

AT AUCKLAND

Appellants: AF (Afghanistan)

Before: B L Burson (Chair)
B A Dingle (Member)

Counsel for the Appellants: S Laurent

Counsel for the Respondent: T Thompson

Dates of Hearing: 5, 6, 9, 10, 11 May 2011

Date of Decision: 24 June 2011

DECISION

INTRODUCTION

[1] These are appeals against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), dated 30 June 2010, cancelling the grants of refugee status to each of the appellants, all citizens of Afghanistan.

[2] The principal claimant for refugee status is AF. He was granted refugee status by decision dated 10 June 1999, based on difficulties he faced in Afghanistan with the *Taliban*. At that time, the practice was to include family members in a principal applicant's claim and the other appellants in the present proceedings are his wife and children.

[3] The DOL contends that the original grant of refugee status may have been procured by fraud in two broad ways. First, by misrepresentations made by AF as to his difficulties with the *Taliban* arising from the sale of alcohol in a shop he had and, second, his failure to disclose relevant information relating to a high-ranking

position he held in the Afghan government and to his being a *Mujahedin* commander. A separate issue has arisen as to whether the eldest son is the child of AF and Mrs AF or is, in fact, a brother of AF. AF denies all these allegations as does the eldest son in relation to the specific allegation made against him.

THE CLAIM FOR REFUGEE STATUS BY AF

[4] AF claimed to be a teacher from X. His father, an army officer, was a close personal friend of Dr Najibullah, the President of the Soviet-backed Najibullah government in Afghanistan. His father had been a senior member of the ABC Party. He claimed refugee status upon the grounds that in the 1990s, he had been a military advisor to the Najibullah government and had been the military commander in charge of the defence of X against the attacks on the city by the various *Mujahedin* groups seeking to overthrow the government. After the overthrow of the government in 1992, a general amnesty was declared for supporters of the former government. Nevertheless, both AF and his father lost their jobs. AF supported himself and his family by opening a small shop which sold general foodstuffs and alcohol. Following their coming into power in the mid-1990s, the *Taliban* killed AF's father in 1997, along with his first wife who was home at the time. AF was detained and interrogated by the *Taliban* about his father's support for the Najibullah government and his knowledge of the addresses of his father's associates. He was also interrogated about the sale of alcohol in the shop. He managed to escape from his detention and fled to Pakistan. A "wanted notice" was issued by the *Taliban* and placed in a *Taliban* newspaper.

THE CASE FOR THE DOL

[5] The nub of the DOL's case is that AF has told lies in relation to his difficulties with the *Taliban* in that he has given inconsistent evidence regarding whether or not he sold alcohol in his shop. Also, it was now considered that the timeline originally given by AF for his movements following his escape from detention did not match up with his date of arrival in New Zealand. More significantly, material seized by the police from his house in 2000 in relation to an unrelated investigation casts doubt as to his age. According to these documents, and in particular, his Afghani identity card (*tezkerá*), AF would have been too young to have married his first wife and to have fathered the eldest son and to

have been a teacher. Furthermore, the DOL contend that the material seized and interviews conducted by the police indicate that AF may have held a senior position in the government and/or was a *Mujahedin* commander, both being matters the appellant failed to disclose to the RSB during his claim.

Evidence of Sergeant Turley

[6] Prior to 2006, Sgt Turley worked as a detective sergeant in the police force. In late 1999/early 2000, he was in charge of two separate police operations. The first of these was an in-depth investigation into organised crime and, specifically, people-smuggling organisations based in New Zealand and operating on a global basis. In the course of this operation the police came into possession of evidence which raised significant concern about a criminal conspiracy to conduct terrorist attacks in Australia. These persons became the focus of a separate police operation. In the course of these police operations a number of houses were searched in the Auckland region, including AF's. A search warrant was executed at the property and a number of items were seized including photographs, correspondence, and telephone records. Although the police operations revealed that AF was not involved in the people-smuggling operation or in any criminal conspiracy, information obtained in the course of the investigations indicated to Sgt Turley that AF may not have told the truth in relation to his refugee application.

[7] Indeed, fraud charges were laid in the District Court relating to his refugee claim. The charges were subsequently dropped by the police because of concerns that the appellant may not be able to receive a fair hearing in the immediate aftermath of the terrorist attacks in the United States in September 2001 and associated concerns about the safety of witnesses proposed to be called in evidence in support of the police prosecution.

[8] Following the dropping of the charges, a number of items including some photographs were returned to AF. However, a number of photographs and other documents were retained by the police because of their possible ongoing significance. The police file was then stored in a special location for files of general importance. Since that time, the police have restructured the administration covering Sgt Turley's former station of operation and in the subsequent shifts the files have been lost. Sgt Turley believes they could still be locatable.

[9] In the course of his investigations, Sgt Turley interviewed AF on four separate occasions. He made notebook entries of his interviews. One interview was videotaped. Sgt Turley told the Tribunal that members of the Afghani community in Auckland had told him that AF was known as a commander and photographs seized from his house showed a number of armed men travelling in convoy. Also, notations on the back of some photographs seized identified AF as the Director-General of borders. He checked the RSB decision and realised these things had not been mentioned by AF. In the course of his interviews Sgt Turley also raised issues in relation to the importation of alcohol by AF.

Evidence of Erin Jones

[10] Erin Jones is a refugee and protection officer (RPO) at the RSB. Under cross-examination from Mr Laurent, Ms Jones confirmed that she had not seen the originals of any of the documents on the file and, in particular, photographs taken by the police from AF's house. She could not, from the copy of the photographs on the file, identify which of the persons appearing in the photographs was AF. Nevertheless she confirmed that the DOL wished to rely on the photographs and other documentary evidence produced.

[11] Ms Jones acknowledged that the date of birth for AF provided on the passport he obtained showed a date of birth of 1959 which appeared to be a different date of birth from that on his *tezker*a. She believes, based on country information available, that the *tezker*a was more reliable than the date given in the Afghani passport.

[12] Ms Jones was not aware of any information that calls into question the assertion by AF that his own father had been a prominent military figure in the Najibullah regime. Nor was Ms Jones aware of any information calling into question the veracity of the appellant's assertions to have been employed as a teacher. She did not believe that there was any attempt to verify any of this information.

Evidence of the interpreters

[13] The Tribunal heard evidence from four interpreters, Mr Karimi, Mr Mahboob, Mr Ibram and Mr Atal. These interpreters had been engaged by either the police or Immigration New Zealand (INZ) to interpret for them in interviews with AF and/or the eldest son, or to provide translations of documents

seized by the police during searches of AF's home. All stated that they had provided accurate translations of what had been said in interview or what was contained in the documents sent to them.

[14] More specifically, Mr Karimi, Mr Mahboob and Mr Atal all confirmed that there is not much difference between Dari and Farsi script in Afghanistan. The script tends to be similar.

[15] Mr Ibram, who had been engaged by Sgt Turley to act as a translator in his interviews with AF, stated he played no other part in the police investigations and did not assist them in any other way in their enquiries. He was aware that AF's first language was Pashto; it was AF himself who requested that the interview with the police be conducted in Dari. Although during the course of this interview AF had some difficulty with the words, AF did not at any stage indicate a wish to switch to Pashtu and was sufficiently fluent in the Dari language.

[16] Mr Atal told the Tribunal that it was a feature of Afghani culture as in other cultures that people would sometimes be referred to as "brother", not because they were in fact that person's brother but because they knew and respected the person. He did not think this was a practice peculiar to Afghani culture. Mr Atal also told the Tribunal that the *tezker*a did not give a clear date for the date of birth of AF. He disputed the accuracy of the uncertified translation obtained by the police.

Documents and submissions on behalf of the DOL

[17] On 14 February 2011, the Tribunal received a memorandum of opening submissions together with unsigned witness statements from Mr Young, Sgt Turley, Supt McLennan, Mr Atal, Mr Ibram, Mr Karimi and Mr Mahboob. Signed copies of statements from Ms Jones, Sgt Turley and Supt McLennan were filed on 29 April 2011.

[18] On 3 June 2011, the Tribunal received from counsel final written submissions. Attached were a certified translation of a letter on the file said to be from AF's brother together with a letter dated 16 May 2011 from the translator employed.

THE APPELLANTS' CASE

[19] AF and the eldest son deny all of the allegations made against them. The account which follows is that given in support of the appellants at the hearing. It is assessed later.

Evidence of AF

[20] AF confirmed that all of the evidence he gave in support of his refugee status claim was correct. He told the Tribunal that he obtained his *tezkerá* (his Afghani identity certificate) about 30-35 years ago. He went with his father to obtain it as required by the relevant regulations. He was approximately 13 years old when he obtained it.

[21] He confirmed that his main occupation in Afghanistan was as a teacher. After finishing high school at the age of about 18 or 19 years, he attended teachers' college for approximately two years before commencing employment as a high school teacher in X. He held this employment for approximately 13 years. He stopped working as a teacher in 1992 with the collapse of the Najibullah government. During the winter months, schools shut down and teachers were on half-salaries. As he was relatively financially secure, for many years AF did not seek to obtain alternative employment during these winter months although it was common for teachers to do so to supplement their income. However, as the security situation worsened in X, prices of basic goods skyrocketed. Consequently in his final year of teaching AF obtained temporary employment in an administrative position in the Directorate-General of Borders within the DEF Ministry.

[22] AF confirmed that following the collapse of the Najibullah government he undertook a number of jobs to help sustain his family. Approximately a year or 18 months after the collapse of the government he and a business partner opened up a small general shop in the area near to where he was living, selling foodstuffs. Although the shop also sold alcohol, this was not a significant part of the business as the locals regarded the consumption of alcohol as being forbidden by Islam. After a number of months, the appellant's business partner obtained a licence to operate near to the central city. The appellant and his business partner moved to a larger shop near to the centre of town. Their business flourished. Staff from embassies and hotels purchased alcohol for sale to hotel guests and foreign journalists. Approximately 70 per cent of the sales of the shop were alcohol-

related. The remainder was foodstuffs. However, once the *Taliban* took control of the city the appellant and his partner shut the shop. It did not reopen.

[23] In mid-1997, as he left his home to buy groceries, AF passed a military jeep full of armed *Taliban* travelling in the direction of his house. A short time later he heard shots fired from that direction and he rushed back to the house. He found that his father and his first wife had been killed. AF was arrested and taken to GHI Prison in X. He was interrogated about his father's support for the Najibullah government and his father's role as a senior advisor to the ABC Party. He was also interrogated about his knowledge of other supporters of the Najibullah government. He was questioned about the sale of alcohol in his shop. He was repeatedly slapped, punched and kicked during his interrogation and kept in sub-standard conditions. He was released following a visit to the prison by a friend of his father, who advised AF that he had been sentenced to death by hanging and that the *Taliban* had confiscated one of his two homes. He was informed that the shop had been burnt to the ground. He requested to see his uncle who told him that his father's friend could be trusted and arrangements were made to smuggle AF out of prison. The plan was successfully executed and he travelled to another province where he stayed for a number of days before crossing overland into Pakistan.

[24] As regards the material taken from his home by the police, AF told the Tribunal that there were a number of documents seized when the police searched his house approximately a month after his family arrived in 2000. However, not all of this documentation was his. Prior to his family arriving in New Zealand he had been living at his address with a number of flatmates. Some of his flatmates had left some possessions behind, including a number of photographs. AF told the Tribunal that the photograph album, with photographs of armed men in rural locations seized by the police, did not belong to him but rather belonged to one of his flatmates and that he had told the police this in an interview with Sgt Turley.

[25] When shown photographs from the file which Sgt Turley had stated he positively remembered as showing him with General Kartewazi, AF replied that it might be him but it was impossible for him to say so with any certainty because the copies of the photographs on the file were not sufficiently clear. He accepted it was possible because General Kartewazi was a close personal friend of his father's and often came to the family home at which time photographs were often taken.

Evidence of the appellant's eldest son

[26] The eldest son told the Tribunal that he finished school in approximately 1992, because the school was closed due to the deteriorating security situation. He confirmed that his mother, BB, was a teacher and home-schooled him and his siblings for a number of years until she was killed, along with his grandfather, by the *Taliban*. He confirmed that his father married his current wife and that she lived with them in the family home. He confirmed that he was home when his grandfather was killed. His grandfather was in the army and people used to visit him and call him by a particular rank. His mother and father were both teachers although they taught at different schools. He went to a different school from that where his mother and father taught.

Evidence of the appellant's wife

[27] Mrs AF spoke briefly to the Tribunal. She confirmed that she was married to AF but could not remember her age or his age. She explained she was uneducated. She explained that after her marriage she went to live with her father-in-law, mother-in-law and her husband, AF. She confirmed that a number of AF's brothers had lived at the family home in Afghanistan along with the eldest son and his mother. She confirmed that at the time of the death of her father-in-law and the eldest son's mother, she had gone to her own father's home for a family wedding.

Evidence of Mohammed Zahir Hamed

[28] Mohammed Zahir Hamed told the Tribunal that he first met AF in Afghanistan in approximately 1994 or 1995. AF was a friend of Mr Hamed's supervisor at the United Nations agency he worked for. AF initially came to the United Nations agency looking for work but was unsuccessful. Over the course of the next two or three years, Mr Hamed met AF with his supervisor on approximately three or four further occasions. He recalls people were always referring to AF as "Malem AF" which means teacher or school teacher. On one occasion Mr Hamed went to AF's home with his supervisor. On this occasion Mr Hamed recalls his own father saying that AF's father was well-known.

[29] Mr Hamed told the Tribunal that, although he is very busy and does not socialise regularly with the community, he does go to special occasions such as weddings, funerals and the like. On these occasions he has not heard of anybody

calling AF “commander”. He is not aware of him being in any other position other than that of a teacher. Mr Hamed told the Tribunal that if there are photographs of AF with high-ranking military officials, that this is something very common in Afghanistan. People generally do this and, indeed, his own work for a non-governmental organisation required him to travel in the presence of senior army officials. He would have his photograph taken with them and also other people would do likewise.

Evidence of Abdul Ghani Ahmadzai

[30] Mr Ahmadzai told the Tribunal that he met AF in approximately 1980 and saw him a number of times over the following two years. One of AF’s uncles lived in the neighbourhood where he and his family lived and AF was sometimes there when Mr Ahmadzai visited his uncle’s house. AF lived in another part of X. He remembers that during this time people were referring to AF as “Malem AF”. This means teacher and people would call someone this only if they were in teachers’ college or were working as a teacher. Mr Ahmadzai told the Tribunal he was born in 1961 and that he believes AF to be slightly older than him. He believes this because at the time when he met AF, he himself was in college. At this time people were calling him “Malem AF” which indicated that at the very least he was at teachers’ college which made him a few years older than him. Also, he looks around his age.

[31] Mr Ahmadzai is not aware of anybody in the Afghani community in New Zealand calling AF a commander or of him holding any high-ranking positions in the Afghani government.

Evidence of Dr Slaimankhel

[32] Dr Slaimankhel told the Tribunal he first met AF when AF first arrived in New Zealand in 1998. Whenever there is a new Afghani arrival, the Afghani community sends a representative to meet them at the hostel to welcome them. Dr Slaimankhel drove there with his own father and his father spoke to AF. During this conversation Dr Slaimankhel’s father realised that he knew AF’s father because they were both friends of General Katawazai. Dr Slaimankhel is from the same tribe and they were closely related because they were from the same extended family group. Dr Slaimankhel’s father held many government positions and knew the appellant’s father, an officer in the army, well. Although the conversation was brief, Dr Slaimankhel recalls his own father asking AF why he

had not followed his father's footsteps into the army. He recalls AF replying that he wanted to devote himself to teaching. Dr Slaimankhel confirmed that AF had been doing occasional voluntary work in an early education facility run by the Afghani community in New Zealand, teaching Afghani children the Pashto language.

[33] Dr Slaimankhel recalls at some point seeing a photograph taken of AF with General Katawazai. This is unremarkable he said. The fact that he had this picture taken with a high-ranking official does not mean that he himself held a high-ranking position of any kind. Dr Slaimankhel told the Tribunal that he was not aware of the community referring to AF as "the commander". He said it may have been a joke. He has not heard of this nor is he aware of AF holding any military or high-ranking civil position.

Evidence of Abdul Qadeer Sidique

[34] Mr Sidique was a fully qualified medical doctor in Afghanistan. He attended CDE Medical School from the early 1970s until 1980. Soon after enrolling in medical school he met a person called Shah Mohammad who was AF's uncle. Most of the time during the 1970s and 1980s Mr Sidique and Shah Mohammad were room-mates. During those times, Mr Sidique would occasionally go to the AF's family home on Fridays. He recollects the appellant being the person who served them tea or who was responsible for looking after guests.

[35] From the mid-1980s Mr Sidique worked for the Red Crescent alongside Shah Mohammed. When the Russians invaded Afghanistan Mr Sidique went to Pakistan but returned to X from time to time to take medical supplies. He still had regular contact with Shah Mohammed during this time and around 1981 learnt that AF was finishing his teacher's training. After the Russian occupation ended, Mr Sidique saw more of Shah Mohammed. He asked after AF because he remembered him being the family member who had served him when he visited. He remembers being told that AF was now working as a teacher. He did not ask any details about the private life of AF such as whether he had married or had children as it was culturally inappropriate for him to do so. Nor would Shah Mohammed talk about these matters for the same reason. He has no knowledge of AF working as a commander or in a senior position in any Afghani ministry.

Documents and submissions for the appellants

[36] On 21 February 2011, the Tribunal received from Mr Laurent a memorandum of opening submissions together with witness statements from Dr Slaimankhel, Abdul Qadeer Sidique, Abdul Ghani Ahmadzai and Mohammed Zahir Hamed.

[37] During the hearing, the Tribunal received a bundle of medical letters relating to the eldest son and Mrs AF. It also received the original copy of the newspaper in which the “wanted notice” issued by the *Taliban* in respect of AF was contained.

[38] On 13 June 2011, the Tribunal received Mr Laurent’s closing written submissions together with a certified translation of the “wanted notice” and a certified translation of a notarised letter purportedly written in Peshawar by DD – the brother whom the DOL assert is in fact the person claiming to be eldest son.

THE ISSUES

[39] Pursuant to section 198(2) of the Immigration Act 2009, on an appeal against cancellation of refugee status the Tribunal must:

- “(a) determine the matter de novo; and
- (b) ... determine whether—
 - (i) recognition of the person as a refugee or a protected person may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information:
 - (ii) the matters dealt with in Articles 1D, 1E, and 1F of the Refugee Convention may not have been able to be properly considered by a refugee and protection officer for any reason, including by reason of fraud, forgery, false or misleading representation, or concealment of relevant information; and
- (c) determine, in relation to the person, the matters referred to in subsection (1)(b) and (c) of this section.”

[40] Section 198(1)(b) directs the Tribunal to determine whether to recognise the person as:

- “(i) a refugee under the Refugee Convention (section 129); and
- (ii) a protected person under the Convention Against Torture (section 130); and
- (iii) a protected person under the International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).”

ASSESSMENT REGARDING AF

[41] Claims for refugee status may be made on one or more grounds. While in many cases only one aspect of the appellant's life is claimed to contribute to the risk, often a claimant refers to various aspects of their life said to contribute to their risk of being persecuted. These features may even relate to different or overlapping Convention grounds.

[42] In cancellation proceedings, care must be taken to examine the actual grant of refugee status to ascertain the basis upon which it was accepted. In cases based on multiple aspects, it may be that it was only the aggregation of these aspects which led to the recognition. In other cases, one aspect out of the multiple may have sufficed. In either case, for the grant of refugee status to have procured the fraud or the like, sufficient evidence must exist to establish that the core aspect upon which the grant was made is tainted. Unless the core basis upon which refugee status was recognised is sufficiently tainted, it is difficult to see how the cancellation would be justified under the statutory test: see, for example, *Refugee Appeal No 75478* (25 July 2006) at [74]-[75] and *Refugee Appeal No 75977* (22 July 2007) at [77]-[90].

The grant of refugee status to AF

[43] The decision cancelling AF's refugee status does not analyse the actual grant of refugee status in any detail but rather broadly asserts that the grant of refugee status was made:

“on the grounds he had a well-founded fear of being persecuted because of his father's position in the previous regime and because of his business selling alcohol.”

This overstates the position as it relates to the significance of the sale of alcohol to both his claim and the grant of refugee status.

[44] The grant of refugee status began its assessment by outlining the officer's understanding of the claim. It read:

“1.IS THERE A WELL-FOUNDED FEAR OF PERSECUTION?”

[AF] stated that he fears the Taleban, and believes that if he were to return to Afghanistan, he would be killed for one or all of the following reasons:

1. He is considered to be a traitor because of his family association with the Najibullah regime.
2. He worked as a teacher.

3. He is considered to be 'anti-islamic', because he sold alcohol from his shop."

[45] From this, two points emerge:

- (a) the officer understood the claim to involve assessing a multiplicity of factors arising and not a single source of risk; and
- (b) that AF was not relying only on the aggregation of these factors to establish risk to him, but that they were entirely free-standing matters, any one of which exposed him to a real chance of being persecuted.

[46] Of these factors, it was the issue of family association to the Najibullah government through his father which overwhelmingly comprised the main element of AF's claim as advanced in his statement. It is in respect of this issue that he claimed his father and first wife were killed and that he was detained and mistreated by the *Taliban*. He did refer to his employment as a teacher and the restriction placed on female education after the *Taliban* took power in a number of paragraphs, but with markedly less emphasis. His selling of alcohol in the shop barely featured. It was mentioned only in two paragraphs out of 55.

[47] That the relationship of the appellant to his father and, through him, to the Najibullah government comprised the core basis of the claim is reflected in the grant of refugee status itself. Not only did the officer deal with this issue first, but the officer clearly limited her finding of past persecution to the "murders of his own wife and father, and his own lengthy period of detention".

[48] The officer then correctly noted that, despite this finding, AF was required to establish a current well-founded fear of being persecuted and went on to consider this issue. Significantly, for present purposes, after noting country information relating to the poor human rights situation in Afghanistan generally, the officer turned her mind to the risk of harm to AF arising from his association with the Najibullah government. In light of "his past political profile" and country information relating to the detention of persons previously working with the Najibullah government, the officer concluded:

"[AF's] past political profile would clearly bring him to the attention of the Taleban authorities if he were to return to [X]."

[49] The officer then noted that, although no specific information could be found about the treatment of former teachers, country information did note persons were

being punished for “anti-islamic” behaviour including shopkeepers for selling goods to women or teachers giving women lessons.

[50] At no point did the officer consider the question of risk to AF for selling alcohol or refer to country information on that point. At most, the officer referred to AF possibly being accused of being “anti-islamic” as a result of his “business activities” in the context of nexus to a Convention reason. Given the lack of any analysis in the grant as to risks to persons who sold alcohol, it is not clear however whether, by this, the officer was referring to his business as an alcohol-seller, his occupation as a teacher, or both.

[51] What is clear from reading the document as a whole is that the basis of the grant of refugee status to AF rested overwhelmingly on his relationship to his father who he claimed was a senior military figure in charge of the defence of X during the time of the Soviet-backed Najibullah government. It was this which was found to ‘clearly’ bring him to the attention of the *Taliban* at the time the grant was made.

[52] In order to justify cancellation of the grant of refugee status, the evidence of fraud or the like must cast sufficient doubt on the correctness of the acceptance of this fact by the officer. For the reasons that now follow, the Tribunal is not persuaded that this is the case.

Assessment of the evidence

Identity of the appellant’s father as a senior military figure confirmed

[53] The appellant has been clear and consistent throughout his refugee claim and in various interviews with Sgt Turley about his father. It has not been seriously challenged that his father was a senior military figure in the Najibullah government and indeed was the man responsible for the defence of X. There is a photograph of his father in uniform on the file. Both Mr Sidique and Dr Slaimankhel told the Tribunal that his father was in the military.

[54] Indeed, Sgt Turley recalls seizing a number of photographs, including a photograph showing what appeared to be a state funeral for the appellant’s father. Sgt Turley also told the Tribunal that, during one of his interviews, AF gave a lengthy account about his father’s history and his father having a senior role in the government at one point. Sgt Turley did not speak to other members of the

Afghani community about the appellant's father because it was not a significant issue for him.

[55] It seems clear that, in terms of the investigations Sgt Turley was conducting, the identity and status of AF's father was irrelevant. That this was the case is further evidenced by the fact that when the appellant began to tell Sgt Turley about his father in the interview on 1 August 2000, Sgt Turley switched from verbatim recording of what AF said, to a summary notation that AF spoke about his father. Asked why the police had been informed that he is referred to as "the commander", Sgt Turley recorded that AF:

"...(gives lengthy statement on how his father was a famous military commander and it is possible he is called commander because of this)"

[56] During an interview with Sgt Turley on 17 October 2000, AF was asked whether he had feared for his life if he had mentioned his employment, even briefly, as a Director-General of Borders. Sgt Turley recorded AF's answers as follows (verbatim):

"HS No as I have said, I was not asked about it because my fears were because of who my father was.

IS What did your father do?

HS As I have mentioned, he was an important man, he was responsible for the defence perimeter of [X].

IS How did your father die?

HS He was killed by the Taliban when they took over, he was murdered.

IS I'm sorry to hear that

HS It was very sad."

[57] No further details were sought. The interview then went on to touch upon matters relating to the people-smuggling ring and national security. This should not be interpreted as any criticism of Sgt Turley who was not interviewing AF in relation to potential immigration fraud at that time. Matters relating to AF's father and the problems he encountered as a result were entirely peripheral to his investigation. However, what was peripheral to Sgt Turley's investigation is plainly central to the refugee claim and to the cancellation proceedings. Yet there is no evidence to suggest that AF, by asserting to the officer who granted him refugee status, that his father had occupied a senior position, gave false or misleading information, relied on forged documents or failed to withhold relevant information about his father.

[58] Given that the detention of AF by the *Taliban* to ascertain information about his father's associates is a plausible matter, this in itself is sufficient to cause the Tribunal to find in favour of the appellants in relation to the cancellation proceedings insofar as they are based on AF's claim. However, out of deference to the effort counsel have expended on dealing with other matters, the Tribunal makes the following observations thereon.

As to his employment

[59] It is to be recalled that the DOL claims that AF has not been truthful about his background. There are a number of aspects to this. In her closing submissions, Ms Thompson seeks to impugn his assertion to have been employed for 13 years as a Pashto teacher by reference to the evidence that his children cannot speak Pashto fluently. Yet this, in itself, is an extremely thin evidential basis upon which to mount a challenge. It is entirely outweighed by the evidence of the various witnesses called on behalf of the appellants who confirmed their understanding that AF was known to them in Afghanistan, to be at training college, or addressed by the cultural honorific for a teacher.

[60] A related issue is the vast amount of evidence devoted to whether AF was at one time employed as the Director-General of Borders. The DOL case has been hampered by the fact that much of the original documentation is not available to the Tribunal. The original photographs on the file on which the appellant is purportedly identified as Director-General of Borders are now lost and are unavailable. However, Sgt Turley, who the Tribunal accepts to be an honest and credible witness, recalls specifically that the original colour copies of the photographs clearly had AF in them. The Tribunal accepts Sgt Turley's evidence on this point and accepts that the appellant is indeed shown in photographs with handwritten notifications describing him as the Director-General of Borders. AF's explanation that the words "Director-General" were meant to be Directorate-General is tenuous. Also, when shown by Sgt Turley during the 17 October 2000 interview the photograph with a notation that the person sitting alongside a General Kartewazi was the Director-General of Borders, AF accepted that he was this person. He stated he had been employed in the branch of the Finance Department dealing with Afghanistan's borders but did not mention it to the RSB because it was not important, not because it was not him.

[61] But even accepting that this was not disclosed, it does not take matters very far in the context of the grant of refugee status which was very much grounded on

his relationship to his father. While Sgt Turley, in the same interview, suggested that his job was more important than he was indicating and that he had had bodyguards, no evidence of this has been provided. Moreover, if he were a Director-General of Borders, even on a temporary basis, it is unsurprising that he was travelling in the presence of armed men, given the civil war that was unfolding and the attacks on the Najibullah government by various *Mujahedin* groups at the time.

[62] As for him being a *Mujahedin* commander, the evidence is equivocal. AF stated that the booklet of photographs showing some armed men travelling in convey belonged to a former flatmate and not to him. In any event, travelling in such fashion would be unremarkable in the context of Afghanistan given the history of civil conflict over recent decades. The Tribunal accepts Sgt Turley's evidence that, in 2000, some of the people in the Afghani community in New Zealand mentioned the appellant was known as "commander". However it is unclear just how extensive in the community his enquiries were. Sgt Turley conceded that the police had had to act cautiously because they were aware of historical divisions and enmity between the various ethnic and political groups within the Afghani community in New Zealand. Moreover, each of the witnesses called by AF and drawn from the same community stated they had not heard of his being called commander. Dr Slaimankhel indicated that it could even have been a joke.

[63] Of more concern is evidence from Sgt Turley that part of the evidence in relation to the proposed prosecution of AF related to the seizure by police of documents containing satellite telephone numbers and the infiltration of *Mujahedin* groups using the numbers found. On balance, however, such 'intelligence' raises suspicions but no more than that. AF has not been charged with any offence in relation to this material, and no security risk certificate has issued in relation to it. The Tribunal has not been shown this material. Moreover, the Tribunal is troubled by the fundamental problem with this assertion. As mentioned, it seems accepted that AF's father was an important military figure in the Najibullah government and was responsible for the defence forces of X *against* the various *Mujahedin* groups. The plausibility of AF as his son being involved in these groups is something that seems not to have been expressly considered.

[64] Finally, even if it is assumed that the appellant was involved with the *Mujahedin*, and even that he was a *Mujahedin* commander, the failure to mention those bare facts alone do not meet the 'may have been' threshold. No evidence

has been presented to establish where and when he held this position. Given that Afghanistan is notorious for the shifting allegiances of its political leaders, it is difficult to see what can be read into the information in terms of impugning the basic claim that AF was at risk because of his father's negative political profile with the *Taliban*.

Selling alcohol

[65] Despite the fact that the selling of alcohol did not feature prominently in the grant of refugee status, this issue has been elevated in importance. It is accepted that AF has given inconsistent evidence on this issue in that, during an interview with Sgt Turley on 17 October 2000, he specifically denied that he ever sold alcohol from his shop. However, in all other instances including his RSB interview, his further interview with Sgt Turley on 19 October 2000, and an interview with INZ fraud officers in November 2004, he maintains that he did. He puts this anomaly down to interpreter error during the 17 October interview. The Tribunal notes the otherwise consistent nature of his evidence on an issue he has never, himself, sought to give much prominence in the context of his claim.

[66] As for the submission by Ms Thompson that AF has also given inconsistent evidence as to whether the alcohol was sold secretly, the Tribunal finds the evidence more reflects the evolving importance attached to this issue and not a lack of underlying veracity. Quite simply, as the issue of selling alcohol has assumed greater significance, greater detail has been sought.

[67] In his statement filed in support of the refugee claim AF stated that he sold a variety of foods and beverages from his shop. He added simply that, although banned "by the *Mujahedin* government", he also bought alcohol and sold it from his shop. He says nothing more about it. In his RSB interview, AF was asked to confirm the contents of his written statement regarding his selling of alcohol from his shop. He replied that he sold alcohol:

"...upon request from people from previous regime. If they asked, I would provide it."

He went on to state that in Afghanistan people sometimes even considered soft drinks to be alcohol. He was then asked "Any problems doing this?" He replied:

"Rabbani government had to put alcohol in coke bottles; sold secretly. Never caught until shop burnt by Taliban while in prison. Not only mine but all of them."

Consistent with its peripheral nature to the claim, further details and clarifications of these somewhat cryptic statements were not sought by RSB.

[68] Now, having gathered more steam, his evidence on the issue of his selling alcohol was expressed in greater detail before the Tribunal. He told the Tribunal that the sale of alcohol took place at two separate locations, firstly in a small shop in a residential area and then in a larger shop located near to the city centre. In the small shop, caution reigned. He did not sell much alcohol out of fear of the local residents who did not like the idea that alcohol was being sold. However, he subsequently moved to larger premises in the city centre where there were ministries and hotels. There, it was sold more openly in a fridge that was visible but the shop was shut when the *Taliban* came.

[69] Weighing this evidence up, the Tribunal is not persuaded that there is such variation in his evidence as the DOL allege. His later evidence is not inconsistent with his RSB interview. The overall impression is that, while alcohol was available, it was not something that was generally sold openly. The shop was called a “market” and not a “wine” or “alcohol” shop. It was mainly sold when the business moved to the city centre and was sold only to foreigners and hotel workers.

[70] Finally, insofar as the DOL case against him also rests upon concerns that AF misrepresented his true age, the Tribunal deals with this later, in relation to the allegations in respect of the “true” identity of the eldest son and adopts that reasoning in relation to AF and the remaining appellants.

Summary of conclusions on “may have been” in respect of AF

[71] There is no evidence before the Tribunal that calls into question the assertion by AF that his father was a senior military commander closely aligned to the Najibullah government who was murdered by the *Taliban*. Nor do the other matters referred to in the RSB cancellation notice, but not specifically addressed in evidence, either individually or cumulatively, cause the Tribunal to doubt AF’s general credibility such that he must be treated as an unreliable witness as regards his own detention and mistreatment as claimed.

[72] For the above reasons the Tribunal finds that there are no grounds for finding that recognition of AF as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information. The appeals of AF and all appellants, apart from the eldest son, are allowed on

this basis. The eldest son, however, faces a further challenge to his recognition, namely the assertion that he is not, in fact, the eldest son of AF but is his brother DD. It is to this issue that the Tribunal turns.

ASSESSMENT REGARDING THE ELDEST SON

[73] A substantial proportion of the DOL case in relation to the eldest son relates to the date of birth in AF's *tezkerā*. Significant adverse credibility inferences in the immigration context have been drawn from this document. According to the DOL, the date of birth in his *tezkerā* makes AF too young to have married his first wife, calling into question the claim that the eldest son was born from that marriage.

[74] AF was interviewed by INZ investigators in November 2004 on this point. The record of that interview records as follows:

"Q I am sure you can appreciate that we must make sure that everything is as it should be, and that people who come to NZ are who they say they are and everything is correct.

A I have my Afghan ID card. Everything is there; my father's name, my grandfather's name, everything

(interpreter looks at ID card and asks [AF] what year the date is printed as it is unreadable as to what year in the 50s his DOB is. [AF] answers him. Interpreter then states that the document is officially dated on page 6 at 1356 and that he was 13 years in 1356, Afghani calendar which is 1977 – 78 in European calendar)"

When this was put to AF he stated that he did not know his date of birth in the Western calendar and that this conversion has been done by interpreters but that his understanding was:

"...according to the European calendar I am "45 years using 1959. My age according to the Afghan id card is correct".

[75] Despite the uncertainty surrounding this date of birth, at no time during the cancellation process does it appear to have been considered necessary to have this document subjected to a certified translation. This is despite the fact that certified translations were obtained by the DOL in respect of other documents upon which they placed substantial reliance. Therefore, at the hearing, the Tribunal sought an oral translation of this document from Mr Atal, the interpreter engaged by the DOL for the November interview. According to Mr Atal, the document does not state that AF was 13 in 1356 at all. Under "date of birth" it simply records "13 in 50". He could not say whether this meant 1350 or 1950.

Mr Atal told the Tribunal that the pre-printed script on this document was in Pashto. However, the answers recorded were handwritten in Farsi or Dari as the script is identical in both languages in respect of the information set out in the answers. Assuming on the basis that it was in Dari it meant 1350, this would make the appellant 13 years of age in around 1971. In other words, his date of birth would be approximately 1959.

[76] Mr Atal went on to tell the Tribunal that, at the bottom of that page in the *tezker*a where it records the details of the person issuing the certificate, there was a date of “3/1/56” recorded. This notation appeared to him to be in the English script for 56. He believed it may be an English date, as the Dari/Farsi script for 56 looked distinctly different. He also pointed out that in another part of the document there is a date in the Islamic calendar which appears to be “22/7/71”.

[77] There are substantial doubts as to whether the *tezker*a does in fact purport to say that he was 13 years-old in 1356, upon which this aspect of the cancellation proceedings have been premised. The accuracy of uncertified translations of similar effect obtained by the police in the context of their investigation, which Mr Atal expressly disagreed with, must also be called into serious question.

[78] The DOL also relies on various forms filled out by the appellants and, in particular, the citizenship applications filled out by AF and the eldest son. However, plausible explanations have been given as to the matters raised by the DOL. As to why Mrs AF was listed in his application as the person he married in the 1970s, AF explained that his form was completed by a friend as he did not understand the form. In support of his citizenship application he relied on and provided his friend with the letter granting residence to him, Mrs AF and the remaining appellants. As Mrs AF's name was mentioned in this letter but not that of his first wife (who was deceased), his friend mistakenly gave his date of marriage to his first wife as the date of his marriage to Mrs AF. This is plausible. A copy of this letter granting residence was produced to the Tribunal and it confirms AF's assertions.

[79] Equally plausible is the explanation given by the eldest son as to why he did not list the name of his actual birth mother, AF's first wife, in his own application. He stated that he asked his father what to do and was told that, as his first wife was dead, he should put his stepmother's name there. He followed this advice.

[80] Mr Laurent also points to documentation filed relating to the eldest son's own marriage in which a person listed as AF's mother was stated to be his grandmother. While the DOL points out that this documentation was generated after the eldest son had become aware that INZ was investigating him for fraud, the internally consistent nature of this documentation needs to be factored into the overall assessment by the Tribunal.

[81] A further matter relied on by the DOL relates to a notebook entry made by Supt McLennan at the time he conducted a brief interview with the eldest son during the initial search of AF's family home in August 2000. The DOL point to an entry in this notebook where Supt McLennan, after getting various other details relating to the eldest son, records:

"Is oldest child of [AF].

Mother died in Afghanistan about 5 years.

Was a teacher in [X]. Was killed in fighting. Died after some time.

Mother's name – states that he cannot remember his mother's name now."

[82] As to this, the eldest son disputes that he would not have been able to give the name of his mother. He points out that various other entries in the notebook of Supt McLennan are factually inaccurate as it relates to particulars of him. He further points out that, at the time of this interview, he was only recently arrived in New Zealand and, although he could only speak limited English, he was not interviewed with the assistance of an interpreter. The eldest son states that he may have simply misunderstood the question that was being asked of him at this point.

[83] Of more concern is the final piece of evidence relied on by the DOL, namely a letter from a person with the same name as the appellant's brother, CC. AF denies that this letter, which refers to people by the same name as himself and his brother DD, was in fact from his brother. Despite this denial, the Tribunal is satisfied that this letter was in fact written by AF's brother. It is too coincidental that another person with the same name as his brother would be writing to a person in New Zealand sharing the same name as AF. A further pointer that this letter does originate from AF's brother is the fact that it refers to the writer's "nephews and nieces" by name – names which match AF's children.

[84] However, this letter is also problematic from the DOL's perspective. While the letter refers to AF and DD, the letter then goes on to refer to "the eldest son" by name separately in another paragraph. If indeed the person referred to as DD

is in fact the eldest son, it is unusual that the latter should be mentioned separately in the text of the letter. The interpretation placed on this letter by the DOL is, however, one of many. As providing a document for the eldest son seems to be one of the purposes of the letter, consistent with this, the author may have decided to refer to him separately from the other children, for whom the letter had no particular purpose. In short, the letter is more equivocal as to this issue than DOL assert.

[85] Weighing this letter against all of the evidence presented on the issue in relation to the true identity of the eldest son, the Tribunal finds that it raises mere suspicion but no more. The concerns raised in relation to the *tezkerā* are substantially undermined. The evidence arising from various applications made by family members is equivocal. Some aspects corroborate the account given, some aspects do not. Plausible explanations have been given for concerns raised in relation to those aspects which do not. As to the notebook entry of Supt McLennan, it is to be noted for its brevity. The note records other features relating to his mother consistent with the account given by AF. It must be remembered this interview took place shortly after the eldest son's arrival in New Zealand. When asked by the immigration investigators about this interview some years later, the eldest son told them that the whole experience was very frightening. Based on his experiences in Afghanistan he thought that his father was at risk of serious harm when taken away by the police. It was only after he telephoned some interpreters in the Afghani community that he realised that the New Zealand Police did not work in a similar fashion to their Afghani counterparts. To the extent necessary, the Tribunal extends him the benefit of the doubt on this point.

[86] In summary, while the Tribunal remains troubled by the letter from CC, nevertheless, after weighing this concern against its assessment of the other evidence relied on, the Tribunal finds that the letter raises mere suspicion only. There is insufficient evidence to say that the grant of refugee status to the eldest son may have been procured by fraud on the basis he is actually CC.

CONCLUSION

[87] For the foregoing reasons, the Tribunal finds that there are no serious grounds for believing the grant of refugee status may have been procured by fraud

and the like. Recognition of refugee status is reinstated in respect of each appellant.

[88] The appeals are allowed.

"B L Burson"

B L Burson
Chair

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B L Burson
Member