

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO.73545/02

AT AUCKLAND

<u>Before:</u>	V J Shaw (Chairperson) P Millar (Member)
<u>Counsel for Appellant:</u>	D Ryken
<u>Appearing for NZIS:</u>	No Appearance
<u>Date of Hearing:</u>	13 and 14 March 2002
<u>Date of Decision:</u>	11 October 2002

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of Afghanistan.

INTRODUCTION

[2] The appellant is one of 131 asylum seekers brought to New Zealand on 28 September 2001 from Nauru where they had been taken after being rescued by the Norwegian ship MV Tampa. He was initially detained at Mt Eden Remand Prison then later transferred to the Mangere Refugee Resettlement Centre, where he remained detained up until the first day of the appeal hearing. He was released on the evening of 13 March 2002.

[3] The appellant was interviewed by a Refugee Status Officer on 1 October 2001 and 16 October 2001. He was notified of the decision to decline his refugee claim in a decision dated 20 February 2002.

Country Material

[4] The Authority regrets the delay in publishing this decision. This came about because of the ongoing political developments in Afghanistan. The Authority considered it prudent to delay final determination of the appellant's claim so as to allow for a more comprehensive picture of political conditions and the security situation particularly having regard to the *Loya Jirga* process and the establishment of the Transitional Administration.

[5] It is appropriate to briefly describe the country material submitted by counsel and independently located by the Authority which the Authority has read and considered and disclosed in the course of reaching its decision. While not exhaustive the material consisted largely of the following:

- (a) Numerous media reports, including news releases from various NGOs accessed largely through Nexus.
- (b) US Department of State, Country Reports on Human Rights Practices: Afghanistan 2001 (March 4, 200).
- (c) UK Home Office, *Afghanistan Assessment*, October 2001 and April 2002.
- (d) Various UNHCR bulletins and news updates concerning the return of refugees to Afghanistan.
- (e) Amnesty International, Afghanistan, Continuing need for Protection and Standards for Return of Afghan refugees, July 2002.
- (f) Human Rights Watch, Afghanistan, Iran and Pakistan, Closed door policy, Afghan refugees in Pakistan and Iran, February 2002.
- (g) Human Rights Watch, Briefing Paper, On the Precipice: Insecurity in Northern Afghanistan (June 2002).
- (h) Human Rights Watch, *Afghanistan: Return of the Warlords*, June 2002.

- (i) Danish Immigration Service, Political Conditions, Security and Human Rights Situation in Afghanistan, Report on fact-finding mission to Islamabad and Peshawar, Pakistan and Kabul, Afghanistan, 5-19 May 2002 (The Danish Report).

[6] Material located by the Authority post hearing was forwarded to counsel and an opportunity provided for further submissions. These submissions have been taken into account.

THE APPELLANT'S ACCOUNT

[7] The appellant is a Tajik. He is also a Shi'a Muslim. He is uncertain of his exact date of birth, although says that he was born during 1984. He told the Authority that he had not been told his exact birth date by his parents and that the celebration of birth dates was not the custom in his country. The appellant brought with him to New Zealand an Afghan identification document which records in the space for his date of birth only that he was seven years old in the Afghan calendar year 1730 (1991-1992), which is consistent with the appellant's claim to have been born in 1984.

[8] The appellant was born in Kandahar, where his parents, three older brothers and two sisters still reside. The appellant has learned through an aunt living in Quetta that his third sister was killed in a road accident late last year.

[9] The appellant's father originally had a wholesale business selling such items as rice, oil, tea, chickpeas and other foodstuffs. During the Najibullah period his father had maintained offices both in Kabul and in Kandahar. The appellant described his family's economic position as being a little higher than average in Afghan terms.

[10] Around 1985 or 1986 the appellant's family moved to Kabul. In 1991 he was enrolled in a prominent Lycee in Kabul. The medium of teaching was Farsi (Dari), the appellant's mother tongue, although according to the appellant the teachers were also, in the main, Pashtu speakers, Pashtu being a language also spoken by himself. The appellant's schooling came to an end after not quite three years because Kabul had become increasingly insecure with rockets and

grenades exploding in the street, so that his parents would not allow him to travel to school. Just prior to the fall of Najibullah the family returned to Kandahar. Initially his father endeavoured to run his wholesale business but once the Taliban gained control the business was no longer viable as the roads were closed, making it difficult for him to import goods from Pakistan. Since then the family has lived off rental income from land and other property owned by the appellant's father.

[11] Under the Taliban no schooling was available apart from the religious schools or madrassa. The appellant's father was pressured by the Taliban to enrol the appellant in a *madrassa* but he successfully resisted this by suggesting that if he was to attend a *madrassa* it should be a Shi'a one. The appellant would attend religious instruction at the Shi'a mosque a few minutes walk from his home but the classes lasted only half an hour or so and he did not attend daily. In effect, his formal schooling ceased once he left the Lycee in Kabul and as a result he is not fully literate. The appellant's eldest brother set up a welding business and when older the appellant would sometimes help his brother in his workshop.

[12] When aged between 11 ½ and 12 ½ years the appellant travelled with relatives to Kabul to attend a family wedding. While walking from the relative's house in a district in northern Kabul to the relative's nearby shop he was suddenly rendered unconscious in an explosion and woke up in hospital. He is uncertain whether the explosion was from a grenade or an exploding rocket or shell, although it was said to have been the work of the Mujahedeen. The appellant sustained injuries to his left leg and arm and pieces of metal remain lodged in his leg. He remained in hospital for between two to three months. His family were not informed of his situation for some three weeks, due to the appellant's anxiety not to worry them and the difficulties in communication; a relative had to travel to Kandahar to inform his parents.

[13] Because Kandahar was a Taliban stronghold it was relatively free of fighting once the Taliban took control. According to the appellant the local Sunni population were very happy that the Taliban had taken power. When asked if his family had encountered any problems living under the Taliban he referred to what he called humanitarian problems such as the women in the family not being able to leave the house and religious problems. The Taliban were Sunni, along with most of Kandahar's inhabitants. The appellant's home was in a Sunni

neighbourhood, although not far from a Shi'a community. Even prior to the Taliban takeover, being a Shi'a, had not been comfortable. The appellant recalled being regularly abused when in the street and being shunned by Sunni students when at school. If he or other family members had to pray in public they always prayed in the Sunni way so as to avoid drawing attention to themselves. The Taliban would regularly harass the local Shi'a mosque.

[14] According to the appellant, Shi'a were very likely to be picked on to fight in the Taliban front lines against the Mujahedeen. As his family were Shi'a, with four sons, this was a problem as the Taliban had a rule that if there were four sons in a family one was required to fight. The appellant's father therefore resorted to paying the Taliban so that neither of the two older sons would be conscripted. The appellant is uncertain of the sums paid but was told by his mother that they were relatively large.

[15] The appellant's life was relatively restricted as his parents were increasingly concerned that he did not go outside of the home unnecessarily as they were afraid that the Taliban might "catch me and send me to the war". For the same reason, he avoided going to the Shi'a mosque, as the Taliban had been known to arrest Shi'a youths from the mosque. At least ten local Shi'a families had had a son taken to fight for the Taliban and it was only the wealthy, such as his family, who had a chance of avoiding this.

[16] Additionally, the family felt vulnerable because of their connection to Sheikh Asif Mohseni, a prominent Shi'a Ayatollah, as well as the founder and leader of the Shi'a political party Harakat-i-Islami. Sheikh Mohseni is the appellant's father's older brother. He studied in Saudi Arabia, Iran and Iraq, and was the author of various religious books. The appellant understands that his uncle had spent a considerable period of time out of Afghanistan. He has only ever met him on one occasion in Kabul when his uncle had visited the family home. He had been aged around eight to nine years at the time. He recalled that his uncle had come to Kabul when the Mujahedeen took over and thinks he had previously been in Pakistan. His father would sometimes go to the mosque to hear his brother speaking. On one occasion in Kabul during the early 1990s his father was shot at when driving home in his car and the family surmised that the attack may have been linked to a recently given speech by Sheikh Mohseni reported on the radio and TV. The appellant believes his uncle left for Pakistan

around the time the family returned to Kandahar because of the growing insecurity in Kabul. The appellant is uncertain of his uncle's current whereabouts. The appellant's paternal grandmother lives in Iran, as well as his father's younger brother. Sheikh Mohseni's son, who is also prominent in the Harakat-i-Islami has spent many years in Syria.

[17] The appellant's father has never been a member of Harakat-i-Islami or any other political party or faction as, according to the appellant, he does not like politics.

[18] The appellant's departure from Afghanistan was the result of his father's fears that life was getting progressively harder. The appellant's oldest brother was married and his second brother was preparing to do so and his father was increasingly concerned that of his sons the appellant would be the one most likely required to fight for the Taliban. His father therefore wanted him to leave Afghanistan in the hope of finding a better future. Taliban officials, he said, would require his father to talk to them in their office on a regular basis, sometimes as much as three or four times a month. His father therefore decided to try to send the appellant to Australia and sold some land to pay an agent to organise the appellant's travel. He did not discuss his plans with the appellant until three or four days prior to his departure around the middle of July 2001. The Authority asked the appellant if he knew why his father had not chosen to send him to either Pakistan or Iran, where he had relatives. The appellant was not absolutely certain but believed it was because these countries were too close to Afghanistan. His father would have wanted him to go right away so there was no possibility of his becoming or being pressured to become involved in Afghan politics.

[19] The appellant travelled by car to the border with a smuggler where he was introduced to another smuggler. An Afghan passport with his photo was produced. The appellant spent three days in Quetta in what he thought was a guest house before travelling by bus at night to Karachi, where he waited in a private house organised by the smugglers for some five days before departing Karachi airport as part of a group of four other asylum seekers. His Afghan passport was taken from him by another smuggler in Jakarta.

[20] Since being in New Zealand the appellant has received some news from his family in Kandahar through a maternal aunt living in Quetta. At the end of last

year his aunt informed him of the death of one of his sisters in a car accident. Apart from this tragedy he understands all family members are safe and still living in the family home in Kandahar, although his mother is unwell.

[21] The appellant does not want to return to Afghanistan. While acknowledging the collapse of the Taliban he believes that the country is too insecure and that fighting between various factions, typified by the assassination in February 2002 of a government minister at Kabul airport will continue. No one can say for sure how many Taliban are left or even who is a Taliban. Removing the Taliban is, he says, much like peeling the skin off a rotten fruit. The same problems remain particularly for the minority Shi'a who have long experienced intolerance from Afghanistan's Sunni majority irrespective of the Taliban. His family's link to a prominent Shi'a leader is well known and this makes it more insecure for him. The atmosphere in Afghanistan is one of hatred and mistrust between Sunni and Shi'a. Most people are not educated and hate one another. He is afraid to return to such an environment.

[22] The appellant brought with him to this country an Afghan ID card. This contains a photo of a young child recognisably similar to the appellant. It records typical biographical data such as father and grandparents name and place of birth. In respect of the ethnic group the card records "Pashtun". The appellant claims that he is Tajik. In response to the Authority's query as to why this was not on his ID card, he stated that his father would have obtained the card. Pashtun is used in Afghanistan to signify an Afghan as well as an ethnic Pashtun and he assumes that his father believed it would be prudent to use this term on his ID card so as to minimise any difficulties associated with being a Tajik.

[23] At the completion of the hearing the Authority granted counsel four weeks leave to obtain a language analysis, which Mr Ryken submitted he wished the Authority to consider in light of what he submitted were significant inadequacies in the language analysis obtained by the RSB, which had raised doubts as to the appellant's credibility. This material was subsequently received by the Authority. This and the language analysis obtained by the RSB will be the subject of further discussion below.

THE ISSUES

[24] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly 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."

[25] 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 he returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

[26] The Authority must first undertake an assessment of the appellant's credibility.

[27] We have received a report from Auckland Refugees as Survivors Centre which we have read and taken into account.

[28] Putting aside for the moment the issue of the language analysis, the Authority records that after seeing and listening to the appellant no significant credibility issues emerged. His account has been generally consistent with prior statements and there was nothing suspicious or evasive in his demeanour. The account given of his life was unremarkable and seemingly devoid of embellishment. The Authority finds it surprising that the appellant claims not to know his actual date of birth. However he was insistent that he knew only the year of his birth and the ID card issued when he was a child which records only that he was seven years old in the Afghan calendar year 1730 is consistent with

his oral evidence. The Authority therefore concludes that nothing falls on the point.

[29] No doubt mindful of the security concerns following the September 11 tragedy the refugee status officer most properly and capably rigorously tested the appellant's evidence. Various concerns were identified by the refugee status officer which raised doubts in her mind as to the reliability of the appellant's testimony. We have carefully considered all of these issues but have concluded that whether viewed in isolation or cumulatively they are not significant and provide no grounds for impugning the appellant's credibility.

[30] Only one matter needs to be referred to. The Authority has noted, as did the refugee status officer that while the appellant generally spoke confidently about his uncle and his relationship to his family, his knowledge of his uncle's political party's activities was not especially detailed. However, it must be remembered that the appellant is a young man. He says he has met his famous uncle on one occasion only when aged eight to nine years. His uncle has spent many years outside Afghanistan. His own father has never been a member of his brother's political party and has deliberately avoided any political involvement. The appellant's knowledge of his uncle has largely been learned from the talk of family members. Taking these matters into consideration it is not surprising that the appellant could not talk in any detail about his uncle's political manoeuvrings and alliances.

Language Analysis

[31] Reference has been made to the fact that the RSB obtained a language analysis from the Swedish firm Skandinavisk Språkålysis AB for the purpose of establishing that the appellant was from Afghanistan as claimed. The Authority understands that language analysis is a tool utilised by immigration authorities in a number of countries to assist in establishing the correct country of origin of refugee claimants, it being well known that some refugee claimants masquerade as nationals of known refugee producing countries. We in New Zealand are not immune from this problem. There have been past instances of Pakistanis obtaining refugee status either from the RSB or this Authority by passing themselves off as Afghans, a situation made possible by

the geographical proximity of Pakistan and Afghanistan, cultural affinity, and the fact that the countries share a number of common languages.

[32] The language analysis obtained by the RSB in respect of the present appellant is the first such analysis considered by this Authority. This, plus the fact that the appellant's counsel Mr Ryken has made a number of trenchant criticisms of the language analysis makes it appropriate for the Authority to consider the analysis in some detail and provide some preliminary observations as to appropriate use of language analysis in the refugee determination process.

[33] The present language analysis, is based on a tape of the appellant speaking for approximately 15 minutes about such general matters as places he has lived, cultural practices, common foods and the like. It is the practice of Skandinavisk Språkanalys AB that the identity and qualifications of their analysts are not revealed for reasons of security.

[34] For ease of reference and to assist discussion the language analysis is set out in full below.

Language analysis involves the assessment of regional and local linguistic traits within phonetics, morphology, syntax and vocabulary. In some languages stylistic traits can be taken into account. The assessment normally describes the findings as 'obvious', 'most probable', 'probable' or 'possible'.

Expert opinion

The speech on the tape is Dari. The person speaking obviously has his language background in Afghanistan.

Explanation

The person speaks Dari with a clear Pashtu accent, probably from the province of Kandahar or surrounding areas. Pashtu is spoken in the southern and south-eastern parts of Afghanistan as well as in the north-western and western parts of Pakistan, in Baluchistan.

His accent is mostly reminiscent of the one used in the southern parts of Afghanistan. Dari is probably not his mother tongue, but he uses typical Dari words and phrases from the Kabul region such as: *maktah* (= school), *dars* (= lesson), *kelkeen* (= window), *darwaza* (= door), *godipara bazi* (= kiting), *rafeeqaish* (= his friends), and *barf* (= snow).

The person says he was raised in Kabul, but he does not know much about the layout and the geographical location of the city. He names a mountain *koh-e television* and two more places in Kabul, *Jangalak* and *Chehlsotoon*, where he says he has lived. He talks in general terms about the cinemas in Kabul without naming any of them.

He talks in general terms about the seasons of the year and the weather conditions and names the most typical fruits, vegetables, dairy products and dishes in Kabul such as: *maska* (= butter), *sheer* (= milk), *paner* (= cheese), *mast* (= yoghurt), *aash* (= a typical food), *pala* (= kind of rice), *berinj* (= rice), *asal* (= honey), *shorwa* (=soup), *qorma* (= sauce).

The way the person speaks indicates that he might be illiterate, but he is acquainted with the cultural and traditional celebrations and festivals. He describes the traditional Afghan wedding ceremony briefly and knows about the way of life there. He also explains some religious events briefly. However, on one occasion the person uses a typical Pakistani word *patata* (= potatoes), which indicates that he has lived in Pakistan for a period of time.

Considering his strong Pashtu accent, the person's mother tongue seems to be Pashtu, but his prosody is typical of Kabul Dari, and there is nothing in this recording which indicates that the person speaking has his language background in any country other than Afghanistan.

The analyst originates from Afghanistan

[35] The primary conclusion reached is that "The speech on the tape is Dari. The person speaking obviously has his language background in Afghanistan." It is a conclusion which clearly corroborates the appellant's evidence as to his origins. The same cannot be said of the other conclusions to emerge from the language analysis, namely that his mother tongue is probably not Dari as he has claimed but seems to be Pashtu and that he has lived in Pakistan for a period of time. If these conclusions are correct then the appellant has been concealing or misrepresenting his true circumstances.

[36] Mr Ryken urged the Authority to give no weight to these additional conclusions of the language analysis. He challenged the analysis as lacking a scientific approach and/or objectivity. Failings identified by him included:

- (a) The absence of any analysis of the pronunciation differences upon which the conclusion and findings are based.
- (b) The inappropriate references to the appellant's geographical knowledge of Kabul in the context of a language analysis and the likelihood that this influenced the analyst's conclusion the appellant's native language might not be Dari.
- (c) The inappropriate reliance on the use of the one word *patata* as indicating that the appellant has lived for a period in Pakistan.

[37] Mr Ryken submitted that the above suggested that the language analysis was most probably the work of someone unfamiliar with basic linguistic principles and was possibly an interpreter or translator.

[38] In support of his contentions Mr Ryken arranged an evaluation of the language analysis to be undertaken by Dr Ruth Schmidt, Senior Lecturer in Urdu with the Department of East European and Oriental Studies at the University of Oslo. Dr Schmidt's curriculum vitae shows that she holds qualifications in linguistics and has written extensively on Urdu and other Indo-Aryan languages.

[39] Dr Schmidt commences her evaluation by stating that she agrees with Skandinavisk Språkanalys AB's statement "Language analysis involves the assessment of regional and local linguistic traits within phonetics, morphology syntax and vocabulary." although in her opinion a complete linguistic analysis will also make a statement about the language situation and the speaker's native country. Dr Schmidt provides a brief description of the five elements of language analysis, the salient features of which are summarised below.

Phonetic traits

[40] A trained linguist who is a specialist in the language(s) of the region under investigation can often detect the speaker's geographical origin by analysing his pronunciation or accent. The results of analysis of pronunciation are presented in a special transcription, usually the International Phonetic Alphabet.

Morphological (grammar)

[41] Language analysis of grammar compares the speech sample to the grammatical features of the language the speaker claims is his mother tongue.

Syntax (word order)

[42] An important component of language analysis because syntax along with word order is hard for an adult speaker to change.

Vocabulary (lexical items)

[43] The easiest to perform but the least reliable component of language analysis, words being easily borrowed. Vocabulary analysis is only useful as part of a holistic analysis of the speaker's speech.

Language situation in the native country

[44] Even in western countries with universal education dialect variation exists. In Asian countries such as Afghanistan such variations can be extreme and people often treat or declare only the official language(s) as their mother tongue.

[45] Turning to the Skandinavisk Språkanalyt AB analysis of the appellant's speech Dr Schmidt notes that with respect to phonetic traits no phonetic data is presented and even the vocabulary items discussed are not transcribed consistently or scientifically. While the analyst asserts the speaker has "a clear Pashtu accent" no data is provided to support this claim. With respect to morphological traits (grammar) and syntax (word order) no data for either category is provided in the analysis. On the other hand, Dr Schmidt notes that the analysis contains exclusively lexical (vocabulary) data. All the vocabulary items are indigenous Dari words several of which have been borrowed into Pashtu. (*darwaza, barf, paner, qorma*). Two (*palau, shorwa*) are used throughout Afghanistan. No indigenous Pashtu words are provided in the analysis.

[46] Dr Schmidt is of the opinion that the claim that *patata* is "a typical Pakistani word" is questionable. The word she says does not exist in Urdu the official language of Pakistan. Dr Schmidt said that she herself has never heard of it in 12 years of residence in Pakistan while a Pakistani research colleague, Manzar Zarin, with 21 years of work experience throughout northern Pakistan and fluency in Urdu, Pashtu, Punjabi, Hindko and Shina is also not familiar with it. Even if *patata* is used in Pakistan the use of a single vocabulary item is not proof of residence in Pakistan. Vocabulary from non-indigenous food stuffs is typically borrowed.

[47] In summary Dr Schmidt states that the language analysis presents only one type of linguistic data namely lexical data. To the extent that the data provided proves anything it demonstrates that the speaker's mother tongue is Dari and that he originates from Afghanistan. There is no proof to support the claim of the

speaker's "strong Pashtu accent" and no reliable data to support the claim that the speaker has lived in Pakistan.

[48] Annexed to her report Dr Schmidt provides a brief report from a colleague, Finn Theisen, a senior lecturer in Iranian philology who listened to the sample tape of the appellant speaking. Mr Theisen states that he agrees with the expert opinion that the speech on the tape is Dari and that the speaker obviously has his language background in Afghanistan. He further notes that the word *patata* is certainly in common use in many parts of Afghanistan.

[49] Mr Ryken advised the Authority that he had never shown the language analysis to the appellant. When questioned by the Authority about the languages he spoke the appellant was most firm that Dari was his mother tongue. He says he speaks Pashtu but not nearly as well as Dari. He thought if somebody listened to him speaking Pashtu they would probably conclude that he spoke Pashtu with a Dari accent. It is relevant to note that the appellant was interviewed in Pashtu when he arrived at Auckland airport on 28 September 2001. Thereafter on the two occasions he was interviewed by the refugee status officer, when appearing before this Authority, and when conversing with his counsel, the appellant has always chosen to speak Dari. It is unquestionably a language in which he is fluent and at ease. It is also the case that the appellant is from Kandahar, a predominantly Pashtu speaking region. (Ethnologue; languages of the world, 2001, 14th ed, Summer Institute of Linguistics, www.ethnologue.com/show_language.asp?code=PRS). Presumably in the case of a young person speech in one language can be influenced by the frequent hearing and use of a second language.

[50] The appellant also denied that he had ever been to Pakistan apart from the brief period when he transited that country on his way to Indonesia. According to the appellant *patata* is a word everybody uses in Kandahar although it is not used in Kabul. He did not know from what language the word derived.

[51] We have considered the submissions of Mr Ryken, and the points raised by Dr Schmidt. We find the deficiencies identified by Dr Schmidt in her evaluation to be persuasive and they leave us in real doubt as to the reliability of some of the conclusions contained in the language analysis. When combined with the appellant's own evidence on the language issue which we note is supported by the conclusions of Dr Schmidt and her colleagues, and our prior assessment of the

generally credible nature of the appellant's evidence overall, we conclude that the appellant is entitled to the benefit of the doubt. We place no weight on the opinions expressed in the language analysis that Dari is probably not the appellant's mother tongue and that he has lived in Pakistan for a period of time. We therefore accept that the appellant has not concealed material information about his past.

[52] As this is the first language analysis the Authority has had to consider, the following observations are necessarily of a preliminary nature only. No doubt as the Authority's familiarity with language analysis increases the Authority will find it appropriate from time to time to make additional observations much in the same way as it has done over the years in respect of psychological reports, a form of expert evidence commonly considered by the Authority.

[53] The approach adopted in respect of psychological reports is equally applicable to language analysis. Before turning to these principles however it is worth recalling the potential benefits to be derived from language analysis. The practical constraints and limits to the refugee inquiry are too well known to require re-iteration (see *Refugee Appeal No. 72668/01* (5 April 2002) for a recent summary). Any information which is of potential assistance to the decision maker in carrying out what can sometimes be the extraordinarily difficult task of assessing a claimant's credibility is to be welcomed.

[54] Language, and in particular the issue of whether a claimant is able to speak the language of the region or tribe from which he/she claims to originate can sometimes be highly relevant to the refugee inquiry. See for instance *Refugee Appeal No. 70750/98* (28 May 1998), *Refugee Appeal No. 71010/98* (30 October 1998), *Refugee Appeal No. 71481/99* (21 October 1999), *Refugee Appeal No. 72061/2000* (7 September 2000) and *Refugee Appeal No. 72254/2000* (30 November 2000). The ability to draw on the opinion of an expert with knowledge of the language(s) in issue in any particular refugee claim is of potential assistance to the refugee inquiry.

[55] It must however be borne in mind that the weight to be given to a language analysis, as with any expert evidence, is a matter for the decision maker. The comment of the Giles J in *Butler v Removal Review Authority [1998] NZAR, 424-425* and discussed in *Refugee Appeal No. 71729/99* (22 June 2000) para 51 that

expert reports vary in quality and integrity bears repetition. The decision maker is not obliged to accept the report of a qualified expert without more. The decision maker is fully entitled to evaluate and assess the expert evidence, to consider it in the context of the totality of the evidence, and to reach his or her own objective and reasoned assessment of it.

[56] Where the expert report is from an anonymous person whose qualifications, experience and knowledge of the language(s) of the region in issue is unknown there is a need for caution. Language analysis is obviously a specialised task. All the more so when the analyst is called on to determine the origin of a person from an unstable border region where a range of languages are spoken and where there is considerable transborder movement of peoples. The uncritical acceptance of all of the opinions contained in such reports has obvious dangers.

Well-Founded Fear: Objectively on the facts as found is there a real chance of the appellant being persecuted if he returns to the country of nationality?

[57] The appellant's evidence is that his father arranged for him to leave Afghanistan during July 2001 so as to avoid being conscripted by the Taliban. His father's relative wealth had enabled him over the years to deflect Taliban interest in his two eldest sons but he had become less confident in his ability to go on resisting the pressures of the Taliban indefinitely.

[58] The appellant said he was opposed to the idea of fighting for the Taliban as he believed it would involve him in killing and harming innocent people. Further he and his family were opposed to the Taliban's discriminatory treatment of the Shi'a minority. Any resistance to the Taliban's demands, he believed, would have resulted in his being persecuted especially as he is a Tajik and a Shi'a and his family's connection to Sheikh Mohseni, a prominent Shi'a political leader and opponent of the Taliban, was well known.

[59] The Authority is aware from various reports that the Taliban did sometimes forcibly conscript young men to fight in its ranks. See for instance Human Rights Watch, *Afghanistan, Iran and Pakistan, Closed Door, Policy: Afghan Refugees in Pakistan and Iran*, February 2002, Vol 14, NO, 2(H) at page 42. Whether the appellant's father was genuinely concerned that the appellant would be

conscripted as the appellant has claimed, is open to some doubt given the father's success over the years in protecting his two elder sons from being conscripted, including in the month following the appellant's departure which preceded the fall of the Taliban. Even if his fears had some objective basis the point need not concern the Authority.

[60] It is a fundamental principle of refugee law in New Zealand that the relevant date for assessment of refugee status is the date of determination. (*Refugee Appeal No. 70366/96* (22 September 1997) page 33-39). As explained in the same decision the enquiry into refugee status is concerned only with the prospective assessment of the risk of persecution. Past persecution is not therefore determinative, though incidents of past persecution may be relevant to the assessment of the risk of future persecution. It also follows that someone who may have had a well-founded fear of persecution at the time of flight may no longer be able to satisfy the Article 1A(2) inclusion criteria at the date of determination due to changed conditions in the country of nationality.

[61] Since the appellant's departure from Afghanistan in July 2001, significant political developments have taken place. In summary the collapse of the Pashtun dominated Taliban regime, which emerged in 1994 and by 1998 had gained control of some 90% of Afghanistan, followed the US led military campaign which commenced on 7 October 2001 (UK Home Office, *Afghanistan Assessment*, April 2000). The Taliban finally abandoned Kabul on 12 November 2001 and were dislodged from their stronghold in Kandahar, the appellant's home city, by 6 December 2001 (*Afghanistan Timeline*, 2001, 2002 www.mapreport.com/countries/afghanistan.html). An interim administration under the chairmanship of Hamid Karzai took office on 22 December 2001. (US Department of State *Country Reports on Human Rights Practices* – 2001; Afghanistan, March 4, 2002 [www.state.gov.]). An assembly or *Loya Jirga*, comprised substantially of elected representatives from local districts convened in Kabul between 11-19 June 2002. Karzai was elected president of the Transitional Administration and appointed a Cabinet in which key posts were divided equally between Tajiks and Pashtuns. It is expected that the Transitional Administration will prepare a new constitution to be followed by general elections within two years. Guardian Weekly, *Panel sets rules for Afghan Assembly*, April 4-10 2002 page 32, Associated Press, *Karzai Names Cabinet, reduces ethnic Tajik influence in top posts*, Associated Press, June 19, 2002, UN News Service,

Afghanistan concludes historic Loya Jirga - a key step in political transition, 19 June 2002.

[62] Acknowledging these developments, the appellant still maintains that he is afraid to return to Afghanistan. He says he continues to fear the Taliban and does not believe that they have been wiped out entirely or that this is even possible. Afghanistan will, he says, continue to be insecure for some time to come and as a minority Shi'a with family connections to a prominent Shi'a political leader he feels vulnerable.

[63] On the appellant's behalf, Mr Ryken submits that although the original reason for the appellant's departure from Afghanistan was to avoid conscription by the Taliban, the routing of the Taliban from Afghanistan's cities and the formation of a new government does not necessarily mean that the appellant does not have a well-founded fear for other reasons. He directs the Authority to the following:

- (a) whether the changed circumstances have reduced the chance of persecution for the appellant to below a real chance;
- (b) whether the appellant can claim refugee status on the grounds of his membership of the Shi'a minority;
- (c) whether the appellant, as the family member of a prominent leader of a minority political party is at risk of persecution; and
- (d) whether the ongoing civil war raises the risk of persecution to that of a real chance.

[64] Issues (a)-(d), Mr Ryken suggests, should be considered cumulatively, the appellant's minority religious status and family background being factors likely to increase the risk of persecution and/or reduce the practical availability of protection in conditions of ongoing insecurity.

[65] With respect to the most significant changed circumstances, namely, the fall of the Taliban Mr Ryken referred the Authority to a number of media reports which suggest the distinction between the Taliban and other Afghan groups is relatively porous. The reports refer to instances of Taliban members

having been arrested only to be released relatively soon afterward, the ready defection of many Taliban to the rebel Northern Alliance during the allied advance, attempts by the Taliban to regroup, and the ease with which many Taliban can simply return to their ethnic group or clan and the likelihood that they will be able to re-emerge under a different name. Commenting on developments since the hearing, Mr Ryken notes the opinions recorded in the Danish Report at page 22, that in Pashtun areas, the Taliban movement is seen as a movement that re-established Pashtun dominance in Afghanistan in connection with taking over power from 1994.

[66] Addressing the problems facing the Shi'a minority in Afghanistan, Mr Ryken suggests that such problems arise not only from the internal differences between Sunni Islam and Shi'a Islam but must be placed in the context of the political upheavals in the region surrounding Afghanistan today. He referred the Authority to the opinion expressed by Moojan Momen in *An Introduction to Shi'a Islam, 1985, Yale University Press at page 278* that Sunnism in Afghanistan has a reputation for fanaticism and that in response the Shi'a have always kept a low profile especially in the towns and that even in 1985, up to a half of Afghanistan's Shi'as were refugees.

[67] In his latest submissions received on 11 September 2002, Mr Ryken acknowledges the absence of references to the appellant's uncles' party Harakat-e-Islami in post-hearing country material located by the Authority and the possibility that this might reflect that Harakat-e-Islami has been pushed to the sideline, however, he submits it is difficult to draw any firm conclusions from the available material. In any event he submits that the situation is so fragmented and fractious that even if the appellant's uncle is still on the political scene, realistically he could not provide the appellant with protection.

[68] As for the human rights situation Mr Ryken submits that Afghanistan has been weakened by more than 20 years of civil war, ethnic bloodshed and repression. Ethnic and religious tolerance is low while the human rights record of the Taliban's opponents in the Northern Alliance has always been poor. Any resurgence of warlords and their tribal militias could see Afghanistan sliding back into the chaos and abuses that characterised the Mujahedin years between 1992 and 1996.

[69] Commenting on post hearing developments, Mr Ryken summarised the outlook as one of increasing instability with Afghanistan facing an extremely difficult future in which ethnic cleansing is likely to continue with minorities being persecuted in different areas at different times. Returning the appellant to such an environment would, he adduced, be problematic and expose him to a real chance of persecution.

[70] The Authority will address each of the points raised by Mr Ryken in turn:

The Taliban

[71] The report from the Danish Immigration Service contains an assessment of the Taliban's current position and influence. Of particular relevance is the following at page 21:

"Most sources stated that the Taliban, as a political movement, does not exist any more. At the same time, most sources were of the opinion that many former members of the movement are in particular in the southern and south-eastern Pashtun areas of Afghanistan, but that there are also former Taliban in other areas of the country. It is the opinion of the co-ordinator for UNAMA's [United Nations Assistance Mission to Afghanistan] Civil Affairs that the Taliban movement will not re-emerge as an organised political movement, but that a possible new Pashtun movement may arise. Historically, the Pashtuns have conquered non-Pashtun areas, and Afghanistan has always been considered by Pashtuns to be a Pashtun state, which means that the Pashtuns will not accept a state led by a Tajik. Therefore Pashtun political opposition could occur if they are not allocated sufficient power in the central administration and sufficient autonomy in the Pashtun area."

[72] With respect to the position of evaders and deserters from the Taliban, the report notes at page 22:

"UNHCR-Geneva had no specific information as to whether people who have evaded or deserted from Taliban military service have encountered problems in the local communities which supported the Taliban movement. The source emphasised that this does not mean that such problems do not exist. UNHCR commented that in local communities which did not support the Taliban, a person will not encounter problems solely due to evasion or desertion from the Taliban movement.

According to several sources, including the director for CCA [Co-operation Centre for Afghanistan] and the co-ordinator for UNAMA's Civil Affairs department, the Taliban generally cannot constitute a risk for people who fled from the Taliban's forced recruitment of soldiers. The director for CCA commented, however, that it cannot be completely excluded that such people may have problems. In some areas the Taliban mentality is still strong, for example a local commandant in Ghazni announced that men must not shave. According to the same source, in

Pashtun areas the Taliban movement is seen as a movement that re-established Pashtun dominance in Afghanistan in connection with taking over power from 1994."

[73] The Authority acknowledges that former Taliban or Taliban supporters are obviously still present in the country and some will have successfully accommodated themselves to the new power arrangements, including, according to the Danish Report at page 22, acquiring positions in the new administration. There are indications that remnants of the Taliban are intent on regrouping in southern Afghanistan and Pakistan and will continue their efforts to destabilise and/or regain a foothold in the political mainstream. Fighting between US forces and the Taliban and their al-Qaeda allies is intermittent. The Dominion, *Taliban regrouping says Afghan leader*, February 11, 2002, Guardian Weekly, *Al Qaeda Leadership eludes the pentagon's relentless hunters*, April 4-10 2002, page 32, *US Soldiers killed in Chinooks downed in Afghan battle* March 7-13 2002. Agence France Press, *Two US - Allied Afghans killed by mine, ambush* April 10, 2002. *Suspected Al Qaeda fighters killed in Afghanistan; Us Army*, April 14, 2002. AP Online, *Afghan Gunmen Fire on Peace Keepers*, April 20, 2002.

[74] There has also been speculation that al-Qaeda may be behind the bomb blast in Kabul on 5 September 2002 which killed at least 26 persons and injured many others and the failed assassination attempt on President Karzai during a visit to his home city Kandahar on the same day. BBC News, *Double attack raises Afghanistan fears*, Thursday 5 September 2002, CNN.com, *Karzai escapes assassination attempt*, September 5 2002. However this is not conclusive and another suspect, warlord Gulbuddin Hekmatyar has also been nominated, BBC News, *Karzai attacker from Taliban area*, Thursday 5 September 2002.

[75] The Authority considers that none of the above can detract from the essential position that Taliban rule has been brought to an effective end by the US military action following the September 11 terrorist attacks. The Taliban's former leaders have no role in the new government and Taliban influence is currently confined to pockets of resistance in isolated regions of the south. This must render remote indeed the appellant's original fear of being conscripted by the Taliban.

[76] It must also be remembered that although the appellant and his father entertained fears during the first half of 2001 that he might be conscripted by the local Taliban authorities in Kandahar, this did not actually happen. It was the

appellant's evidence that the local Taliban were happy to receive monetary payments from his father in lieu of conscripting his eldest sons and presumably the appellant as he grew older. There is no evidence that the appellant's family suffered any retribution from the Taliban because of the appellant's departure from Kandahar and consequent unavailability for conscription at a time when the Taliban's very survival was at stake. On the contrary, the evidence suggests that the appellant's father, over a number of years, successfully managed an accommodation with the local Taliban thereby ensuring minimal problems for his family. The appellant is not an evader or deserter from Taliban military service. He did not have a political profile when living in Kandahar nor did he come into any conflict with the Taliban in that city. There is therefore no reason to account for his being a likely target for persecution by former Taliban in Kandahar or elsewhere. The Authority therefore concludes that there is no real chance of his being persecuted by the Taliban in the event of his returning to Afghanistan.

Family Political Connections

[77] With respect to the appellant's family association with Sheikh Mohseni, a prominent Shi'a religious figure and leader of the Harakat-e-Islami political party, the Authority considers it to be highly relevant that neither the appellant nor any member of his immediate family, including his father, Sheikh Mohseni's younger brother, was harmed in the past due to this family connection. This state of affairs continued throughout the years irrespective of the changing political landscape. The appellant's family lived in both Kabul and Kandahar. The appellant referred in his evidence to an incident around the early 1990s when his father was shot at when driving in his car in Kabul. The evidence for the shooting being connected to his father's brother's activities is conjectural. Even if we were to assume the contrary it remains an isolated incident located well in the past. It does not assist us in assessing the future risk to the appellant.

[78] Throughout the period of Taliban rule, the appellant's family lived in Kandahar, a Taliban stronghold. If the family was going to be at risk because of their relation to Sheikh Mohseni, a Shi'a political opponent of the Taliban, one would have expected harm to have occurred during this period. Yet this did not happen. The appellant told the Authority that his father was not a member of his brother's political party or any other political group and did not like politics. It

would seem that the appellant's father's apolitical stance and relative wealth helped to ensure that his family remained relatively free of official harassment. The Authority has seen nothing which suggests the situation has changed for the family since the fall of the Taliban.

[79] The Authority has limited information about the current activities of the Harakat-e-Islami. Sheikh Mohseni does not hold a ministerial position in the Transitional Administration. (For membership of the new Cabinet refer to www.afghanland.com/history/transitional.html). Two members are identified as Shi'a). Even assuming that Harakat-e-Islami remains an active political player and intends participating in proposed future general elections, it is the Authority's finding that this does not give rise to a real chance of the appellant being persecuted because of his family association with Sheikh Mohseni

Position of Shi'a

[80] The appellant is a member of the Shi'a minority. The Authority has taken note of counsel's submissions concerning the historical discrimination against the Shi'a in Afghanistan. In particular it is mindful of instances of persecution of the predominantly Shi'a Hazara minority by the Taliban including the massacre of up to 5,000 Hazara civilians following the Taliban capture of Mazara-i-Sharif in August 1998. (UK Home Office, *Afghan, Afghanistan Assessment*, April 2000 paras 5.74-5.80). Concerning the situation after the fall of the Taliban, the Authority notes the relevant absence of any reports of persecution against Shi'a by reason of their religion. Referring specifically to the Hazara, the Danish Report mentions at page 42:

"The Director of ICG [International Crisis Group] stated that Hazaras generally have control over Hazarajat. The same source said about the Hazara population's conditions that after the fall of the Taleban there is no longer an open war against Shi'a Muslims, but that according to the source, they are still a religious minority and there is therefore a feeling of uncertainty in this group."

[81] The Authority takes into account the fact that the appellant and his family have in the past experienced, at most, only minor discrimination by virtue of their minority religious status. The appellant mentioned having suffered abuse (but not actual harm) when walking in the streets and referred to harassment of the local Shi'a mosque and discriminatory conscription of Shi'a youths by the Taliban in his

home city Kandahar. However, the harassment did not prevent either the continued functioning of the mosque or the appellant's and his family's ability to practice their Shi'a religion, their prudent adoption of certain Sunni practices when praying in public notwithstanding. The appellant's father was readily able to resist Taliban demands that the appellant attend a Sunni *madrassa* and for the reasons discussed above, was also able to avoid conscription of his sons. These past experiences fall well short of the degree of harm necessary to constitute persecution, namely the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. (*Refugee Appeal No. 2039/93* (12 February 1996) 14-16; *Refugee Appeal No. 71427/99* [2000] NZAR, 545 at paras 43-73)

[82] The Authority is unaware of any reports of problems being experienced by Shi'a in the appellant's home city Kandahar. On the basis of the appellant's past experiences and the available country information, the Authority concludes that, in the event of the appellant returning to Afghanistan, there is no real chance that he would experience persecution by virtue of his Shi'a religion.

Tajik Ethnicity

[83] Although not specifically highlighted by counsel the Authority has considered whether the appellant's Tajik ethnicity might give rise to a real chance of harm having regard to Pashtun/Tajik tensions that have emerged post the collapse of the Taliban. There are two matters for consideration.

[84] First, attacks and abuses against the Pashtun minority in the north have been widespread, giving rise to renewed population flight. These attacks have been largely carried out by the forces of the predominantly Uzbek Junbish-e Milli, led by Dostrom, the predominantly Tajik Jamiat-e-Islami led in the north by Atta Mohammad and the Hazara Hizb-i-Wahdat and are thought to be reprisals for abuses committed by the Taliban (Human Rights Watch Briefing paper, *On the Precipice: Insecurity in Northern Afghanistan*, June 2002). Such ethnic conflict with its connotations of ethnic cleansing has the potential to cause a backlash against minority ethnic groups in the Pashtun dominated south. The Transitional Administration clearly remains alive to such developments and appears to have taken steps in an endeavour to diffuse the situation. In July Karzai appointed a

delegation to investigate factional fighting in the north and pressure continues to be applied to both Generals Dostum and Mohammad Atta to achieve compliance on security issues. (Radio Free Europe/Radio Liberty, *Afghanistan: Karzai sends delegation to investigate factional fighting*, 1 July 2002, New York Time.

[85] The efforts of President Karzai appear to be meeting with some success as the Authority is unaware of any reports of spill over attacks on Tajik or other ethnic minorities having taken place in the south, particularly in the appellant's home city of Kandahar.

[86] The Authority also takes into account the fact that the appellant and his family lived in Kandahar in the period leading up to the Taliban take-over and throughout the years of Taliban rule. They came to no harm because of their Tajik ethnicity.

[87] Another factor to take into account is that rivalry between Tajik and Pashtun over control of the central government has produced speculation about the possibility of a new Pashtun movement or even uprising in the south, should the Transitional Administration fail to achieve broad ethnic and political representation. Because Afghanistan has historically produced a pattern of ethnically motivated outrages, inter-ethnic rivalry usually being related to developments in the political sphere, a Pashtun movement or uprising could potentially lead to acts of revenge against Tajiks, Hazara and Uzbeks (see Danish Report pages 21 and 24).

[88] The Interim Administration resulting from the Bonn agreement was Tajik dominated leading to Pashtun fears that an attempt was being made to turn Afghanistan into a Tajik state. Addressing these concerns in the composition of the Transitional Administration, President Karzai (himself a Pashtun) appointed Pashtuns to the key posts of the Interior and Finance with Panjshiri-Tajiks retaining the other two key ministries, Defence and Foreign Affairs (The Associated Press, *Karzai Names Cabinet, Reduced Ethnic Tajik Influence in Top Post*, June 19, 2002, Institute for War and Peace Reporting *Karzai unveils cabinet – At last*, 19 June, 2002. *Pashtuns hold 13 of the 28 Cabinet Posts* (www.afghanland.com/history/transitional.html))

[89] Reporting to the Security Council, the UN Under-Secretary General for Political Affairs, Kieran Prendergast, stated that despite incidents of intimidation the *Loya Jirga* achieved a truly representative sample of Afghan society. Karzai had presented an encouraging reformist vision, including proposals concerning national commissions on national defence and security, foreign investment and the return of property among others. He had also noted the need for an ethnically balanced national army accountable to the state. UN Security Council, *Loya Jirga a truly representative sample of Afghan society, Security Council told in briefing on Afghanistan*, 21 June 2002. Such developments may go some way to accommodating Pashtun aspirations and diffusing the potential for Pashtun grievances to coalesce into an aggressive new political movement along the lines of the Taliban. It is also relevant that the Pashtun community itself is not unified in its views and many Pashtuns now returning to Afghanistan were opposed to the Taliban.

[90] The Authority concludes that fears raised of a future Pashtun uprising remain too speculative to support a finding that there is a real chance that the appellant would suffer serious harm in the event of his returning to Afghanistan because of his Tajik ethnicity. The facts fail by a substantial margin to satisfy the well-founded test articulated by the Authority in *Refugee Appeal No. 72668/01* [2002] NZAR, 649 at para 154.

General Insecurity

[91] The final issue for consideration advanced by counsel is whether the general security situation in Afghanistan itself gives rise to a real chance of the appellant suffering persecution, particularly having regard to his individual ethnic, religious and family characteristics. Mr Ryken contends that political conditions in Afghanistan are fragmented and fractious and the picture painted by the country material is one of increasing instability and lack of protection.

[92] The Authority concurs that political conditions in Afghanistan are fragile. In particular the overall weakness of central authority is apparent from the following extracts from the Danish Report at pages 13-14.

"The human rights advisor for UNAMA [United Nations Assistance Mission to Afghanistan] stated that the central administration is not particularly strong and

does not have any authority outside Kabul, where real control is exercised by local warlords. Building up of government institutions should begin first and for the time being the main task has been to create peace and put a political power in place. There is no judicial system and no development of a national police force."

"The directors for the Co-operation Centre for Afghanistan (CCA), observed that there is no central power in Afghanistan today, but there is the so-called "B52-syndrome" (understood as the USA's military control) that really controls the country. There is no authority at present that can appoint local governors or civil servants at province level without consulting the local rulers, who according to the CCA's Director are really "those who rule by arms"."

"The director for the International Crisis Group (ICG) also pointed out that after the fall of the Taliban regime, political powers are being exercised by local commandants, and that no central leadership really exists in Afghanistan today. There are also no valid laws and no functioning judicial system."

"The leader of Oxfam was also of the opinion that the administration's influence is generally not reaching down to province level in Afghanistan today, and that no representatives from the interim administration can be found in the rural areas. Moreover, no salaries are currently being paid to civil servants at province level. The leader of Oxfam found that the northern areas of Afghanistan were controlled more from Kabul than the rest of the country."

"The director for ABAR [Agency Coordinating Body for Afghan Relief] stated that the interim administration has an influence, but no real control. He mentioned as an example that the whole of the western area is controlled by the governor in Herat Ismael Khan. The administration wishes to exercise influence down at province level but this requires the break-up of local warlords' power."

[93] With respect to the position of warlords, the country material reflects a broad consensus that the fall of the Taliban has provided the opportunity for local warlords to re-assent control over large areas of the country. Not only has this resulted in civil war in certain areas due to open conflict between rival warlords such as ongoing conflicts for much of the year between Generals Dostum and Mohammad Ata in the region of Mazar-i-Shariff but also a climate of repression particularly as the warlords sought to influence the *Loya Jirga* process. For an account of the tactics employed by the warlords, see Human Rights Watch Briefing Paper, *Afghanistan: Return of the Warlords*, June 2002.

[94] Speaking of the security situation in general, the Danish Report notes that security varies from region to region. While Kabul which hosts the International Security Assistance Force enjoys relative security, the north is subjected to intermittent fighting between rival groups and has seen reprisal attacks on Pashtun minorities. Security in the west has been relatively good with the governor of Herat, Ismael Khan exercising full control over the area. The central region around Hazarajat has seen outbreaks of fighting between leaders of the factions within the Hezbe-Wahdad party, though otherwise is generally considered safe. In

respect of the south (page 32), the Danish Report refers to conflicts over opium cultivation, conflicts over local Pashtun commanders due to confused power structures and local support for the Taliban in some areas.

[95] The appellant is from the city of Kandahar in the south. At best the Authority can gauge from various media reports over the previous months, the security situation in that city has continued to stabilise. Kandahar is currently under the control of Governor Gul Agha Sherzai, a Pashtun warlord and the US maintains a base in the city. Gul Agha survived a rocket attack on his residence during April 2002 (Agence France Presse, *Two killed in rocket attack on Afghan Governor's palace*, April 14, 2002) and was slightly injured in the recent attempt to kill President Karzai on 5 September 2002, (BBC News, *Karzai attacker from "Taliban area"*, Thursday 5 September 2002). Commenting on the situation in Kandahar in the lead up to the meeting of the *Loya Jirga*, Human Rights Watch stated in its briefing paper on the Return of the warlords, *ibid* page 8:

"Human Rights Watch found that the election in Kandahar had far fewer problems than in surrounding rural areas, and that general security was far better inside the city than in other locations in the south of Afghanistan. Because of the centralised security apparatus under Governor Gul Agha and possibly because of the close presence of international troops, there was no reported incidents of commanders or troops showing up at first stage election sites and intimidating potential representatives."

[96] Human Rights Watch also referred (page 8) to there being a large number of armed and uniformed men in Kandahar, some being troops attached to the Governor and other police under the command of the chief of police, General Akram. There are still other troops from surrounding bases sometimes within the city as well as troops from commanders in outlying districts. Interviews with locals in Kandahar revealed complaints of soldiers stealing and the belief that the city is not as secure as Kabul.

[97] That various groups remain opposed to the Transitional Administration and/or the peace process has been starkly underlined by the killing of one of the three Vice Presidents, Haji Abdul Qadar, a Pashtun, in Kabul during July and the failed attempt to assassinate President Karzai on 5 September 2002 (BBC News, *Murdered Afghan Minister Buried*, 7 July, 2002; *Attack Exposes Karzai's Weakness*, 5 September 2002).

[98] Speculating as to possible future conflicts, informants interviewed by representatives of the Danish Immigration Service referred to new political and military alliances being formed amongst the various warlords and tribal leaders and the potential destabilising effect of the US policy of arming various Pashtun groups in the south-east as part of its ongoing fight against al-Qaeda (page 24). The critical importance of an ethnically and politically balanced administration for long term stability has already been discussed in para [88] above.

[99] Despite security concerns, over recent months Afghan refugees have been returning to Afghanistan in unprecedented numbers. UNHCR reported on 5 July 2002 that 1,167,000 Afghans had returned home with UNHCR assistance since the beginning of March and that it expected up to 2,000,000 will have returned by the end of the year. (UNHCR briefing notes, *Afghanistan: returns update*, 5 July 2002., UNHCR Briefing Notes, *Afghanistan: returns build again after Loya Jirga*, 24 June 2002, UNHCR, *Real-Time evaluation of UNHCR's response to the Afghanistan emergency*, Bulletin No 3, 1 May, 2002.)

[100] Amnesty International, in its report of July 2002, *Afghanistan Continuing need for Protection and Standards for Return of Afghan refugees* voiced its concern that the high rate of refugee returns could be destabilising given the fragility of the transitional process and the country's limited absorption capacity. It questioned the sustainability of the high rate of refugee returns.

[101] In response UNHCR rejected Amnesty International's assessment that refugees should not be encouraged to return. Acknowledging that Afghanistan is still insecure, UNHCR emphasised that returns were taking place on a voluntary basis. UNHCR's position is that it is facilitating rather than actually promoting repatriation. It does however draw attention to the fact that security in many parts of the country is very fragile while access to food and healthcare, shelter and adequate water remains limited in some regions. It requests that the international community not force Afghans to return or encourage widespread repatriation without ensuring adequate funding for the relief effort (Agence France-Presse, *UN rejects Amnesty position on Afghan refugees*, 20 June 2002, UNHCR, *Afghanistan Humanitarian update-No 61*, 30 May, 2002. On 2 July, 2002, UNHCR announced that it was suspending the repatriation of refugees to the north because of the precarious security situation associated with ongoing rivalry between warlords Dostum and Mohammad Atta (Agence France-Presse, *UN suspends IDP's*

repatriation to Afghanistan's volatile North, 2 July 2002, Radio Free Europe/Radio Liberty *Afghanistan: Karzai sends delegation to investigate factional fighting*, 1 July 2002.

[102] The Authority has given careful consideration to the concerns outlined above. It must be remembered that Afghanistan has undergone over 20 years of civil war. It is inevitable that achieving overall security will require ongoing effort, while the creation of new and effective political and administrative structures, including a national army and police force, will be a lengthy process. Realistically, given its recent history, there will be further human rights abuses and outbreaks of violence. Even so, war weariness which afflicts much of the population and strong local and international backing for political, social and economic reconstruction must also be taken into account. For many Afghans such factors as the minimal infrastructure, crime and banditry, the presence of landmines and harsh climate will make the task of rebuilding their lives an unenviable one.

[103] Fortunately the present appellant has a family to return to. Their relatively secure financial position, as counsel concedes, means accessing shelter and food should not present the appellant with any real difficulty.

[104] Generalised conditions of insecurity such as exist in Afghanistan, understandably, will give rise to subjective feelings of apprehension and vulnerability as experienced by the present appellant. However, it is important to recall that feelings of insecurity without a real risk of persecution do not satisfy the Refugee Convention. Whether a fear is well-founded requires an objective test. The focus is not on the subjective feelings and perceptions of a refugee claimant but on the objective facts as found by the decision maker. A fear is not well-founded unless there exists a real or substantial basis for it. Conjecture and surmise have no part to play in determining whether a fear is well founded. (*Refugee Appeal No. 72668/01* [2002] NZAR 649 at paras 116-154). Even in situations of civil war the Refugee Convention requires that a refugee claimant establishes in relation to him or herself a well founded fear of being persecuted. See *Refugee Appeal No. 71462/99* (27 September 1999).

[105] The country material surveyed by the Authority suggests that the appellant's home city of Kandahar enjoys relative stability despite the occasional

attacks on US personnel and criminality by some armed men under the control of the Governor. The appellant and his family have lived in Afghanistan throughout the entirety of the civil war, and for varying periods experienced high levels of insecurity. When younger, the appellant suffered injuries in a bomb blast in a Kabul marketplace. It was a random, indiscriminate event. The Authority cannot exclude the bare possibility of his again being a random victim of some such similar episode. However, the chance of the appellant coming to serious harm is a remote or speculative one as opposed to a real chance.

[106] Nor, for the reasons already discussed, does the Authority accept that the degree of risk is significantly increased to the level required for a well-founded fear by the fact of the appellant being a Shi'a and/or related to a prominent Shi'a political leader or by reason of his Tajik ethnicity. He is not differentially at risk because of his civil or political status.

[107] Having considered all of the issues raised by counsel against an extensive survey of the country material, the Authority concludes that the appellant does not have a well founded fear of being persecuted in the event of his returning to his home country.

[108] This being so Issue 2 relating to Convention ground does not fall for determination.

[109] The Authority concludes by noting that refugee claims are determined on their specific facts. Given the diversity of individual circumstances in Afghanistan each case will need to be carefully assessed to establish whether the refugee definition in Article 1A(2) of the Refugee Convention has been satisfied.

CONCLUSION

[110] For the above reasons the Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

.....
V J Shaw
Chairperson