that because they did not apply for refugee status separately from the father and because they were not in New Zealand at the time of the determination of the claim, they were not recognised as refugees. It follows, they say, that if they were not recognised as refugees then there is no jurisdiction for the RSB or the Refugee Status Appeals Authority to consider and determine whether that recognition of refugee status should now be cancelled.

[23] In determining this issue, it is appropriate to consider the focus of cancellation proceedings as expressed in the statutory framework of the Immigration Act. The jurisdiction to take cancellation proceedings under s129L(1)(b) (and on appeal by way of s129O) applies to a *decision* to recognise a person as a refugee. There is no reference to a person having made an application for that refugee status or for the decision to recognise to have taken a particular form. Put another way, jurisdiction to take cancellation proceedings does not rely on an application for refugee status but on a decision to recognise a person as a refugee.

[24] Equally, it is not appropriate to focus on what the mother and sons believed their position to be (although it is noted that they have subsequently indentified themselves as recognised refugees) but rather on what the administrative decision, in fact, was.

[25] It is acknowledged that, prior to 1 October 1999, the internal policy and operation directions within RSB as to determining the refugee status of family members of a refugee claimant were somewhat confusing. Nothing is gained by setting out the detail here because the ambiguity and potential contradiction between different sections of the Operations Manual do not shed any light on the issue.

[26] The correct approach is to simply assess whether a decision to recognise the mother and sons as refugees was, in fact, made. The Authority finds that it was for the following reasons.

[27] The starting point for assessment must be the RSB decision issued on 12 August 1999. The front page of the decision clearly indicates that the mother and sons are included in the application. While it is acknowledged that the mother and sons' predicament is not specifically considered in the decision, that is a matter which goes to the adequacy of the reasoning within the decision – an issue potentially relevant to a judicial review of the decision, had one ever been sought, but not relevant to whether or not a decision was made. The approval of the application for refugee status was notified to the father's lawyer on 13 August 1999 and the notification letter expressly names the mother and sons as being included in the approval for refugee status. The letter also reflects the NZIS data which recorded the mother and sons as having been recognised as refugees. Following that recognition, the mother and sons were the recipients of the same benefits of refugee status enjoyed by the father including the approval of residence permits on the basis of refugee status.

[28] The Authority therefore rejects the appellants' argument that the mother and sons were never recognised as refugees. It finds that the mother and sons were recognised as refugees on 12 August 1999 and were subsequently treated as being such for the purpose of being issued a residence permit.

[29] Although not specifically articulated as such, the appellants have also advanced what the Authority interprets to be an alternative argument that the RSB refugee decision in respect of the mother and sons was *ultra vires* and is therefore a nullity. With respect, this argument is rejected.

[30] It is well established that administrative law validity principles mean that while an *ultra vires* decision is a potential nullity it will be operative until set aside retrospectively by a Court. The invalidity is latent until it is impugned retrospectively by a Court of competent jurisdiction. The principles were set out in *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) where Elias J held at 320:

> It is settled law that every unlawful administrative act, except perhaps an extreme case of clear usurpation of power, is operative until set aside by a Court. Even where a decision is challenged by a plaintiff entitled to do so in appropriate legal proceedings, the Court is not compelled to set aside the decision.

[31] The statements by Elias J in *Murray* have been cited and confirmed in a number of cases including *Commissioner of Police v Hawkins* [2009] 3 NZLR 381 (CA) at [42]; *Air New Zealand v Wellington International Airport Ltd* [2008] 3 NZLR 87 (HC) at [65]; and *Diagnostic Medlab v Auckland District Health Board* [2007] 2 NZLR 832 (HC) at [335]. This principle is commonly referred to as the legal relativity theory because the validity of the decision is a concept which is relative depending on the Court's willingness to grant relief in any particular case. See Wade and Forsythe, *Administrative Law* (7th ed, 1994) p341.

[32] As Ms Curtis correctly concedes, the RSAA is not a Court as referred to in the case law. There is no jurisdiction for the Authority to set aside the original grant of refugee status to the mother and sons. If the RSB decision were to be challenged, the appellants should have applied to the High Court for an order setting aside the original decision in which they were recognised as refugees. No order having been made by the High Court, the decision to recognise the mother and sons as refugees continues to remain administratively operative.

[33] In addressing validity principles Ms Curtis asserts (Submissions, 3 June 2010) that the RSB made a procedural mistake, as opposed to an error of law, when it stated that it had granted refugee status to the mother and sons. Ms

Curtis contends that the NZIS letter (13 August 1999) stating that the mother and sons were approved refugee status was never acted on and therefore the RSB mistake was one of syntax rather than substance. The Authority disagrees for reasons already articulated at [27]-[29] above. The assertion is not borne out by the evidence. As noted above, the NZIS records clearly record the mother and sons to have been recognised as refugees. Further, the process for the grant of residence permits for the mother and sons was undertaken simultaneous to and on the same grounds as that completed for the father. They were all treated, in law and practise, as persons recognised as refugees.

[34] Counsel has also argued that because there was no fraud perpetrated by the mother and sons in relation to the original refugee claim, they should not be subject to cancellation proceeds. The Authority disagrees. Section 129L(1)(b) does not prescribe that fraud be perpetrated by or even with the knowledge of the individual whose refugee status is subject to cancellation proceedings. Third party fraud is sufficient.

[35] Counsel has further argued that if it is found that the original recognition may have been procured by fraud then the determination of whether the mother and sons should cease to be recognised as refugees should proceed by consideration of whether they were, in fact, refugees in 1999 at the time the original recognition was made. That argument too is resisted. It is well established that the stage two enquiry of cancellation proceedings involves a determination anew of whether the individual should be recognised as a refugee, on the basis of the situation of the appellant as at determination, whatever their circumstances at that time. The determination of whether it is appropriate to cease to recognise the appellants as refugees is made with regard to their circumstances at the time of this determination.

[36] The Authority has not overlooked Ms Uca's submissions (made orally on 23 September and supported by documents provided on the same date) in which she seeks to support the above argument with reference to various commentators' comments on the process and jurisdiction for determining refugee claims in 1999. However, as Ms Uca noted, the contradictory practise and policy at the time led to a situation of confusion. This confusion appears to have been shared by refugee status officers and therefore the contradictory comments and policies are not particularly helpful in advancing the analysis of what decision was in fact made in regard to these appellants.

Summary of findings on preliminary issue

[37] In summary, the Authority finds that the mother and sons were recognised as refugees, together with the father, on 12 August 1999. On that basis, the refugee status officer had jurisdiction to cancel the refugee status of the mother and sons pursuant to s129L(1)(b) of the Act and the Authority has jurisdiction to hear and determine the appeals.

[38] That being so, this decision now turns to consider the substantive cancellation appeal.

THE CANCELLATION JURISDICTION

A TWO STAGE TEST

[39] Section 129L(1)(b) of the Act provides that the functions of a refugee status officer include:

> …Determining whether a decision to recognise a person as a refugee was properly made, in any case where it appears that the recognition given by a refugee status officer (but not by the Authority) may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information and determining to cease to recognise the person as a refugee in such a case if appropriate.

[40] Thus, a refugee status officer has a duty to determine whether to cease to recognise a person as a refugee if it appears that the original grant of refugee status by the RSB may have been procured by fraud.

[41] Where a refugee status officer ceases to recognise a person's refugee status, that person may appeal to the Authority. Section 129O(2) of the Act provides:

> A person who is dissatisfied with the decision of a refugee status officer on any of the matters referred to in section 129L(1)(a) to (e) and (2) in relation to that person may appeal to the Refugee Status Appeals Authority against the officer's decision.

[42] There are two stages to the inquiry. The Authority must first determine whether the grant of refugee status may have procured by fraud. If so, it then determines whether the person should cease to be recognised as a refugee.

THE APPELLANTS' REFUGEE CLAIMS

[43] The father arrived in New Zealand on 28 November 1998 and claimed refugee status on arrival.

[44] The mother and sons arrived in mid-2000 after they had been recognised as refugees, having been included in the grant of refugee status to the father made on 12 August 1999.

[45] The decision to recognise the appellants as refugees was made on the grounds that the father had a well-founded fear of being persecuted by the Taliban for reasons of an imputed political opinion as a result of an association with the Rabbani regime, coupled with his Tajik ethnicity.

CANCELLATION PROCEEDINGS

[46] On 2 October 2007, the appellants were served with Notices of Intended Determination Concerning Loss of Refugee Status ("the notice") in accordance with s129M of the Act and Reg 11 of the Immigration (Refugee Processing) Regulations 1999.

[47] In the notice, the refugee status officer stated the preliminary view that the grant of refugee status conferred on the appellants was not properly made because it may have been procured by fraud. The grounds relied upon in essence were:

(a) That the appellants were resident in Peshawar, Pakistan during the time that the father claimed they were living in Afghanistan and experienced persecution at the hands of the Taliban; and that

(b) That the mother and sons were resident in Peshawar, Pakistan during the processing of the refugee claim and not in Afghanistan as claimed by the father.

[48] On 19 December 2008, the RSB published a decision cancelling the grant of refugee status conferred on the appellants in August 1999 on the basis that it may have been procured by fraud and also because the appellants did not (in the officer's view) presently meet the definition of a refugee in Article 1A(2) of the Refugee Convention.

[49] The appellants now appeal against those decisions to this Authority.

THE DEPARTMENT OF LABOUR'S CASE

[50] Prior to the hearing, counsel for the DOL filed a memorandum of submissions dated 29 May 2009. Further principal submissions were received on: 2 June (accompanied by Mr Boggs' statement), 12 June, 15 September, 7 October and 30 November 2009 and 18 May 2010.

[51] Essentially, the DOL's case consisted of the documentary evidence compiled in the course of the refugee status officer's determination concerning the loss of the appellants' refugee status. This documentation was contained in the DOL file served on the appellants with the cancellation notice in September 2007.

[52] The key documents relied on appear at pages 237 to 522 in the DOL file being a series of letters written by the father's family to the father since his arrival in New Zealand. The content of the letters strongly indicate that the father's family had lived in Pakistan for some years prior to 2000 and that at the time the father was claiming refugee status in New Zealand, his wife and children were living with his family in Peshawar, the wife having lived with the father's family since their marriage in 1996.

[53] Also relevant to the preliminary issue are the documents submitted by DOL in relation to the policy, procedures and regulations in force in 1999 at the time the refugee claims were determined and evidence from Mr Boggs as to the usual practise of refugee status officers in determining refugee status prior to October 1999.

THE APPELLANTS' CASE ON APPEAL

[54] The following is a summary of the relevant evidence presented by the appellants at their cancellation appeal hearing. It is assessed later.

The father's evidence

[55] The father is an ethnic Tajik, Sunni Muslim, born in 1968 in Kabul. He completed primary school and undertook some secondary schooling in Afghanistan.

[56] In the mid-1980s, the father's family decided to send the teenage sons away from Afghanistan to avoid the prospect of them being forced to do military service. The father's older brother and sister went to Peshawar in 1984 and he followed one year later. By 1991, except for the father's father (the grandfather) the whole family had moved to Peshawar. The grandfather continued to live and work in Kabul until the late 1990's. At that point he sold the house in Kabul, moved to Peshawar and did not resume work.

[57] The father and his siblings transitioned through a refugee camp in Peshawar but did not register. However, the father did complete his secondary schooling there.

[58] In 1988, after completing school, the father became a tailor's assistant for approximately six months. He then took another better paid job as a construction supervisor. Following that the father trained as a dental assistant and worked at a

hospital for four years.

[59] In 1994, he took work with an international humanitarian organisation. As part of that job the father was sent to work in Kabul in 1995 for three weeks. He was shocked at the destruction in Kabul. After returning to Peshawar he decided that he would attempt to find a third country to live in, because there was no realistic prospect of returning to rebuild life in Afghanistan and his status in Pakistan was not permanent. For three years, while still working, he applied unsuccessfully in visa lotteries to emigrate to the United States.

[60] The father and mother married in 1996.

[61] In 1997, he sought the help of agents to help him travel abroad and secure refugee status. The process took one year but by 1998 he had found an agent who could help him. He arrived in New Zealand on 28 November 1998 and applied for refugee status. He was granted recognition as a refugee on 12 August 1999. His wife and sons (the second one born after his departure) remained with his family in Peshawar until they were granted resident's visas for New Zealand and travelled here in 2000.

[62] The father told lies in support of his refugee claim because he was in a difficult situation in Peshawar and held no hope for a return to Afghanistan. He felt determined to provide a better life for his children. The agent told him to lie in order to secure refugee status and the father believed that that was the best way to achieve a better life for his family. Once he had started telling the lies, including to people within the Afghan community in New Zealand, he did not feel able to correct the situation.

[63] He lied about having a third son because there was a lot of pressure from his family in Pakistan to facilitate the travel of at least one of the nephews. However, the wife objected to the plan when she heard about it and that was why the account of the child dying was created.

[64] Since approximately 2001, the father has taken on the role of primary caregiver and housekeeper because his wife has limited mobility due to her chronic back pain.

[65] The family all travelled back to Pakistan and Afghanistan in 2005 for the father's sister's wedding in Kabul. While in Kabul they stayed with one of the father's sisters and then one of his elderly aunts. They enjoyed their time there although there was some tension between the father and his family relating to his

inability to support the extended family financially and the fact that he had not been able to help more family members to move to New Zealand.

[66] In 2008, the father was also planning to return to Pakistan to visit his mother who lives with one of his brothers. He was going to go for two months on his own. Although he paid for the tickets, he did not make the trip.

The mother's evidence

[67] The mother is an ethnic Tajik, Sunni Muslim who grew up in Kabul with her parents, three sisters and two brothers. One brother now lives in Germany, a sister lives in Switzerland and the other three siblings live in Kabul having moved back, separately, since 2006.

[68] In 1993, her father was killed in a rocket attack in Kabul. Soon after, the family moved, under the protection of her sister's husband, to Peshawar. She met the father there and they married in 1996.

[69] Following the marriage, the mother moved in with the father's extended family. Their first child was born in 1997. The second child was born in 1999 after the father had departed Pakistan and travelled to New Zealand.

[70] Soon after the birth of the second child, the mother injured her back in a fall and was required to rest for some months.

[71] The mother was not aware of the details of the father's refugee claim but was happy when he was able to stay in New Zealand. When she became aware that she was expected to bring one of the father's nephews to New Zealand, posing as her third child, she became angry and refused. She felt unable to cope with the responsibility of looking after another child. The mother argued with her husband about it and her wish prevailed, to the disappointment of her husband and his family with whom she was living.

[72] In 2000, after she and the sons had been granted residence visas, the father came to assist them with the travel to New Zealand.

[73] Further children were born in New Zealand.

[74] The family returned to Afghanistan in 2005 to attend the wedding of the father's sister in Kabul. The mother felt fearful for their safety because of the general security situation there. She also observed some tensions in the father's

family which she believes is related to their resentment that the appellants had achieved permanent residence in New Zealand.

[75] In 2005, the mother suffered a further injury to her back after another fall.

[76] In 2007, when the Cancellation Notice was served, the mother did not understand the basis of it. When the father eventually confessed that he had lied in order to obtain refugee status, the mother was very angry and threatened to reveal the truth. However, the father's view prevailed and the mother was persuaded to maintain the lies to the lawyer and the RSB. The situation caused significant stress in the marriage.

[77] The mother's two sisters who live in Kabul both live with their husband's families and cannot provide support for the appellants. One sister's husband runs a pharmacy and her father-in-law is a doctor. The other sister's husband is employed delivering water tanks. Her brother lives with her mother in rental accommodation.

Documents provided in support of the appeals

[78] The appellants submit in support of their appeals the following:

(a) Principal submissions from Ms Curtis on 28 April, 19 May, 26 May, 2 June, 22 June, 14 July, 8 September, 16 September and 25 November 2009 and 4 June 2010.

(b) Principal submissions from Ms Uca on 18 September and 23 September 2009.

ASSESSMENT OF THE APPELLANTS' CASE

Stage One – Whether the recognition of the appellants may have been procured by fraud

[79] The determination of whether the decision to recognise the appellants as refugees may have been procured by fraud is straightforward.

[80] The father claimed refugee status on arrival at Auckland airport on 28 November 1998. He claimed to have departed Afghanistan on 12 November 2008. The refugee claim, as set out in the refugee application form, written statement and RSB interview was made on the following grounds:

(a) His elder brother was a member of the *Jamiat-I-Islamia* – the strong rivals of the Taliban (then in power).

(b) His family had associations with the non-Pashtun Rabbani administration, including that his elder brother held a senior position with the Civil Security Department which was responsible for security in Kabul. On that basis the family had been and would continue to be targeted by the Taliban.

(c) The father and grandfather had been arrested, detained and beaten by the Taliban because they could not locate the elder brother. The family home was also raided by armed Taliban on more than one occasion because they were searching for the elder brother.

(d) All of these problems were said to have arisen following the Taliban taking control of Kabul in late 1996 and while the father, mother and son (the second son not having been born) were resident in Kabul.

[81] All of the above was untrue. The father had departed Afghanistan in 1985 and had lived there until 1998 when he travelled to New Zealand. His brothers, sisters and parents also moved from Afghanistan to Pakistan between the years of 1984 and 1991.

[82] The short answer to the question, whether the appellants' recognition of refugee status may have been procured by fraud, is "Yes". The father and mother have admitted that the refugee claim was advanced on false grounds and that they lived, with the father's extended family, in Peshawar at the time the father claimed that they had been targeted by the Taliban in Kabul.

[83] The recognition of the appellants as refugees was procured by the provision of false or misleading information and the concealment of relevant information. The first stage of the enquiry is made out.

[84] For the sake of completeness, the Authority notes that counsel has contended on the mother's behalf that she (the mother) was not aware of the untruths perpetrated by the father in pursuing a refugee claim and therefore should not have cancellation proceedings brought against her. As noted above at [34], there is no requirement that each individual subject to cancellation proceedings is responsible for or had knowledge of the fraud. Third party fraud is sufficient. On that basis, even if the Authority were to accept that the mother had no knowledge of the father's lies (which we do not), her lack of knowledge would not be a bar to cancellation proceedings.

STAGE TWO: WHETHER THE APPELLANT SHOULD CEASE TO BE RECOGNISED AS A REFUGEE

[85] Having found above that the appellants' grant of refugee status may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information, it is necessary now for the Authority to consider the second stage of the two stage test, that is whether or not the appellants currently meet the criteria for refugee status.

THE ISSUES

[86] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

> …owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[87] In terms of Refugee *Appeal No 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

Credibility of the appellants

[88] In order to address whether or not the appellants currently meet the criteria for refugee status, it is first necessary to make a credibility assessment of the evidence they have provided in support of the appeals.

[89] The Authority partially accepts the credibility of the mother and father. However there are aspects of the evidence, including in relation to the situation that each of the appellants would face on return to Kabul, which are not accepted. The specific reasons and findings follow.

History of false claims and belated concession of fraud

[90] The credibility assessment of the mother and father must take into account their history of presenting false information in relation to the presentation of the

original refugee claim and the subsequent applications for residence and citizenship.

[91] The false claims were maintained for the entire duration of the RSB cancellation proceedings (25 September 2007 (date of Notice of Cancellation) to 19 December 2008). During that time, bother the mother and father asserted, in written statements and in the RSB interview, that the original refugee claim was truthful. They also maintained their false assertion to have had a third son who died in Afghanistan and provided detailed explanations for the information the refugee status officer considered to contradict the evidence provided in relation to the refugee claim.

[92] On 23 December 2008, the appellants lodged with this Authority appeals against the decision of the refugee status officer to cancel their refugee status. The mother and father continued to lie about both the fictitious dead child and the false refugee claim in written statements to the Authority.

[93] It was not until 3 July 2009 that the Authority was notified in writing by Ms Curtis that the father conceded that the original recognition of refugee status may have been procured by fraud.

[94] While the fact the mother and father have told lies does not automatically mean that they are telling lies about their likely situation should they now return to Afghanistan, their actions betray a long-standing willingness to undermine the integrity of New Zealand's refugee and immigration system. This necessarily leads to all of their evidence being treated with a significant degree of caution and scepticism.

Exaggeration of evidence

[95] The Authority finds that the parents' testimony included elements of exaggeration and mobility such that the interpretation they have given to past events and aspects of their likely situation on return to Afghanistan cannot be accepted.

[96] As to past events, in his written statement (dated 8 September 2009), the father claims that the grandfather left Afghanistan because he was approached on multiple occasions by strangers who inquired about his sons and he felt extremely fearful for his safety. However, it is difficult to reconcile this with information contained in the letters written to the father in 1999 from his family in Peshawar

referring to the grandfather making frequent trips back to Kabul. The father now says that this was so that the grandfather could escape the heat in Peshawar. However, the Authority finds it implausible that the grandfather was willing to return to Kabul within months of departure if he was indeed fearful of being harmed. Rather, it is found that the grandfather's departure has been given an artificial interpretation which supports the fathers' claims that his family were of interest to the Taliban or other unnamed groups in Kabul in the late 1990's. While this matter is not determinative of issues considered in this appeal, it is indicative of the tendency of the father to exaggerate or manipulate the evidence in an effort to support the appeals.

[97] The Authority also rejects the assertion by the father that he has no functional relationship with his siblings and cannot therefore call on them for support or assistance during the reintegration period in Kabul. The family stayed with the father's sister in Kabul in 2005. The father has maintained telephone contact, albeit intermittent, with his brother in Kabul since the 2005 trip. He has also maintained telephone contact with his brothers in Peshawar and was intending to stay with them and his mother in 2008. While there may have been some issues of disagreement between the father and his siblings, these circumstances do not establish a breakdown in familial relations to the extent that his siblings will not provide him with assistance on return to Kabul. While he has had limited contact with his two sisters in Kabul since 2005, there is no sensible reason why relations would not be revived were the appellant to return there now.

[98] Also rejected is the mother's assertion that the father's family are traditional, conservative and strictly religious and will impose strict traditional rules on her and the family including forcing the husband to leave her or take another wife because of her medical issues. In contrast, the father's evidence was that his family in Kabul are socially moderate, do not impose traditional rules on women such as wearing a head covering or restrictions on moving around the city alone and do not attend mosque. The Authority prefers his evidence because it aligns with other peripheral evidence given about the ability of his sister-in-law to work (before she had children) and her manner of dress.

[99] Having outlined those concerns, the Authority accepts the appellants' account of how the father travelled to New Zealand and the events surrounding the nephew's inclusion in the original refugee claim and residence application. The Authority also accepts that the two sons have been raised in a largely secular household and have integrated into New Zealand society in terms of cultural

norms, behaviour and attitudes. It is also accepted that the sons use English as their first language and that their Dari language skills are limited to the extent that they have restricted listening comprehension and cannot read or write Dari.

DO THE APPELLANTS HAVE A WELL-FOUNDED FEAR OF BEING PERSECUTED IN AFGHANISTAN?

[100] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of basic or core human rights, demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996).

[101] It is well established in the Authority's jurisprudence that the standard for establishing that a fear of being persecuted is well-founded is an entirely objective one. See for example *Refugee Appeal No 72668/01* NZAR 649 at [111] to [154]. A subjective fear, however strong, is not sufficient to establish the well-founded element of the refugee definition. There must be a real or substantial basis for the harm which is anticipated.

[102] The appropriate question to be considered is whether considering the totality of the evidence, individuals having each of the appellants' characteristics would face a real chance of serious harm for a Convention reason if sent to Afghanistan. See *A v RSAA* (CIV 2004-4-4-6314, 19 October 2005, HC, Auckland, Winkelmann J) at [38].

[103] The Authority now turns to consider the country information against which the risk to these appellants is to be assessed. Further country information is provided below specifically relating to the sons’ assessment.

SUMMARY OF COUNTRY CONDITIONS

[104] Afghanistan has been the site of continuing armed conflict since 1979. The launch of Operation Enduring Freedom by the United States and United Kingdom in 2001, has brought with it no improvement in security for the civil population. The current situation in Afghanistan can be characterised as one of ongoing armed conflict accompanied by serious and widespread targeted human rights violations. As reported by the United Nations High Commissioner for Refugees in "*UNHCR Eligibility Guidelines for Assessing the International Protection needs of*

Asylum Seekers from Afghanistan" UNHCR (July 2009) (hereafter "UNHCR Guidelines"):

> The Afghani government and the International Security Assistance Force and Operation Enduring Freedom are fighting groups of insurgents including the Taliban the Hezbollah and al-Qaeda. There is also an array of legal and illegal armed groups and organised criminal groups involved in the conflict. Against such a background, human rights violations are rarely addressed or remedied by the authorities, be it the justice system or the police force.

[105] The same source reports a significant increase in civilian casualties and instability spreading throughout the country:

> Civilian casualties in 2008 increased almost 40 per cent more than in 2007. Armed clashes frequently occurred near or in inhabited areas ... and have led to extensive loss of civilian life.
>
> ...
>
> The most dramatic change in the armed conflict has occurred in the central provinces surrounding Kabul. ... in Wardak, Logar and Kapisa. The number of security incidents in this central region has increased from 485 in the period to August 2007 to 806 in the same period in 2008. Attacks are on the rise in Kabul as well. [...] Insurgents are increasingly able to hold ground, stage attacks on international forces, infiltrate and disrupt travel in and out of the capital. …

[106] The United States Department of State *Country Reports on Human Rights Practices for 2009* (11 March 2010) ("the DOS report") similarly reports on the deteriorating security situation and goes on to record:

> The marked deterioration in security posed a major challenge for the central government, hindering its ability to govern effectively, extend its influence, and deliver services, especially in rural areas. The security environment also had an extremely negative effect on the ability of humanitarian organizations to operate freely in many parts of the country, particularly in providing life-saving care.

[107] As to the situation of returnees, the country information records that there has been a significant influx of returning nationals since the fall of the Taliban in 2001 although the increased violence throughout 2008 and 2009 appears to have slowed the trend considerably. While an abundance of country information documents the specific projects and programmes aimed at successful settlement of returnees, the ability of the Afghan government and other humanitarian organisations to adequately cope with the high numbers is questionable. The United States DOS report records the general situation as follows:

> The country continued to focus on providing services for returning refugees, but the government's capacity to absorb returnees, often in conflict settings, remained low. The continuing insurgency and related security concerns, as well as economic difficulties, discouraged numerous refugees from returning to the country. Many refugees needed humanitarian assistance upon arrival. Common types of extreme vulnerability, as defined by the UNHCR, included minors unaccompanied by adult family members, drug addiction, mental illness, and severe physical illness.

[108] The Central Intelligence Agency (CIA) World Factbook (last updated February 2010) noted that Tajiks comprised about 27 per cent of the population, making them the second largest ethnic group in Afghanistan generally and a significant proportion of the population in Kabul.

[109] Despite the clearly unstable situation in Afghanistan, the violent conflict and state of insecurity does not in itself establish that the appellants have a well-founded fear of being persecuted for a Convention reason. Nor, in the view of this Authority, is there sufficient evidence to establish that every returnee is at risk of serious harm to the real chance threshold. Each appeal falls to be determined on its own facts, taking into account the particular characteristics of the appellant. This decision now turns to consider whether or not each appellant has a well-founded fear of being persecuted on return to Afghanistan.

The father

[110] The country information put before the Authority does not support a finding that all Tajik Sunni men who have been absent for long periods and return to Afghanistan from abroad are at risk of being persecuted for a Convention reason. The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (July 2009) do not include persons of the father's profile who have links in Kabul as among those who are "particularly at risk in view of the security, political and human rights situation in the country". See *UNHCR Guidelines*, Section 3: Main Categories of Claims, p14.

[111] The father is a married man of Tajik ethnicity, a Sunni Muslim who grew up in Kabul until the mid-1980s at which time he moved to Pakistan, along with other members of his immediate family. The father has one brother and two sisters and their respective spouses and children who have voluntarily re-settled in Kabul.

[112] The father claims that he is at risk of being persecuted because his long absence from Afghanistan and his deteriorating Dari language skills mean that he will be perceived as a westerner and targeted for violence on that basis. He claims not to have work skills. Furthermore, he claims that he is the main caregiver for the children in New Zealand and he will be unable to continue in that role as providing financially for the family in Afghanistan. He also says that his relationship with his siblings has broken down and therefore he cannot seek their assistance.

[113] However, for the reasons given below, the Authority finds that the specific characteristics relied upon by the father to support his claim to be at risk of being persecuted to the real chance level in Afghanistan have either not been established or do not expose him to a real chance of being persecuted for a Convention reason.

[114] As to being perceived as a westerner, the country information indicates that while anti-government groups may target groups associated with or perceived as supporting the Government (including schools) there is not a real chance that an adult returnee from abroad with no other exacerbating profile such as a direct association with the government, will be targeted for harm. The Authority notes that since 2001 there has been a significant influx of returnees to Afghanistan, many of whom have lived elsewhere for long periods and returned to Kabul. In that context, the father's return will not be particularly notable or lead to undue attention focusing on him. The father can speak the local language and as he stated in his evidence, during his trip in 2005 he was able to dress and behave so as not to bring attention to himself. The country information records two reports that returnees known or suspected to have substantial amounts of cash have been targeted by non-State actors. See *UNHCR Guidelines*, p61. However, the father claims that they have very limited financial resources and therefore there is no reason that they would be indentified as having large amounts of cash, even in the context of Afghanistan.

[115] The father's claim that his Dari language skills have deteriorated is acknowledged but does not put him at risk of serious harm. The father has continued to speak Dari with his wife and has Afghani friends in New Zealand with whom he could presumably also speak Dari. He chose to have a Dari interpreter at the hearing so that the more complicated parts of the hearing could be translated. He returned to Afghanistan in 2005 and did not have any difficulty in that respect and there is no reason to conclude that he would encounter difficulties relating to language on return.

[116] The father's claim not to have work skills is not made out. The father worked while he lived in Pakistan and worked in New Zealand until he assumed responsibility for child care and running the house. While the Authority notes the high rates of unemployment in Afghanistan and the difficulty that some returnees have in securing permanent employment, these are part of the general situation of Afghanistan as a vulnerable economy and are not contributed to by a Convention reason. There has also been an implied assertion in the submissions for the

father that his assumption of domestic tasks would somehow put him at risk of harm but this is not established on the evidence.

[117] As noted above, the father's claim have a family 'rift' which means he will not be able to call on the assistance of his family in Kabul is not accepted. The appellants will not be without family connections on return to Kabul and will likely be able to use these connections to their advantage in seeking employment and housing and in re-establishing social networks.

[118] The father also expressed in some detail his fears for his children, who he says would suffer sever discrimination in education and many other civil and political rights. However, the New Zealand-born children are not appellants and therefore their situation cannot be considered by the Authority in this appeal. His concerns for the sons are more properly dealt with below in the section of the decision which specifically considers their predicament on return.

The mother

[119] The Authority finds that there is no evidence to support a finding of the mother being at risk of serious harm should she now return to Afghanistan.

[120] The mother contends (by way of her own evidence and counsel's submissions) that she is at risk in Afghanistan for the following reasons:

(a) She does not wish to wear a burqa and sometimes dresses in a western style.

(b) She is infirm and will be unable to access appropriate medical care and her condition will mean she is more vulnerable to harm.

(c) Her husband's family will force him to divorce her because she is unable to fulfil her duties as wife and mother or alternatively she will be abandoned.

(d) The family will be targeted because they do not practise Islam in the same way as religious based groups.

(e) She will be perceived as a spoiled western woman and targeted for harm as a result.

[121] As already noted, the Authority finds that the family will have significant family connections and links in Kabul. The mother has a brother, mother and two sisters who presently live there. Indeed, it is quite possible that in the context of

having family nearby the mother will receive more family-based emotional and practical support than is available for her in New Zealand.

[122] As to her medical situation, the evidence before the Authority does not support the claim that the mother has medical requirements of a specialised nature or that the medical assistance she can be expected to require will not be available. The medical evidence provided indicates that she was diagnosed by her general practitioner in 2003 with a disc prolapse and trochanteric bursitis. In lay-person's terms the second part of the diagnosis relates to inflammation in part of the hip. The medical notes also record ongoing lower back pain between 2003 and 2009 and on occasion, numbness in her leg – both of which appear to be related to the hip condition. As far as the Authority can discern from the notes the mother has been prescribed an anti-inflammatory medication to treat the condition. There is also reference in the notes to low mood and depression for which she was prescribed anti-depressants in 2006. The notes relate her stress to her uncertain immigration status in New Zealand.

[123] There is no evidence before the Authority to suggest that the mother will not be able to access the necessary medical care in Afghanistan. The medical notes indicate that she is being prescribed anti-inflammatory and anti-depressant medication. In light of her evidence that her brother–in-law is a pharmacist in Kabul and his father is a doctor, there is no reason to think she could not obtain such medication there. Neither is there any evidence to support Ms Uca's implied assertion that she would be denied medical attention because her husband would not assist her to access it.

[124] Although she provided a medical certificate before the appeal hearing to say that she could not sit for long periods, and copies of her medical notes referred to in [122] above, no other medical evidence which supports her contention to be at risk of serious harm in Afghanistan on medical grounds has been provided. The International Organization for Migration (IOM) Country Sheet on Afghanistan (updated on 13 November 2009) stated that Afghanistan's modern health facilities are mostly concentrated in Kabul and other large cities. It further observed that:

> Although there are only three Pharmaceutical companies in Afghanistan: Aria, Afghan American and Kemiagar which have very limited production, all kinds of medicines are becoming more widely available in the country, with a prevalence of imports from Pakistan, India and Iran.

[125] Ms Uca has quoted an excerpt from the UK Home office Report (26 June 2009) with regard to the fact that mental health is not part of the primary health care system. However, that same source goes on to indicate that

> There are community care facilities for patients with mental disorders. Mental Health is included in Basic Package for Health Services (BPHS) which covers health service delivery up to district level. New treatment guidelines for common mental health disorder[s] are being formulated (draft is ready). Four Community Mental Health Centers have been established in the capital [Kabul], but further expansion is required.

[126] As to the mother's claim to be at risk because she does not wish to wear a burqa, the claim is not supported by country information or the father's evidence. The country information does not establish that there is a requirement to wear the burqa. While it is acknowledged that in some circumstances societal or family pressure may mean that women will wear a burqa, there is no evidence that the mother would be at risk of serious harm in Kabul if she did not adopt that form of dress. The father stated the women in his family do not wear the burqa and there is no pressure from the family to do so. The mother has not suggested that the social pressure to wear a scarf in public would amount to persecution for her.

[127] The mother's claims that she is at risk of abandonment and divorce by the father are also rejected. The father has consistently provided her and the children with the support and primary care they require, in the face of what have undoubtedly been stressful and challenging times. There is no sensible basis on which to speculate that she or the children would be abandoned by him should they now return to Afghanistan.

[128] The Authority also finds that the submissions made by Ms Uca that the mother would be at risk of harm because she would be perceived to have transgressed social mores or moral codes is not supported by the country information. The mother has not sought to break out of the traditional role of being a mother and has not expressed a desire to do so. She does not claim that she would pursue the sort of activities that might increase her risk such as a high profile or public career, human rights activism, work for a Government or non-government organisation. The risk profiles for women outlined in the *UNHCR Guidelines* are not applicable to the mother and do not provide support for a finding that she would therefore be at risk of serious harm.

[129] Similarly, the submissions and country information provided about the endemic rate of domestic and intra-family violence against women is not relevant to the mother. No evidence was put before the Authority that she has been the

victim of violence from her husband or anyone in his or her family. There is no reason why she would become subject to domestic violence should she now return to Afghanistan.

[130] For all those reasons the Authority finds that the mother does not have a well-founded fear of being persecuted in Afghanistan.

Whether the sons have a well-founded fear of being persecuted

[131] Before turning to address the predicament of the sons it is necessary to consider the country information as to the current situation for children in Afghanistan.

Country information

[132] With regard to the security situation for children generally the UNHCR Guidelines state:

> Children are reportedly being killed, exploited and ill-treated in ever-increasing numbers in Afghanistan as the violence across the country worsens. Allegations of recruitment of children by armed groups, including those associated with the Taleban, have been received from all regions, particularly from the south, south-east and east. Recruitment is also reported to be prevalent in areas with high concentrations of returnees.

[133] Particularly relevant to the sons is the increasing insurgent violence directed systematically at the education sector, including schools, teachers and students. In summarising the situation the 2009 *UNHCR guidelines* record:

> There has been an escalation of incidents affecting the education sector, including attacks on schools, students and teachers. According to the Ministry of Education and aid agencies over five million children (three million of them girls) have been deprived of education as a consequence of conservative customs, poverty, lack of education facilities and a culture of gender discrimination…. Schools have also been damaged in artillery exchanges with anti-Government elements and international military forces.
>
> … Whatever progress has been achieved towards enforcement of children's rights is threatened by the worsening humanitarian situation, the intensifying armed conflict, and the reduction in access and humanitarian assistance.

[134] In the lead up to the 2009 presidential elections, the intensity of attacks on schools increased markedly. These attacks escalated further when many schools were designated to be polling stations for the elections. The motivation behind the violence has been explained by the UN Educational, Scientific and Cultural Organisation (hereafter UNESCO) as follows:

> Schools are a visible manifestation of the presence of the state. Some elements within the Taliban want education to be limited to radical Islamic education in the *madrassas* (schools for Koran study) that they control. By attacking schools, they

> display their might, while ensuring the population stays uneducated. Attacks on schools have become explicit Taliban policy. UNESCO and International Institute for Educational Planning, *Education and fragility in Afghanistan: A situational analysis* (21 July 2009) p18.

[135] Another recent report by UNESCO, *Education under Attack 2010 – Afghanistan*, (10 February 2010) records detailed incidents of attacks on schools. It also states:

> CARE report on Afghanistan for the World Bank warns of an "alarming" trend. Between January 2006 and December 2008, 1,153 attacks on education targets were reported, including the damaging or destruction of schools by arson, grenades, mines and rockets; threats to teachers and officials delivered by "night letters" or verbally; the killing of students, teachers and other education staff; and looting. The number of incidents stayed stable at 241 and 242 respectively in 2006 and 2007, but then almost tripled to 670 in 2008.
>
> …
>
> UNICEF recorded 98 school incidents in the period from 1 May through 24 June 2009. At least 26 schools were attacked and partially damaged by the Taliban on election day, 20 August 2009, because they were being used as polling stations, according to the MoE. The schools were hit with rockets, missiles and improvised explosives.
>
> In June 2009, six incidents of explosives being found near or in schools and other locations occupied by children were reported.

[136] The same source goes on the report that in the cities such as Kabul, the targeting of school students by suicide bombers and abduction for ransom by criminal groups on the journey to and from school were also reported as significant problems. As noted in the country information at [105] above one of the most notable developments in the recent security situation in Afghanistan is the increasing number of insurgent attacks taking place in and around Kabul. It is reasonable to assume that this will extend to a corollary increase in attacks on and violence against schools and students in Kabul.

[137] Even where education is available and accessible, the country information records that it is of dubious quality and may expose children to physical or psychological violence.

[138] In general terms, the state education system is characterised by a marked lack of trained teachers, resources (including at times safe buildings or any buildings at all) and teaching materials. Representative of the country information an IOM report records:

> The once robust and well-respected education system in Afghanistan has fallen over the pat two decades into a state of neglect. War has destroyed more than 70% percent of the schools and there are not enough teachers or necessities such as textbooks and notebooks to provide adequate educational services. One of the greatest difficulties in teaching the students is that Afghanistan has so few adequately trained teachers left in the country. Currently in the system there are

> more than 135,000 teachers, and out of that only 22 per cent of them are graduated from teachers colleges. Only about 30,000 have a Grade 12 level of education, the rest all have below Grade 12 education. *Afghanistan: Enhanced and Integrated Information on Return and Reintegration in the Countries of Origin - IRRICO II* [last update] 6 March.

[139] The country information also suggests the prevalence of corporal punishment against children in Afghanistan generally leads to an acceptance of violence against children within schools. See for example UNICEF *Education in Emergencies in South Asia: Reducing the Risks facing Vulnerable Children* (14 August 2009) p56. In February 2008, the Afghanistan Research and Evaluation Unit (AREU) noted that corporal punishment was widely used in Afghanistan and the common, if not universal, assumption is that in order to discipline children they should be frightened. Also recorded by the research was the idea that if a beating is severe enough children will never forget how it felt and, therefore, not repeat their "bad behaviour".

[140] Issues faced specifically by returnee children in the education sector include face language, curriculum continuity, special needs and social integration. See for example UNICEF *Education in Emergencies in South Asia: Reducing the Risks facing Vulnerable Children* (14 August 2009) p56.

Assessment of the sons' predicament

[141] The short answer to the question whether the sons face a real chance of serious harm if returned to Afghanistan is yes. This finding is reached for the following reasons.

[142] The Authority finds that the sons face a risk of being targeted for serious violence by anti-government insurgents at school, together with a risk of being harassed, physically harmed or kidnapped while travelling to and from school. This finding is made having particular regard to the fact that the sons have limited Dari language ability and have grown up in New Zealand ignorant of the cultural and social norms in Afghanistan. They will therefore be more likely to attract the attention of persons with anti-Government and anti-western political views, particularly in the initial period of their return. The finding is also made having regard to the current situation in Afghanistan in which violence against the government appears to be increasing in intensity and there is considerable uncertainty about the political stability of the current regime.

[143] The Authority also finds that there is a real risk that during attendance at school the sons will be subject to systemic physical violence in the form of corporal punishment. The Authority finds that because of the sons' limited Dari language ability and their unfamiliarity with the Afghan school environment and cultural and social context, their risk of being targeted for such violence by untrained teachers is beyond what might ordinarily be experienced by other students. Systemic corporal punishment is a violation of the fundamental human right to be free from inhuman treatment and therefore constitutes serious harm. See International Covenant on Civil and Political Rights, Article 7.

[144] Alternatively, the risks posed by the unstable security situation in Kabul may mean that the sons do not attend school in order to avoid potential harm. The fact that their non-attendance would be directly attributable to the inability of the State to provide safe access and attendance at school amounts to a violation of their right to education. The right to provide a primary education for all is an immediate duty of all States parties. See International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) Article 13 (2)(a). As noted by the Committee on Economic, Social and Cultural Rights the nature of the fundamental right to education in Article 13(2) requires that the State respect, protect and fulfil the right including to ensure that education is accessible and to prevent third

parties from interfering with the right. See ISECR General Comment No. 11 (1999) paragraphs 46 & 47.

[145] The Authority is satisfied that on return to Afghanistan the sons' situation as returnees who have never lived in Afghanistan, have limited language abilities and who will clearly exhibit "western" behaviour will lead people to identify them as outsiders. Cumulatively, in the context of serious violence being perpetrated against schools and students by insurgents targeting symbols of the government and the "west", and in the context of corporal punishment occurring within schools, there is a real chance of the appellants coming to serious harm. There is no ability for the State to protect them from that harm. In that regard, it must be remembered that the 'real chance' threshold for refugee status is a low one, and all that is required is that it be real as opposed to being remote or speculative. Refugee status is not predicated upon a *certainty* of being persecuted. Nor is the harm assumed to occur immediately upon return.

[146] The alternative of the boys not attending school is also serious harm by way of a violation of the fundamental right to an education.

[147] The persecution that the children face is by reason of their membership of a particular social group, namely children. In this regard it is noted that the Convention reason need only be a "contributing factor to the risk of being persecuted". See *Refugee Appeal No 72635* (6 September 2002).

[148] Accordingly, for the sons (*Refugee Appeal Nos 76307 & 76308*), the framed issues are answered in the affirmative.

CONCLUSION

[149] The following determinations are made:

(a) The Authority has jurisdiction to hear and determine cancellation appeals for all of the appellants (*Refugee Appeal Nos 76305, 76306, 76307 & 76308*) against whom proceedings have been brought.

(b) The grant of refugee status to the appellants made on 12 August 1999 may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

(c) It is appropriate to cease to recognise the mother and father (*Refugee Appeal Nos 76305, 76306*) as refugees. Their appeals are dismissed.

(d) It is not appropriate to cease to recognise the sons (*Refugee Appeal Nos 76307* & 76308) as refugees. They continue to be recognised as refugees. The appeals of the sons are allowed.

"B A Dingle"

B A Dingle
Member