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Heard at Field House  
on 21<sup>st</sup> & 25<sup>th</sup> June 2002

Appeal Nos: HX52471-2000(30)  
HX52468-2000(27)  
HX52469-2000(28)

**30 27 28 (Risk - PDPA Member) Afghanistan CG [2002] UKIAT 06500**

## IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:  
13/02/2003

Before:

**Mr A R Mackey (Chairman)**  
**HH D Holden**  
**Ms S S Ramsumair JP**

Between:

**“AFGHANI CASE 30, 27 & 28”**

**APPELLANT**

and

Secretary of State for the Home Department

**RESPONDENT**

### **Representation**

For the Appellants: Mr N Oakeshott, Refugee Legal Centre

For the Respondent: Mr M Blundell, Home Office Presenting Officer

## **DETERMINATION AND REASONS**

### **Index to this Determination**

	<u>Paragraphs</u>
a. Introduction and brief background	1-2
b. The evidence and cross-examination of Appellant 30	3-10
c. The evidence and cross-examination of Mr Sapand	11
d. The evidence and cross-examination of Appellant 27 (the wife of Appellant 30)	12-15
e. The evidence and cross-examination of Appellant 28	16-19
	<u>Paragraphs</u>

f.	The evidence and cross-examination of the expert witness, Mr Peter Marsden	20-44
g.	Relevant country of origin information presented to us by the parties	45-50
h.	The submissions on behalf of the three Appellants	51-57
i.	The submissions on behalf of the Respondent	58-70
j.	The issues before us	71-73
k.	Assessment	74-88
l.	The decision	89

**a. Introduction and Brief Background**

1. The Appellant are all citizens of Afghanistan who had the misfortune of being on the Ariana Airline plane which was notoriously hijacked whilst on a flight between Kabul and Mazar-i-Sharif, (Mazar) and eventually ended up in the United Kingdom. They appeal with leave, against the decision of a panel of Adjudicators (His Honour Judge Dunn QC, Professor D B Casson, and Miss K Eshun). Those Adjudicators dismissed an appeal against the decision of the Respondent who had refused leave to enter and asylum claims. The decisions were promulgated in September 2000. The Respondent had refused to grant leave to enter and asylum on 6<sup>th</sup> April 2000. Leave to appeal was granted in October 2000. The grounds presented are largely of historical interest only at this time because of the massive changes that have taken place in Afghanistan since the applications by these Appellants were lodged. The decision in Pardeepan [00/TH/02414\*] makes it clear that the provisions of the European Convention on Human Rights can have no direct application because of the date of the original decision under appeal.
2. The Appellants are a family group who happened to be on the plane travelling to Mazar for family and medical reasons. Appellant 30 was a ticketing clerk with Ariana Airlines, Appellant 27 is his wife, who he married in 1996. Appellant 28 is the sister-in-law of this couple, she is married to the brother of Appellant 30, her husband was not on the plane and remains in Afghanistan. All three Appellants are Pashtun of the Saif sub-tribe and they all previously lived in Kabul. The names of the Appellants have been dropped from the proceedings some time back in an apparent, if minor, effort to preserve some confidentiality. However, given the notoriety of the events that these Appellants were involved in logically it would be very difficult to prepare a meaningful decision and at the same time fully retain confidentiality. Unfortunately, these three cases were set down for hearing in a somewhat random manner with Appellant 28 being the first case set down and Appellant 30 the last. On discovering this situation on 17<sup>th</sup> June 2002, and noting at that time that Appellant 27's case was largely derivative on that of her husband; Appellant 30, and there was also a clear linkage to the case of Appellant 28, we set down all three matters for hearing which included four witnesses, on 21<sup>st</sup> June 2002. The taking of evidence took a full day and a further half day was required on 25<sup>th</sup> June 2002 when full submissions were presented. We allowed the time for some additional country of origin material to be presented. We thank Mr Oakeshott for presenting this promptly to us a few days after the hearing.

**b. The Evidence and Cross-Examination of Appellant 30**

3. Mr Oakeshott submitted to us that the evidence of Appellant 30 was presented in the light of the significant changes in Afghanistan since his arrival in the United Kingdom and would establish a well-founded fear of persecution for him on return to Kabul for a mix of political (past membership and roles within the former Communist regime of President Najibullah), religious (now seen as being anti-Islamic for a combination of past secular beliefs and a desire to obtain asylum in a western country), and race or ethnic (as a Pashtun) reasons.
4. We were presented with a witness statement dated 23<sup>rd</sup> May 2002 and a full Appellant's bundle in respect of Appellant 30. The bundle contained the statement, a witness statement from Dr Saleh Mohamed Zeary (dated 6<sup>th</sup> June 2000 and presented in support of the appeal before the Adjudicators), country of origin information presented from a number of sources including: UNHCR, CIPU Report April 2002, International Crisis Group Briefing 16<sup>th</sup> May 2002 "*The Loya Girga*", Human Rights Watch, Amnesty International, the Guardian Newspaper, BBC News, Afghan Press, and various other newspaper reports.
5. Appellant 30 stated that he was scared of returning to Afghanistan for several reasons. The first was that he had been a member of the People's Democratic Party of Afghanistan (PDPA), a Soviet-backed Communist party, between 1968 and 1990. In that role he had worked for the Najibullah Government both as a party member and in the Civil Service of the Najibullah Government. He had been in the Ministry of Education until about 1976. During that period, he claimed that he had been an officer for the PDPA in "*a medium level position*" which involved him in speaking in support of the PDPA and encouraging people to join the party. He was one of approximately 100 people in Kabul carrying out that political activity. In approximately 1976, he moved to the Ministry of Agriculture and became responsible for the implementation of Government agricultural policy in the Kana Province. He was Assistant Administrator for the Province working directly to Dr Zeary, who was then the Minister of Agriculture for approximately 14 months in the late 1970s. Appellant 30 then worked as Assistant Administrator to the Minister of Agriculture and after that his most senior post, in the 1980s, was as Manager of Administration for the Ministry. In 1989, he was called up for additional military service in the defence of Kabul, fighting for the Najibullah Government against the Mujahadeen. He was then appointed to a position as Political Assistant to the General Manager of the Farmers Co-operative. His role was to co-ordinate political activities of the Co-operative and issue propaganda and generally encourage people to support the Government's agricultural policies. He explained that his role in Kana had been as the person in charge of the whole area, ensuring the delivery of food and water supplies to the local people. It was not overtly political but governmental. Later, however, he stated that he was involved in both administrative and political roles and that in Afghanistan they were closely linked.

6. With the Farmers Co-op, between 1989 and 1992, he confirmed that he had reported to Mr Sapand, who was in a position that was like that of a Minister. His role was to help Mr Sapand politically. He was one of four assistants to Mr Sapand, and he was the most senior. The other three roles were in planning, information and business.
7. In 1992, he was able to move, for a better salary, to Ariana Airlines. Unfortunately, at this time, the Mujahadeen took control of Afghanistan and his role within Ariana became a very small one because, due to the fighting, there were hardly any flights.
8. During the seven years he was with Ariana he explained that there were some difficulties and there had been attempts to remove him. The attempts to remove him, he claimed, were because of his connections with the previous PDPA regime. However, he managed to keep a low profile and did not get too involved in any confrontation with the Mujahadeen. On one occasion, during an attack by the Mujahadeen, he was shot in the leg. To avoid coming into contact with the Mujahadeen he that he moved about in Kabul from time to time to stay with friends. He claimed the Mujahadeen knew of his home and so he moved around to confuse them. Ultimately, his home in Kabul was destroyed about one month before he left. He spent the last month with his wife in rented accommodation.
9. In his statement he claimed that the Mujahadeen group who had now taken control of Kabul in the American/Northern Alliance defeat of the Taliban were a group dominated by Tajiks (the '*Jamiat-i-Islami*'). He claimed that this group still pursued Islamic fundamentalism and would still wish to target him as a former member of the PDPA regime. In addition, he claimed he was currently a member of a London-based group '*Shorh Tofahom*'. This group made up of Afghan exiles, many of whom were involved with the Najibullah Government, were actively involved in making representations to the recent *Loya Girga*.
10. Appellant 30 claimed that various family members had been arrested and tortured by the Taliban as a result of he, his wife and sister-in-law being caught up in the hijack. He stated that his wife also had similar fears which resulted from her family being targeted for similar reasons. The four relatives who had been targeted were his sister's husband, his second sister's husband, his wife's brother, and another relative.

**c. The Evidence of Mr Sapand**

11. Mr Sapand explained that he had been granted refugee status in this country on 26<sup>th</sup> April 2002. He was an ex-senior member of the PDPA *Kahalquan* Section. He confirmed that Appellant 30 had also been a member and held a rank at the second level, which he termed '*activist, Qadar*' or '*Cadre*'. There were three levels of members. Leaders, activists, and then workers. Mr Sapand explained the political activities of Appellant 30, stating that he had been in charge of the political section of the organisation and that it was the

highest position reporting directly to him. His own role, had been at Ministerial level. As President of the Farmers Co-op he had been responsible at the political level to the PDPA and at the operational level to the Prime Minister. He was also a member of the Central Committee of the PDPA, which was the ultimate decision-making body in Afghanistan.

**d. The Evidence of Appellant 27**

12. Appellant 27, the wife of Appellant 30, confirmed a witness statement presented along with an Appellant's bundle in her regard. In that statement she claimed that she was scared she would be persecuted by Mujahadeen groups now in control of Kabul as a result of the association of her husband, her own past and her family's association with the former Communist regime. Her father had been one of the leaders in the Unity and Peacekeeping Police Force. After the fall of the Najibullah Government, her father had had to hide and at other times go to Pakistan. On two occasions the Mujahadeen had come to the house to arrest him. On one occasion he had been arrested for two weeks and at another time a grenade had been thrown at their house, but her father was not there. The grenade killed her grandmother. In addition, two of her brothers had held senior ranks, one of them a general, in the Najibullah Government. Most of her family had gone to Pakistan when the Najibullah Government fell. She herself did not go because her sister and mother were ill.
13. She also explained that she was a qualified teacher in Afghanistan and had studied at high school and then had joined a group of young people involved with the Government '*Young Afghans Union*' who were spreading Communist ideas. She took a teachers training course at the University of Kabul in 1989/1990 and then began teaching children aged 6 to 13.
14. She married Appellant 30 in 1996, knowing that he was an ex-member of the PDPA but not much else about his political background because it was five years after the fall of the Najibullah Government. She also claimed that the ruling groups in Kabul at this time would have interest in her because of her background and because she had been on the hijacked plane. In addition, because of the treatment of her family members after the hijacking, she perceived there would still be a risk to her from fundamentalist groups. All these things, along with her having been a teacher, a Pashtun and her association with her husband contributed to the fears that she held.
15. She also explained that her brother, who had been detained for some eight months by the Taliban because the Appellant had been on the plane, was very angry with her and may seek revenge because of the problems he had suffered as a result of her being on the plane and subsequent actions by her. She therefore had fears from her own family.

**e. The Evidence of Appellant 28**

16. Similarly, Appellant 28 presented a witness statement dated 23<sup>rd</sup> May 2002, which she confirmed as true and correct. She stated that she had had no contact with her husband M since the day she boarded the plane. She was scared that she would be considered as having dishonoured him as a result of having been in Europe where she would be presumed to have acted in an anti-Islamic manner. She is scared she would not be forgiven as a result of this dishonour. She does not consider that the present Government would be able to protect her from actions that her husband may take to protect his honour.
17. She also advised that she had been a teacher in Kabul, working for the PDPA Government. Her family had been involved with the Najibullah Administration both on her own side and the family of her husband. One of her brothers had been a member of the Army and another had been in the Intelligence Service '*Khad*'. He left Afghanistan at the fall of the Najibullah Government and went to Pakistan. She is unaware of his current whereabouts and has had no contact with him.
18. After the Najibullah Government lost power, the Mujahadeen came to her father-in-law's home and stole many possessions from them, claiming this was done because they were supporters of the former Communist Government. On another occasion, her father-in-law was arrested and detained for two nights.
19. She also claimed a fear from remnants of the Taliban who would take revenge on them for involvement in the hijacking as, in her view, they consider Appellant 30 was one of the main people involved in the organising of the hijack.

**f. The Evidence of Mr Peter Marsden**

20. Mr Marsden presented three separate expert reports, one for each Appellant. Much of the material in the reports is similar for each Appellant but there are specific references to the plight of women in Kabul and comments on the individualised fears of each Appellant.
21. The reports set out Mr Marsden's expertise. He states that he has been a full-time information co-ordinator since 1989 for the British Agencies Afghanistan Group (BAAG). The BAAG group provides a secretariat for British aid agencies operating programmes in Afghanistan and allows sharing of information and discussion of issues on programmes. They produce a monthly review which provides an analysis of political, economic, humanitarian and cultural environment in Afghanistan for humanitarian agencies and for governments across Europe and to the European Commission. Mr Marsden is the sole author of this. Also his group produces detailed information on operating conditions in Afghanistan. To carry out his job he states that he needs to be in daily contact with developments in Afghanistan through internet, e-mail and direct communication. He has written extensively on Afghanistan, including a book entitled '*The Taliban: War and Religion in Afghanistan*' (Zed Books 1998) as well as numerous studies and articles. Mr

Marsden told us that his role had been to assist aid workers and agencies in their operations in Afghanistan and his expertise was built around that. He said that he did not claim to be an expert on human rights issues in Afghanistan but his work required him to be fully abreast of all the relevant issues in Afghanistan on a daily basis. He advised that he had last been in Afghanistan in 1997, primarily because of a ban by the British Government on aid workers travelling to Afghanistan during the Taliban regime. He confirmed that he had read the statements of all three Appellants and those of Dr Zeary and Mr Sapand.

22. In respect of Appellant 30, he states at the outset:

“It is reasonable for [Appellant 30] to fear that he might be targeted because of his and his family’s connections with the former Soviet-backed Government of Muhammed Najibullah. Although the new Afghan interim administration has been in power since 22<sup>nd</sup> December 2001, on the basis of the Bonn Agreement of 6<sup>th</sup> December 2001, it is not in a position to provide protection to the population beyond the confines of Kabul and, even in Kabul, it has not been able to provide sufficient security to protect the population from arbitrary action. The regime includes former Mujahadeen who were engaged in armed conflict with the Soviet occupying forces and the Soviet-backed Government from 1978 to 1992. One particular group of these, a party known as *Jamiat-i-Islami*, which represents the *Tajik* ethnic group, now has control of the defence and interior ministries and interior services. Although efforts have been made to establish a national army, most of the forces maintaining order in Kabul are from this group of former Mujahadeen and there have been a number of incidents which indicate that the regime does not have effective control of these forces. Those with scores to settle would therefore feel free to act with impunity. There is, therefore, a significant risk that those linked to *Jamiat-i-Islami*, other Mujahadeen groups or Taliban will target [Appellant 30] and such targeting will result in the use of violence.”

23. He goes on to state that the UNHCR has identified those with links with the Communist regime as being at risk. The fact that he fought against the Mujahadeen and his role in co-ordinating political activities with the Farmers Co-operative would indicate that he was regarded by that Government as committed to its ideology. He then notes that Appellant 30 kept a low profile during the time of the Mujahadeen and Taliban but, in spite of this was targeted on two occasions. The political activities of the Appellant in the United Kingdom would also label him as a moderate and intellectual and while this may be acceptable to some elements of the transition authority, there is a history going back many years of Mujahadeen and Taliban targeting moderate intellectuals because they are perceived as secular, anti-Islamic and a threat to their power base. He also considered it reasonable to conclude intelligence services would have records of his previous affiliations.

24. He noted that the International Security Assistance Force led by Britain and now Turkey can do little more than provide protection for members of the Administration and for Government buildings. This is operating solely in Kabul. Thus, control of the local level is largely reverted to those who had power prior to the Taliban capture of various parts of the country between October 1995 and September 2000. The security situation has deteriorated in some areas since the fall of the Taliban with various outbreaks of hostility and criminality.

25. He then refers to the *Loya Girga* (11/17 June 2002) and significant levels of intimidation and a climate of fear in relation to the electoral process. He surmises that if the Pashtun population feel the outcome of the *Loya Girga* process leaves them insufficiently represented, they may again turn to the Taliban to take on a leadership role, thus facilitating a come-back.
26. He also considered it important to note the presence of Appellant 30 on the plane hijacked to the United Kingdom and that this will very much elevate his profile and increase the possibility that he would be targeted because of his past associations. In this area, he considered that the remnants of the Taliban would take a negative view towards him and that this would be heightened by his past employment with the Airline and being of the same ethnic sub-group as those charged with the hijacking offences.
27. He then goes on to set out the difficulties for the Afghan economy and the difficult task of the new transitional authority. He considers that it would almost be impossible for the Appellant to obtain employment because of his past association with the former Soviet-backed Government. This would leave him in a very exposed position, making it impossible to maintain a low profile so that he could maximise personal security. He states that “*the rumour-mill is very powerful in Afghanistan and it would be almost impossible for him and his wife to hide their previous presence on the hijacked plane. It would be clear from his accent and mannerisms that he had lived in the West and this would provoke questions.*”
28. Finally, he sets out some details of risks to Pashtuns from resentful non-Pashtun minorities including Tajiks and the *de facto* occupation of Kabul from November 2001 by the Tajik forces.
29. His written evidence in respect of Appellant 27 and 28 is on similar lines, but adds the additional risks to Appellant 27 that could arise from her having spent a period of time in the United Kingdom and being seen as abandoning Islam. “*A woman who is known to have lived in a Western country will be perceived as having abandoned her Islamic values*”. This, plus the higher profile through her presence on the hijacked plane, would give rise to public speculation as to her moral character and those who might feel inclined to take action against her because of the perceptions of her character. He also considers that her other family associations would heighten her risks. He states that it would be almost impossible for her to secure employment because of her close association with the former Soviet-backed Government and that as a teacher who has lived in Kabul, she would be regarded as an intellectual woman. These factors would lead to the likelihood of her being targeted by the Mujahadeen and remnants of the Taliban.
30. In respect of Appellant 28, a similar report was presented. In her case, the additional factors relating to her brother, who was in the Intelligence Department, and her similar background as a teacher and intellectual could heighten her risk.



31. In his evidence to us, Mr Marsden expanded on the reports submitted explaining the background to the Mujahadeen and particularly the fundamentalist attitudes of the *Jamiat-i-Islami* who now have effective control of much of Kabul.
32. In respect of the results of the *Loya Girga*, he considered that the appointments that were flowing from this were still largely dominated by the 'power-holders'. Thus while the new President was a moderate, he would be largely powerless against the so-called 'war-lords' at the local level. The Government therefore is one that still pursues radical Islamic ideas, and indeed the new Justice Minister had already announced that an Islamic justice and punishment system would be introduced. In this situation, the risks to high level associates of the former Soviet-backed Government, particularly those with higher profiles, would be that there was a very high chance that they would be subjected to violence from groups such as *Jamiat-i-Islami* and possibly ex-Taliban supporters. There was also the fact that there was no national Army or Police Force available, and it appeared that it would be more than two years before any sort of Army was put in place. The role of the International Security Force (ISAF) was one largely confined to protecting the Administration in the western suburbs of Kabul. He noted that, even in this situation, a Cabinet Minister in the interim Government had been assassinated. He considered that there would be no-one for these Appellants to turn to for protection and support and that they could be targeted with impunity and then there would be no follow-up, even if they were attacked. The mandate of the ISAF did not extend to individual citizens. Quoting the example of Dr Zeary, he considered that while nothing may happen for a period of time there is a high risk that at some stage suddenly there will be an attack on persons such as these Appellants. They are thus under constant threat and would be constrained in their activities because of the risks of 'incidents' to them.
33. In respect of Appellant 28, he noted particularly that if she returned without Appellants 27 and 30, she would be in a position of having no male protector on her return and it would be very likely she would have to live alone if her husband rejected her. A person such as her could just disappear as there was no protection mechanism available for her.
34. In response to cross-examination by Mr Blundell, Mr Marsden stated that he had not been to Afghanistan since 1997 because British nationals funded by the International Development Agency had been banned by the UK Government from travelling there because of the risks involved. He submitted that he was better informed in London than he would be in Kabul because of the communications available to him in this country, together with the wide range of contacts he had with humanitarian agencies on a daily basis that he would not be able to access in Afghanistan.
35. He was referred to a recent article in The Times, dated 14<sup>th</sup> June 2002, headed '*Letter from Kabul – Afghan Capital Embraces Hope and Mr Bean*'. This article contains statements such as:

“By the time the Taliban had fled the Afghan city in November, this ancient city, slumped in a once fertile valley surrounded by mountains, was a bombed-out corpse. Now that wreck is teeming with energy and hope. In six months, Kabul has come alive, rushing headlong to embrace the 21<sup>st</sup> century.

Since January, more than 1 million Afghans, buoyed with an optimism denied them since the Soviet invasion 23 years ago, have returned to reclaim their birthright. More than 1,500 families arrive in Kabul each day.

With them, come the aid agencies, the NGOs, the United Nations teams and their gleaming white four wheeled drives, hundreds of journalists, and foreign businessmen bullish enough about Afghanistan’s future to set up shop here, trading in anything from tea to bathrooms ...

Thousands of men have shed their traditional dress, the *Shalwar Kamiz*, for Western slacks, open-necked shirts and imitation Italian loafers: thousands of women are out in pretty dresses and headscarves, mingling with the sheep, new Indian Tata buses and bicycles.”

It goes on to state that restaurant,s shut for years, are now re-opening, with one even selling beer. A decent bottle of wine or Russian vodka can be obtained from under the counters, along with many Western foods.

36. Students are stated to be teeming back to the University and polytechnics, convinced that their studies will mean something and the *Loya Girga* is being broadcast live.
37. The article concludes that outside Kabul much of Afghanistan remains ‘*medieval*’. The journalist then poses the question as to whether it too will be dragged into the modern era.
38. In response to this article, it was put to him that did he feel after not being in Kabul for some years that he was now missing the flavour of what was going on there. He replied that he did not feel out of touch as he was constantly asking, from many sources, what was going on. He agreed that some women may have abandoned their *Burqas* and that luxury goods were available for foreign visitors. However, the masses, he claimed, were still living in poverty and the Western goods and lifestyle, in his view, was available to the elite only and to foreigners.
39. Mr Blundell also referred him to passages in the CIPU Report which stated that voices were being raised to challenge traditional Islamic values and that there was open criticism of ‘*war-lordism*’. He asked whether this was a move away from the Afghanistan of the recent past. Mr Marsden considered that there was certainly evidence of some scent in Afghanistan now and this was positive. If the result is a broad-based Government, he considered this would be a good thing but the *Loya Girga*, in his view, did not change the situation in that way and he considered that the transitional Government may be in fact less flexible than the interim Government.
40. He referred to the new Cabinet that was just being announced (‘*Afghan News Report*’). He considered that while it appeared there were some three

moderates in the Cabinet, it showed that the *Jamiat-i-Islami* held key posts of defence, intelligence and security and that other posts were held by long-term power holders in Afghanistan.

41. Mr Blundell also noted that there were no references in the Appellants' bundle to ex-PDPA supporters being targeted. The comment of Mr Marsden was that nothing definite in this regard was known but he was giving his advice on the totality of the evidence and the targeting of those who had been involved with the ex-Soviet-backed Government. As an example, he stated that the Minister who had been killed in February 2002 had been a PDPA member.
42. He considered that while his experience in Afghanistan related to the period 1992 to 1997, the current Administration and reality of the situation in Afghanistan was that Islamic values would still predominate and that those seen as abandoning those values and going outside the Islamic framework would still be at risk. In his view Appellant 30 could be seen as a fairly senior official of the Najibullah Government who had managed to keep a low profile during the Mujahadeen and Taliban regime. However, given his heightened profile on return, a risk of arbitrary action against him was real in his view particularly given the lack of protection available. He also considered that those who had remained in the United Kingdom after the hijack would be seen in a more negative light than those who had returned. Thus, on the totality of the background of these Appellants, their risk was a higher one than what he termed '*non-professionals*'.
43. In relation to the possible targeting of the Appellants as Pashtun, Mr Marsden stated that he had no direct evidence of targeting of Pashtun in Kabul but had noted the reports of Human Rights Watch in Northern Afghanistan where this had taken place.
44. In summary, he stated that his role in advising on Afghanistan was one of looking at trends, incidents and all the detailed information he could so that he had an in-depth awareness. He was consulted widely by Government sources in the United Kingdom, including the Foreign and Commonwealth Office, Ministry of Defence, the European Commission and the World Bank.

**g. Relevant Country of Origin Information**

45. In addition to the objective country information presented to us by Mr Oakeshott, set out above, we were also provided with copies of two letters from the UNHCR addressed to Mr Oakeshott dated 14<sup>th</sup> June 2002 and 24<sup>th</sup> June 2002. The letter of 14<sup>th</sup> June 2002 responds to a letter from Mr Oakeshott asking for views of the UNHCR regarding persons or groups who currently face protection-related risks in Afghanistan. The relevant parts of the letter state:

“As UNHCR does not yet have a public domain paper on the above issue, the following advice is drawn from our internal document, namely *Preliminary Position Paper*, considerations relating to the return of Afghan nationals, who are currently

outside their country of origin, in countries of asylum not in the immediate region, February 2002.

We take the view that, notwithstanding the positive changes and the efforts of the international community, there remain individuals or groups of Afghans, who could face serious problems, including physical danger, were they to return at this time. Current information indicates that those who might be at risk of serious violence, harassment or discrimination include persons at risk of persecution on political grounds by groups now in control of their area or origin of persons originating and returning to areas where they constitute an ethnic minority. Similarly, those who have sympathised with, or are perceived to have been associated with, the Taliban regime which came to power in Kabul in 1996, may be also at risk. Another risk category may be persons associated with, or are perceived to have been associated with, the Communist pre-Mujahadeen regime which was overthrown in 1992 and those who campaigned for a secular state.

The above mentioned categories are not exhaustive. The situation in Afghanistan is nothing if not volatile, the UNHCR has no intention categorically to rule out any person or group of persons being considered for refugee status. The key principle is that each case must be given full and fair consideration on its own merits.

Please note that given the complex, fluid and still fragile situation in Afghanistan, UNHCR takes the view that there should be no enforced returns to Afghanistan at the present time. It is our understanding that the Home Office holds the same view.

As regards the basis of the advice offered above, you will be aware that the UNHCR's mandate is to work with States to ensure that refugees receive the international protection they need. Under Article 35 of the 1951 Convention relating to the protection of refugees, UNHCR is auto-tasked, again in co-operation with States, to supervise the implication of the provisions to the 1951 Convention. In pursuance of these functions over the course of the last five decades, UNHCR has, among other things, maintained an extensive field presence that gives it a first-hand view of the circumstances that cause refugees to flee. UNHCR's positions on Afghanistan and other situations are therefore grounded in its familiarity with the conditions on the ground as well as its expertise and experience in matters relating to the international protection of refugees."

46. The letter of 24<sup>th</sup> June 2002 responds to an enquiry from Mr Oakeshott of 21<sup>st</sup> June 2002 asking for comment on the consistency between the letter of 14<sup>th</sup> June 2002 and the UNHCR's '*Real Time Evaluation of UNHCR's Response to the Afghanistan Emergency, Bulletin No 3, 31<sup>st</sup> May 2002*'. This letter states:

"We can confirm that our comments regarding the groups of Afghans referred to in the above mentioned bulletin are compatible with the risk categories mentioned in our 14<sup>th</sup> June letter. The risk of persecution of particular groups upon their return to Afghanistan is not limited to high-ranking members of the former Communist regime, Ismailis and Shi-ite clergymen.

Both documents are consistent in reflecting UNHCR's view that there continue to be individuals and groups who may be at risk if repatriated to Afghanistan. Both documents make mention of examples of such individuals and groups. UNHCR maintain that the examples are indicative only, and there are persons not mentioned in the UNHCR documents who may be at risk."

47. Mr Oakeshott also brought to our attention a letter from the Home Office, Immigration and Nationality Directorate, dated 18<sup>th</sup> April 2002 addressed to the Asylum Processes Stakeholder Group. This relates to a change in policy in

granting exceptional leave to remain in the United Kingdom to unsuccessful asylum applicants from Afghanistan. It states that the long-standing approach had been that except in exceptional circumstances the Home Office would not seek to return to Afghanistan declined asylum seekers. They note the fundamental changes in the political and security situation in Afghanistan. They go on to state that the security situation in Afghanistan remains fragile and humanitarian conditions poor but the expectation is that it will improve. Thus it states that they continue to process Afghan cases in the normal way and “*we will not generally enforce a return to Afghanistan unless or until we are satisfied that it is both safe to do so and the humanitarian situation has improved to the extent to allow such returns*”. This is stated to be consistent with the position of the UNHCR. The letter then concludes that in the light of the changed circumstances, for the future unsuccessful Afghan asylum seekers will be granted exceptional leave to remain in the United Kingdom for periods of 12 months at a time, instead of a period of four years that was previously the situation. Mr Blundell put before us a bundle of documents as well, which included the following:

The Bonn Agreement

*“Real Time Evaluation of UNHCR’s Response to Afghanistan Emergency”*

United Nations Press Release dated 6<sup>th</sup> June 2002

The Times Newspaper Article dated 13<sup>th</sup> June 2002 *“Afghanistan War-Lords Give Peace a Chance”*

The Times Newspaper Article dated 14<sup>th</sup> June 2002 *“Afghan Capital Embraces Hope and Mr Bean”*

The Guardian Unlimited Report dated 14<sup>th</sup> June 2002 *“Democracy Born Again in Kabul”*

BBC News Report dated 15<sup>th</sup> June 2002 *“Loya Girga Diary : Day 5”*

Afghan News Network Report dated 19<sup>th</sup> June 2002 *“New Look Kaizi Cabinet Wins Approval from Loya Girga”*

BBC News Report dated 20<sup>th</sup> June 2002 *“Turkey takes on Afghan Peace Keeping”*

48. On the final day of the hearing (after Mr Marsden had given evidence) he provided us with a copy of the full Cabinet for the transitional Government that had just been announced.
49. The additional documents provided to us by Mr Oakeshott after the hearing were two articles namely:
  - a. A copy of the Associated Press article dated 23<sup>rd</sup> June 2002 entitled *“Ex-Afghan Official Questions Cabinet”*; and
  - b. A copy of a BBC News article of 24<sup>th</sup> June 2002.

He submitted that these provided evidence of the difficulties that emerged in relation to Yunis Qanooni’s appointment in the position as Education Minister in the transitional Government. The second article confirmed that he has taken on the role of National Security Advisor. The Associated Press report

states that Qanooni had resigned from the job as Interior Minister, one of the most powerful Government posts, at the start of the *Loya Girga*. The Interior post had been allocated to a Pashtun and not to Qanooni, who was an ethnic Tajik, in an effort to bring ethnic balance to the new line-up. The report goes on to state that Qanooni had not decided whether he would take up the appointment to the position as the Education Minister and Presidential National Security Advisor. He was stated to have questioned the legitimacy of the Cabinet appointment and the article states:

“Throughout the *Loya Girga*, there were grumblings that the 1650 delegates were being excluded from the real decision making by war-lords and other power blocs. However, Qanooni’s comments were the first public criticism from an influential figure.”

50. Mr Oakeshott also brought to our attention a Home Office Paper ‘*Afghanistan : Bulletin 2002 : Approach to Afghan Caseload in the light of the current situation*’ dated 18<sup>th</sup> April 2002. This states, under the section relating to asylum claims, that:

“10. UNHCR have advised that serious problems could *continue* to be faced by some individuals or groups if they are returned to Afghanistan at the current time. In particular, this could be on political grounds depending on the group in control of their area or origin or on ethnic grounds for persons originating from and returning to an area where they constitute an ethnic minority. In addition, those who were associated with or are perceived to have been associated with, either former Taliban or pre-1992 Communist Regimes *might* face serious problems on return.”

#### **h. The Appellants’ Submissions**

51. Mr Oakeshott provided us with a skeleton argument and made lengthy oral submissions.
52. In respect of Appellant 30, he submitted that on the evidence before us, which he summarised, there was a present risk of serious harm to Appellant 30 from non-state actors within Afghanistan (Kabul) for reasons of Appellant 30’s past associations with the PDPA. That association indicated that he should be seen as a high level and significant member of the PDPA and the former Najibullah regime. On this basis, he submitted that the Appellant fell within a group of high profile ex-PDPA/Najibullah regime supporters who were recognised, even by the Home Office, as being at risk on return to Afghanistan. This risk was also noted by the UNHCR in its Bulletin and in the two letters submitted and noted above.
53. He submitted that the objective evidence presented, coupled with that of the expert witness Peter Marsden and the heightening of the risk to this Appellant because of his involvement in the hijacking, indicated that the risk to this Appellant was at the level of a reasonable likelihood.
54. The non-state actors he identified were those radical elements, including *Jamiat-i-Islami* and former supporters of the Taliban, who, because of the lack

of state protection in Afghanistan, would be able to act with impunity against persons such as these three Appellants.

55. He also submitted that the role of Appellant 30 had been clearly a political one in his work for Mr Sapand in the Farmers Co-op. It was also to be noted that there was an integral link between the Central Governing Committee of the former Communist regime and its operating arms such as the Farmers Co-op. The family associations of the two women Appellants also placed them in the area of being at high risk because of their ex-PDPA associations. He argued that the past treatment of all three Appellants, coupled with their current risk, set against the objective information, confirmed the reality of the current risks to them. Their presence on the hijacked airline would be well-known in the Afghani community on their return and this would unfortunately give them a higher level of celebrity, again contributing to their overall risk on return.
56. He also pointed to the difficulties that all three would have in obtaining employment, particularly because of their past Communist party links. In the current situation, they would be rendered destitute thus being unable to pursue the right to life and the avoidance of degrading or inhuman treatment, which he submitted was a first level category right amounting to persecution under the analysis set out in Professor James Hathaway's text "*The Law of Refugee Status (Butterworths 1991)*". He submitted that we should look at all of the evidence both subjective and objective and note the expertise of Mr Marsden and then reach a cumulative decision, taking into account the totality of the situation.
57. Finally, he submitted that the level of protection on a day to day basis was clearly insufficient to meet the **Horvath** test and thus, not only was there a real risk of these Appellants being subjected to serious harm or persecutory treatment on their return, but also, as required in the situation with non-state actors, there would be a failure of state protection.

#### **i. The Respondent's Submissions**

58. Mr Blundell presented lengthy submissions to us, supported by the objective information set out above. At the outset, he submitted that the recently appointed Cabinet for the Interim Administration reflected appointments from the various groupings and minorities within Afghanistan including substantive representation for the Pashtun (largest) ethnic group within Afghanistan. He particularly took us to a number of articles and noted that these did not include reports of incidents of violence in Kabul to ex-PDPA, apart from the one Minister who had been assassinated.
59. He also pointed us to the Bonn Agreement and noted that it called for a new Afghanistan set in an environment of inclusivity and tolerance. It also stated that the Mujahadeen forces were to be adopted into the armed forces of Afghanistan.

60. He laid stress on The Times article "*Letter from Kabul*" and particularly asked us to note the tone of this article as reflecting day to day life in Kabul at the present time.
61. He considered that Mr Marsden was an expert within his field but it was not a field that was relevant to a refugee case, but one which was more confined to advising aid agencies. He noted that Mr Marsden had stressed that his work was in relation advising aid agencies and that he was not a human rights expert or human rights worker. Therefore, he submitted his evidence in support of these appellants should be considered as outside the field of his expertise. We should also note that his last visit to Afghanistan had been in 1997. He also questioned whether the comments by Mr Marsden that the Appellants would be at a high level of risk were correct in the light of any objective evidence of specific incidents.
62. He accepted the evidence of Dr Zeary and the background of Appellant 30 as related by Mr Sapand and also that the Appellant was a Pashtun, but he did not accept that any of these elements of his background placed the Appellant in a situation where there was a well-founded fear of persecution at this time.
63. In respect of the association with the PDPA, he submitted that the evidence did not show that all individuals were at risk and in need of protection. He submitted that there were some inconsistencies between the UNHCR letters of 14<sup>th</sup> June and 24<sup>th</sup> June 2002, but would leave it to the Tribunal to take the sensible course on which to follow. He submitted that the correct test should be that only those with a high ranking association with the PDPA should be seen as at risk in today's climate. Appellant 30, he submitted, was not a Minister and he questioned whether he was a high ranking member.
64. In relation to the new Cabinet, he was able to provide us with the latest report of the new Cabinet which he contended indicated that only 9 out of 34 positions were held by Tajik or *Jamiat-i-Islami* and that this was not a dominant position. It also appeared that Pashtuns held 15 of the 34 posts.
65. The situation in Kabul, he submitted, could not be compared with that when the Mujahadeen were in power between 1992 and 1996. At that time, there were thousands of deaths from bombings and a massive campaign of subjugation. He submitted there was now a broad-based Government which indeed included one ex-PDPA member.
66. As regards these Appellants, he considered that their past experience with the Mujahadeen had caused them some minor problems but had not shown any specific targeting of them, therefore it was not reasonable to assume this would happen in the future. He also submitted that the association of Appellant 30 with the Farmers Co-op was not an overtly political one but more an administrative/public service role.
67. In relation to possible risks to these three Appellants from parties associated with the Taliban, he submitted that while there may have been a well-founded



fear in the past, it was indisputable that the Taliban had been forced out of Kabul into small pockets only and thus there appeared no reality in risk from them.

68. He further submitted that the risk of society in Kabul moving back to observe more fundamentalist Islamic mores was not realistic and that the perception of life in Kabul was more that shown in The Times article "*A Letter from Kabul*". There was no suggestion that these Appellants had converted from Islam or that they would be able to continue practising their Muslim faith on return. He submitted that, contrary to the position adopted by Mr Marsden, that radical Islam was not in force in Kabul at this time and the perceived westernisation of these Appellants would thus not put them at risk. In addition, he submitted that intellectuals and moderates had returned to Kabul and there was no evidence of them having difficulties as may have happened in the past.
69. In respect of Appellants 27 and 28, he submitted that the past PDPA associated imputed to them from their association with Appellant 30 would fall with his claim. Their risk from being on the plane was the same as his and should not place them at a level of a reasonable likelihood of persecution. In relation to their risks as women, on return, he again noted The Times report "*A Letter from Kabul*" which showed that women were now wearing pretty dresses and headscarves and so the past oppressive regime of the Taliban and Mujahadeen did not appear to be in force. Beyond this, there were reports of educational participation reflecting a markedly changed situation where women were not persecuted per se.
70. In summary, he submitted that any risk to these Appellants was speculative and it was not sufficient to establish refugee status.

**j. The Issues**

71. We found the issues before us to be:
  - a. From an objective and subjective assessment of the accepted facts in relation to these Appellants, do they either individually or collectively have a well-founded fear of persecution on return to Kabul in Afghanistan? If so,
  - b. Is that risk of persecution for reasons of one or more of the five Refugee Convention reasons?
72. In relation to these issues, Article 1A(2) of the Refugee Convention 1951 relevantly states:

“... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, is outside the country of his nationality and is unable or unwilling owing to such fear, to avail himself of the protection of that country ...”

73. We also observe that in the assessment of a well-founded fear of persecution by these Appellants, the risk of persecution is claimed to be, at this time, from non-state actors hence, following the guidance given by the House of Lords in decisions such as Shah and Islam and Horvath, it is necessary for the Appellants to establish not only the reasonable likelihood of serious harm (persecutorial treatment), but also that there would be a failure of state protection from that harm. Both elements must be present before the entitlement to refugee status arises.

**k. Assessment**

74. The general credibility of all three Appellants appears to have been accepted by the Respondent. we agree and therefore proceed on the basis of the evidence presented by them truthful.
75. The evidence of Dr Zeary and Mr Sapand is also accepted as credible.
76. We found that the expert evidence presented by Mr Marsden was of value to us. We, note however, that his evidence is given from his own perspective which he correctly conveyed to us. His expertise is as an adviser to aid agencies and governments and others sponsoring aid programmes in Afghanistan. He is widely experienced and well-versed in the historic, current, social, cultural, religious and political aspects of Afghani life. He is not a human rights expert on Afghanistan but we consider can be accepted as a person able to give a useful and well-informed perspective relevant to the claims of these three Appellants. His evidence, however, has been taken into account by us along with all of the other objective evidence received and balanced together with all of that evidence in reaching our determinations.
77. We have had the opportunity of considering some of the other decisions relating to Afghans who were also on the hi-jacked airplane and have claimed refugee status in this country which have either been promulgated before or contemporaneously with this determination. In particular, those where Mr Marsden gave evidence. We note that our conclusions on his expert evidence and that we regard him as a reliable witness on matters of fact within his own area of knowledge appear to be consistent with the findings in those other decision (for example, HX/51797/2000 and HX/51790/2000). We also considered however that conclusions or conjecture that he made in areas outside of his immediate expertise had to be treated with caution and balanced along with all of the other evidence presented. Where Mr Marsden did assist greatly was in presenting the historic and cultural background against which claims such as those presented by these three appellants must be assessed. Two important aspects of this being the long established culture of "War Lordism" which goes back hundreds of years and is so deeply entrenched that the possibility of it being changed significantly because of the US led toppling of the Taliban is an unlikely prospect and the long term and entrenched societal attitudes and actions towards women in Afghanistan.

78. Turning to the first issue, in respect of appellant 30. At the outset, we note that clearly because of his position, background and relationship to the other two appellants, he must be seen as the primary claimant and prospective treatment of him on return to Afghanistan will be highly relevant and influential to the treatment of the other two appellants. In refugee law terms, these are classic cases where the totality of the appellants' position must be taken into account and then, after doing that, we are still left with some element of doubt, the benefit of that doubt should be applied in favour of the appellant(s).
79. The totality of the all three of the appellants' situations causes us to conclude that they are refugees within the meaning of Article 1A (2) of the Refugee Convention 1951. Individual factors or elements of their cases on their own, would not in our view be sufficient to allow them to succeed.
80. It is not contested by either party that any persecution suffered by these appellants on return would not be from the state, i.e. the new interim government lead by President Karzai. Any fears therefore are from non state actors. We find after a full consideration of the considerable country of origin information presented to us that there is only the remotest possibility of these appellants being able to access meaningful protection from the Karzai administration. That administration is only operating, at this time, with any degree of authority or protection in Kabul itself and "protection" is only achieved for a select few senior government leaders and officials with the assistance of the international peace keeping forces. Indeed the President has had to call for a US guard himself as he could not trust local "police" or army. The "protection test" therefore cannot be met for these appellants. We move therefore to consider if there is a well-founded fear of persecution by non state actors. That is is there a real likelihood they will suffer serious harm of persecutory nature on return.
81. The factors we identify in respect of appellant 30 we consider, cumulatively, discharge the relevant burden of proof. These findings are:
- a) He was a senior cadre in the PDPA for a lengthy period of time (approximately 1997-1991). While not at ministerial level in the Najibullah regime the evidence establishes that he was one step immediately below that.
  - b) While his role was largely an administrative one for a lengthy period it is clear and accepted by us that he also had a senior political advisory role with the ministerial level administrators, such as Dr Zeary, to whom he reported. We agree that in the context of the PDPA very senior administrative positions must be considered as having been highly political in their nature.
  - c) From approximately 1989 to 1991 the appellant fought in defence of Kabul for the Najibullah regime against the Mujahadeen. While he managed to keep a low profile during the time of the

Mujahadeen and Taliban regimes, he was at a level of a real risk during all of that time.

- d) He, and the other two appellants, are Pashtun (Saif sub-tribe) and there are some risks associated with higher profile members of the Pashtun from radical elements of the Jamiat-i-Islami and other Islamic fundamentalists groups as has been evidenced by the assassination of the former tourist minister and, even after this appeal was heard, another notable Pashtun, the Vice President, Abdul Qadir.
- e) Set against the ability of the appellant to keep a low profile during the Mujahadeen and Taliban regimes, we must accept the fact that if he was returned at this time he would have an elevated and more noticeable profile because there is a reasonable likelihood that it would be known that he had been on the hijacked plane. This factor, on its own has a real chance of causing understandable interest to many in Afghanistan, particularly given the appellant's relatively senior or high level position in the former PDPA government.
- f) The above interest must be coupled with the fact that he worked for Ariana Airlines as a Ticketing Manager. We consider that it is reasonable to conclude that this may cause further interest and raise speculation or suspicion that he had some connection with the hijacking. (This of course has not been accepted by the UK authorities). This suspicion would lead to a real risk of difficulties with remnants of the Taliban regime who may still be operative. While it may be inappropriate to assume that this is still an important factor, Mr Marsden did not consider it to be the case. We have formed the view, after seeing and hearing him in a lengthy hearing, that the appellant appears as a mature educated man who gives the air of being a professional member of the Afghan elite. This may distinguish him from the profiles of many others on the hijacked airplane who, we are sure would attract less interest.
- g) The delay of this appellant in returning to his country, despite the fall of the Taliban and the substantial changes in the regime, might also cause resentment and prejudice from fundamentalist Islamic groups. It could give the impression that he was not a supporter of the present regime, that he has pro-western ideas and philosophies and is anti-Islamic.
- h) The appellant's role in Afghani affairs in London and his clear association with very senior leadership in the PDPA while in the United Kingdom may also be another contributing factor to those seeing him as being pro-western, secular or anti-Islamic.

82. We balance against those factors several other items that arose in the evidence. These are:
- a) The appellant successfully maintained a low profile during the period of the Mujahadeen and Taliban regimes.
  - b) He had employment, albeit virtually non-existent at times, when the Ariana Airlines would not fly, during that time.
  - c) He was involved in two minor incidents only with the Mujahadeen regime. It is possible that these could be argued to be more accidental in their nature rather than direct targeting of the appellant.
  - d) While the appellant is a Pashtun it of course must be recognised that the Pashtun are the largest ethnic group within Afghanistan and clearly this appellant, nor the other two, could be considered to be at risk simply because of their Pashtun ethnicity.
  - e) The level of risk at which Mr Marsden would have placed this appellant he considered was "very high". We consider is based on many speculative assumptions and to be excessive when balanced against all of the evidence that has been presented before us.
83. Considering the totality of the evidence cumulatively therefore, and noting that each factor considered, on its own, would be insufficient to give rise to a reasonable likelihood of this appellant being persecuted on return, we find that there is a real risk or reasonable likelihood that this appellant would have a well-founded fear of persecution from Tajik Jamiat-i-Islami, and other fundamentalist Islamic groups, including remnants of the former Taliban. His situation is, in our view, borderline as in all three appellants' cases. However, we exercise any residual doubts in favour of these appellants.
84. In respect of issue 2, the Convention reason, we find that the real risk or likelihood of persecution to appellant 30 on his return would be primarily for reasons of his political opinions by virtue of his former seniority within the PDPA. Beyond this there are also possibly imputed religious reasons which could be imputed because of secular, pro-western, and anti-Islamic attitudes that fundamentalist elements could take against him. His Pashtun ethnicity could also have some minor influence. Thus, we consider that the risk to the appellant is for reasons of two or three of the five Convention grounds, or a mix of them.
85. In respect of the first issue as it relates to appellant 27, the wife of appellant 30, we consider that her risk is primarily one that is derivative of the risk to her husband. Additionally, she herself comes from a relatively high profile PDPA family and is an educated woman who, having been to a western culture, when combined with all of the other aspects relating to her husband could have an elevated risk. She may now be seen as anti-Islamic, pro-western woman. The

Convention grounds for her are thus she is a member of the particular social group (her husband's family) and/or the same mix of Convention reasons that place appellant 30 at risk.

86. Returning finally to appellant 28, the sister-in-law, her primary risk would arise if she returned as a woman alone, without the protection of appellant 30. This we consider remains from the evidence before us from the entrenched attitudes by Afghani men to treatment of women. We agree it appears to have improved but it is still problematic and would elevate her level of risk. She would return as an educated, perceived pro-western, woman, with a high risk that she would not have the protection of her husband. She therefore has the additional risk of maltreatment from her husband or male members of his family to add into the mix of risks she faces.
87. Beyond this we note that the political profile of her own family, in the Najibullah government was also a high one, possibly even higher than that of appellant 30. The accumulation of risks therefore which we have listed in respect of appellant 30 must be taken into account for this appellant if she returned in the protection of appellant 30.
88. In both situations therefore, whether she returns alone or with appellants 30 and 27, we consider there is, again exercising the benefit of the doubt, a reasonable likelihood that she would be persecuted by the same groups as would target appellant 30 (plus her own husband and his family) for reasons of her background and her association with the family group now led by appellant 30. Considered cumulatively therefore we consider that she is also entitled to refugee status.

### **Decision**

89. After careful and close consideration of these three associated cases, we conclude, when considered in the round, that these appellants are all refugees within the meaning of Article 1A(2) of the Refugee Convention 1951. Both issues are answered in the positive. The appeals are allowed.

**A R Mackey  
Vice President**