

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76095

AT AUCKLAND

<u>Before:</u>	A R Mackey (Chairperson) M A Roche (Member)
<u>Counsel for the Appellant:</u>	I Uca
<u>Counsel for the Department of Labour:</u>	S Houliston
<u>Date of Hearing:</u>	17 & 19 December 2007
<u>Date of Decision:</u>	28 May 2008

DECISION DELIVERED BY M A ROCHE

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), cancelling the refugee status of the appellant, a national of Afghanistan, pursuant to s129L(1)(b) of the Immigration Act 1987 (“the Act”).

JURISDICTIONAL ISSUES

[2] Pursuant to s129L(1)(b) of the Act, where recognition of a person as a refugee has been given by a refugee status officer and where it appears such recognition may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information (hereinafter referred to as fraud), a refugee status officer may determine to cease to recognise the person as a refugee. Such a decision may be appealed to this Authority pursuant to s129O(2) of the Act.

[3] When the Authority is considering an appeal against a decision of a refugee status officer under s129L(1)(b), there are two stages to the Authority’s enquiry. First, it must be determined whether the refugee status of the appellant “may have

been” procured by fraud. If so, it must then be determined whether it is appropriate to “cease to recognise” the appellant as a refugee. This determination will depend on whether the appellant currently meets the criteria for refugee status set out in the Refugee Convention: *Refugee Appeal No 75392* (7 December 2005) [10]-[12].

[4] Given that these are inquisitorial proceedings, it is not entirely appropriate to talk in terms of the burden or onus of proof. Nonetheless, it is well-recognised and accepted that, in cancellation proceedings, it is the responsibility of the Department of Labour to present such evidence in its possession by which it can responsibly be said that the grant of refugee status may have been procured by fraud. It is also our view that the term “may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information” is deliberately imprecise and signals a standard of proof that is lower than the balance of probabilities but higher than mere suspicion: *Refugee Appeal No 75563* (2 June 2006).

BACKGROUND

The grant of refugee status to the appellant

[5] The appellant is aged in her 50s. She arrived in New Zealand in May 1988 accompanied by her niece and another asylum seeker and claimed refugee status at the airport.

[6] On 12 October 1998, the appellant was interviewed by the RSB in respect of her claim to be a refugee. On 18 January 1999 the RSB accepted her claim and granted her refugee status.

[7] The basis of the appellant’s claim for refugee status was that she was an ethnic Tajik from Kabul who had converted to the Shi’a sect following her marriage. She claimed that her husband was a musician who had been killed by the Taliban in September 1997, leading her to flee to Peshawar, Pakistan, with her brother and her four children.

[8] She claimed that her brother had engaged a people smuggler who assisted her to fly from Pakistan to Indonesia where she stayed for approximately 20 days before flying to New Zealand.

[9] Between approximately 1999 and 2002, a joint operation, known as “Operation Amid” was conducted by a variety of government agencies including the New Zealand Police, the Department of Labour and the Customs Service. The goal was to identify, and if possible, apprehend the AA syndicate, a group of people smugglers operating out of Auckland and Indonesia.

[10] In March 2000, search warrants were executed at a number of houses occupied by the AA family and their associates. Documents relating to the appellant’s refugee claim were found in one of these houses, together with photographs of the appellant with members of the AA family. The DOL alleges that several of these photographs were taken in Malaysia in the early 1990s in contradiction of the appellant’s claim to have been living in Kabul, Afghanistan at that time.

CANCELLATION PROCEEDINGS

[11] On 16 March 2007, the appellant was served with a Notice of Intended Determination Concerning Loss of Refugee Status (“the notice”) in accordance with s129M of the Act and Reg 11 of the Immigration (Refugee Processing) Regulations 1999.

[12] In the notice, the refugee status officer stated her preliminary view that the grant of refugee status conferred on the appellant was not properly made because it may have been procured by fraud and stated the matters which gave rise to the view that the refugee claim may have been false.

[13] At the core were the allegations that:

- (a) The appellant had been present in Malaysia in the early 1990s with members of the AA family (evidenced by photographs and the record of a police interview with a member of the AA family (Mr AA) during which he identified the appellant as the person in the photographs).
- (b) Documents found at an Auckland address in 2000 indicated that the appellant had been given instructions by an unidentified person as to what to say in her refugee claim (the coaching notes).

- (c) Further documents indicated that the appellant had originally intended to claim only to have two daughters, however, she later claimed to have three daughters and a son.

[14] The appellant did not request an interview in connection with the matters raised by the notice. However, written statements by her and two members of the AA family (Mr and Mrs AA) were filed with the RSB. In these statements the appellant maintained that her refugee account had been true and that she had no close relationship with the AA family.

[15] Mr AA stated that he did not have a close relationship with the appellant and had not met her before coming to New Zealand and that he had lied to the police when he had identified the appellant as a person in the photographs.

[16] Mrs AA also stated that the appellant was not close to the AA family and provided explanations concerning various photographs which were alleged to be of the appellant with the AAs in Malaysia. She confirmed that the appellant appeared in some of these photographs but stated that they had been taken in New Zealand after the appellant and the AAs became acquainted. She denied that the appellant appeared in any of the photographs taken in Malaysia.

[17] On 25 June 2007, the RSB published a decision cancelling the grant of refugee status conferred on the appellant on 18 January 1999 on the basis that it may have been procured by fraud and, further was improperly made.

[18] The appellant now appeals against that decision to this Authority.

THE DEPARTMENT OF LABOUR'S CASE

[19] Prior to the hearing, counsel for the DOL filed a memorandum of submissions and a written statement from the refugee status officer, Anna Louise Stradwick. This statement merely recorded that Ms Stradwick had read the witness statements filed by the appellant and that the reasoning of her decision in respect of the appellant's refugee status was contained therein.

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

[21] The key documents relied on in the DOL file are as follows:

Documents 2554, 2555, 2559 and 2560

[22] These documents appear under tabs 24-27 in the file. They are documents recovered in Operation Amid. Each is handwritten in Dari and is accompanied by an English translation. They have been referred to earlier in this decision as “coaching notes” as they appear to be instructions to the appellant as to what she should say in her RSB interview. For example, Document 2559 commences:

“Family name [deleted], age 47, born [deleted] in Kabul. Home address in Afghanistan: [deleted]. My husband who was killed was [deleted] 49. I have two daughters [DD]15 and [deleted] 14. If they ask you their date of birth tell them you don't know. If they ask you where your daughters are tell them with your brother [BB] in Pakistan. If they ask how old he is tell them 45 and he is a leather merchant, married with wife and two kids, one daughter 8 and one son 6. He did not live in the same house as you, he had his own house also in [deleted]. Your husband's situation was that he was a music instructor who had private sessions at the basement of the house.”

[23] The coaching notes contain variations in the appellant's account. For example, document 2554 is written in the first person. It describes the Taliban raid and the appellant's husband's death as follows:

“They quickly ran into the basement. I heard their crys while the Taliban were beating them and breaking their instruments. After a few minutes I saw my husband all bloodied while being held by the neck. The kids who were about five were hand tied. Upon seeing my husband I lost consciousness and they broke our stereo and TV. They asked where my daughters were, they were at my brother's house being taught by my sister in law who is a Teacher. Anyway I did not notice much after that. After I came to a few neighbours were at my side.

A week passed and we did not hear anything and one day they notified me to come and claim his body. When we heard that news we felt very bad. My brother and a few neighbours went and claimed my husband's body and brought him home and four months passed after we buried him and I had nobody to look after us and support us. My kids were young, there was no chance of schooling and I felt unsafe and our living situation was very bad. Finally I talked to my brother and we decided to leave Kabul.” (*sic*)

[24] In contrast, document 2555 describes the same incident in the first person but in this version, the appellant's children are at home during the Taliban raid and inform her that their father has been taken away after she recovers from unconsciousness.

[25] Document 2560 sets out the appellant's account from the time of her travel to Pakistan until her arrival in New Zealand. It is interspersed with instructions. For example, “If they ask the name of the smuggler, tell them that his name was Hashem and he was from Pakistan”, “Date of your husband's murder is 7 months

and 21 days ago. Please work out the exact date yourself”, “If they ask you whether you know anybody in New Zealand, say: no, no” and “If they ask you about your brother’s occupation, tell them that he has a business of leather skin exports to Pakistan and the ex-Soviet Republic”.

The face mapping report

[26] This report appears at tab 30 of the DOL file. It is a report on facial mapping of photographs, purportedly of the appellant, by a forensic anthropologist, Dr RJ Watt dated 28 March 2005. The report concludes that all the images compared are of the same woman. Included amongst these images is a photograph (photograph 14) of a woman on a beach in Malaysia with a member of the AA family. The remainder are of the appellant in New Zealand.

[27] A written analysis of the photographs used in the face mapping analysis was filed at the hearing. This analysis shows that all but one of the photographs analysed by Dr Watt were of the appellant in New Zealand.

Admission by Mr AA that the appellant was in Malaysia

[28] The RSB cancellation decision records that in a police interview on 16 November 2001, Mr AA admitted that the woman pictured in a photograph with him on the beach in Malaysia was the appellant. This admission was subsequently retracted by him in a written statement dated 3 June 2007.

Police job sheet, dated 11 February 2002

[29] This 17 page document was filed at the hearing. It is dated 11 February 2002, and was prepared on the appellant during Operation Amid. It sets out the contents of documents 2554, 2555, 2559 and 2560 in detail together with that of other documents recovered in Operation Amid. It contains various allegations concerning the appellant and her family. Amongst these are the allegations that the appellant’s nephew is the brother of Mrs AA (attributed to an unnamed informant) and that the appellant was living in Asia at the time she claimed to have been in Afghanistan.

[30] In addition to the documents filed, original copies of the photographs used in the face mapping analysis were made available at the hearing for inspection, together with two wallets of photographs assembled during Operation Amid.

[31] Ms Stradwick appeared at the appeal hearing as a witness for the DOL and confirmed the contents of her written statement.

THE APPELLANT'S CASE

[32] The appellant appeared and confirmed the content of her written statements dated 10 June 2007 and 17 November 2007. A summary of these statements together with the oral evidence given by the appellant follows:

[33] The appellant is aged in her late fifties. She is of Tajik ethnicity and was born in Herat. Her husband was an Azeri from Kabul and the appellant spent her married life in Kabul where her four children were born. She had two brothers; one was killed over 10 years ago and the other has returned to live in Mazar-e-Sharif after spending many years in Pakistan.

[34] Her surviving brother, BB, is the father of the niece with whom she travelled to New Zealand.

[35] In September 1997 the appellant's husband was abducted by the Taliban following a raid on their home in Kabul. She later found out that he was killed by the Taliban. She and her children spent some months with BB in Afghanistan before travelling with him to Pakistan.

[36] In early 1998 the appellant travelled to New Zealand with her niece and her niece's two daughters. They flew, together with the agent assisting them, from Pakistan to Indonesia where they spent approximately 20 days before flying to New Zealand via Sydney on 3 May 1998.

[37] The appellant had never travelled outside Afghanistan prior to her husband's death. She never held a passport before coming to live in New Zealand and has never been to Malaysia.

[38] After arriving in New Zealand, the appellant lived with her niece. The AA family lived next-door and the appellant got to know them as neighbours and attended various functions at their home. She also met with them at Afghani community functions in Auckland.

[39] After being granted refugee status, the appellant raised money to bring her four children to New Zealand with the assistance of the Red Cross. The children

lived with her for several years after arriving in New Zealand but no longer do so. The appellant currently lives with her nephew, CC and his family. Her three daughters reside together and her son lives with his girlfriend.

[40] In 2002, the appellant travelled to Pakistan with her nephew to attend his wedding. One of her daughters had returned to live there and another purpose of her trip was to visit her daughter.

[41] Two of the appellant's daughters have married. Both marriages took place in Peshawar, Pakistan, and were attended by the appellant's brother. The appellant did not attend her daughters' weddings for various reasons, including ill-health, financial difficulties and her disapproval of her daughters' choice of spouses.

[42] The appellant is illiterate and was assisted by others to prepare her refugee claim. However, she can no longer remember specifically who helped her. She denies being helped with coaching notes concerning her refugee account. The claim she presented to the RSB was her life story.

[43] The appellant fears returning to Afghanistan. She is an elderly widow and has no-one to support or protect her there. She believes that Afghanistan is an unsafe place and that she would be at risk from various groups, including the Taliban, should she return there. One of her sons-in-law was recently killed there.

Evidence of appellant's daughter

[44] The appellant's daughter, DD, attended the hearing as her mother's support person. She was declined permission to be present in the hearing room and, after discussions with counsel and the Authority, she changed her status from support person to witness and gave evidence in support of the appeal. She confirmed the content of a written statement made by her, dated 18 December 2007. A summary of her statement, together with her oral evidence, follows:

[45] DD is a married woman aged in her mid-20s. She is currently separated from her husband.

[46] She is from Kabul. She was home when her father was arrested and taken away by the Taliban and described this event in her evidence. After her father was taken, she travelled to Pakistan with her mother, siblings and maternal uncle. She and her siblings remained with her uncle after her mother left for New Zealand

and travelled to New Zealand at the end of 1999. After arriving they lived with the appellant for several years. DD and her sisters now share a house together while their brother lives with a girlfriend.

[47] In her statement, DD explained that she and her sister have a lot of stress. She has a protection order against her husband who was violent towards her and cares for her daughter and her sister's daughter alone. Her sister has mental health problems and has recently given birth to a brain-damaged baby. Her sister's husband was killed recently in Afghanistan. Because of all these problems, DD and her sisters are unable to do much for their mother and accordingly, their cousin, CC, is looking after her. She stated that she and her mother are not related to the AA family.

Evidence of the appellant's niece

[48] Prior to the appeal hearing, counsel for the appellant filed a written statement by the appellant's niece, EE, in support of the appeal. Counsel for the DOL requested that she be available at the hearing for cross-examination. At the hearing, counsel for the appellant advised that EE did not wish to appear before the Authority. Accordingly, on directions from the Authority, the Secretariat issued a witness summons for her, which was served on her. She obeyed the summons and appeared before the Authority and gave evidence in support of the appeal. A summary of her written statement, together with her oral evidence, follows.

[49] Because the Authority is aware that the DOL may be reviewing the refugee status of a number of Afghans who have been associated with the AA family, the Authority cautioned EE and advised her that she was not bound to answer questions which caused her concern in the context of the ongoing enquiries concerning the AA family.

[50] EE is a married woman aged in her early 40s. She is of Tajik ethnicity and is from Herat. She and her family left Afghanistan for Pakistan in 1992 after her father was killed by the *Mojahedin*. She found life in Pakistan very difficult and, after approximately three and a half years, returned to Herat. She left Afghanistan for the second time in 1997 and, in late 1998, travelled to New Zealand with her aunt (the appellant) and two children. She flew with her aunt and children from Islamabad to Jakarta where they stayed for approximately 20 days before flying on to Auckland via Sydney.

[51] EE met Mr and Mrs AA after arriving in New Zealand at an Auckland mosque. She ended up moving to the house next door to them after the rental property she was living in was sold and Mrs AA advised her that there was a vacant house next to her. EE had a number of her aunt's documents at her house and these were removed by the police when the house was raided in connection with Operation Amid in March 2000.

[52] EE received assistance from members of the Afghan community in preparing her refugee claim and supporting statement. She cannot, however, remember specifically who wrote her statement for her. She also said that people helped her aunt write her life story but that it was her life. She denied knowing whose handwriting appears in both her aunt's and her own written statements.

Documentary evidence

[53] In addition to the written statements and counsel's submissions, the appellant filed copies of her daughters' wedding certificates showing that they were both married in Peshawar to Afghani nationals. She also filed a letter from the Afghan Association of New Zealand, dated 10 December 2007, stating that the appellant is a member of the Afghan community in Auckland and that she and her family members regularly participate in community events.

ASSESSMENT OF THE APPELLANT'S CASE

Was refugee recognition procured by fraud?

[54] Before determining this issue it is necessary to make an assessment of the credibility of the appellant and her witnesses and to make an assessment of the evidence produced by the DOL.

[55] The crux of the DOL's case against the appellant is that she has provided a false account of her background, family relationships and travel movements prior to entering New Zealand in 1998. They contend that she was in Malaysia with the AA family in the early 1990s (as evidenced in the photographs appearing in Dr Watt's face-mapping report).

[56] It is alleged in the police job sheet filed by the DOL that she is in fact Mrs AA's mother and that her "nephew", CC, and Mrs AA, are siblings.

[57] Dr Watt's face mapping report compared five photographs against each other. These were labelled 01, 02, 7a, 7b and 14. It was established at the appeal hearing that photographs 01, 02, 7a and 7b were all photographs of the appellant taken in New Zealand while photograph 14 was taken in Malaysia. The appellant denies being the woman in photograph 14.

[58] In his report, Dr Watt acknowledges that photograph 14 has been taken from a different perspective than the other photographs. However, by enlarging and rotating the photograph he was able to compare it to photographs 01 and 7a. He stated:

"When photographs '01', '7a' and '14' were enlarged to the same scale and represented in the same horizontal plane it was found that there was a marked horizontal congruence of facial proportions and there was a vertical congruence with the corners of each eye. This is shown on page 13 with the use of examination lines.

Conclusion: In my opinion because the facial proportions are the same, the woman shown in photograph '14' is the same person as shown in photographs '01' and '7a'. In my opinion she is also the same person seen in all other comparison photographs shown in this exhibit."

[59] Dr Watt's report must be viewed in the light of the evidence given at the hearing that of the five images supplied to Dr Watt for face mapping and upon which his report was based, four have subsequently turned out to be innocuous photographs of her taken in New Zealand. But one photograph, photograph 14, is said to be of her in Malaysia.

[60] A number of difficulties emerge. First, unlike the other photographs, photograph 14 is not a clear face-on image of a person. It has a side-on view that has been "rotated" by Dr Watt. Secondly, photograph 14 is the only photograph on which skin detail could not be reliably observed. At page 14 of his report, Dr Watt notes that with the exception of photograph 14, all images show a spot on the upper left forehead. The report states:

"That this mark can be seen in images which appear to have been photographed over a number of years indicates that this mark is permanent trait. When associated with the other observations, this mark adds to the weight of evidence establishing the identity of this woman."

[61] Thirdly, Dr Watt was given five photographs to examine, four of which it has now emerged are undisputedly of the appellant in New Zealand. He was not asked to examine photograph 14 in isolation. The Authority declines to make a finding, upon the strength of the single comparison between photograph '14' and

photographs of the appellant in New Zealand, that the appellant was indeed present in Malaysia with the AA family in the early 1990s.

[62] The police job sheet filed by the DOL states that the appellant's nephew, CC, is Mrs AA's brother. This again would suggest that the relationship between the two families is closer than has been admitted by the appellant. However, the only foundation for this assertion before the Authority is a reference to information provided by an unnamed informant. Given this lack of foundation, we are unable to make a finding that the appellant is indeed related to the AA family.

[63] We also note the admission made by Mr AA in a police interview in November 2001 that the appellant was the woman in photograph 14. In his written statement of 3 June 2007 Mr AA claimed that he had not met the appellant prior to travelling to New Zealand and had lied to the police in November 2001.

[64] In *Refugee Appeal No 75977* (22 November 2007) the Authority noted that an interview of Mr AA by New Zealand police and Australian immigration officials on 9 January 2001, was terminated because of his attempts to mislead his interviewers. In that decision the Authority found that a claim by him that another Afghani refugee was a member of the AA family was false (see [99]-[100]).

[65] The Authority places no weight on either Mr AA's assertion that the appellant was with him in Malaysia or his subsequent retraction of this assertion. Because of their inherent unreliability, his conflicting statements are removed from our consideration.

[66] The evidence reviewed above, while raising suspicion that the appellant was in Malaysia in the early 1990s and is related in some way to the AA family, does not establish either of these propositions.

[67] Finally, we note documents 2554, 2555, 2559 and 2560 which on their face suggest the involvement of third parties in the formulation of the appellant's refugee claim. Both the markedly different versions of her account in these documents (recovering her husband's body in Kabul versus being told of his death months later in Pakistan and having her children present and alternatively, not present at the Taliban raid), together with the nature of the instructions in the coaching note, raise suspicion that a fabricated account of the appellant's background and experiences in Kabul, upon which she was coached, was

presented to the RSB. We defer our assessment of this issue until after an assessment has been made of the credibility of the appellant and her witnesses.

[68] There were some striking and fundamental differences between the appellant's evidence to the Authority and the details provided in her original refugee account. To the Authority, she gave evidence that she was born in Herat. She had claimed to the RSB to be born in Kabul. Although, when asked to comment, she said that she must have meant she spent her married life in Kabul, we are satisfied that she deliberately misled the RSB on this point. The appellant has been required to state her place of birth in a number of official documents she has filled out in connection with her New Zealand residence and in all cases has stated that this was Kabul. It is significant that the coaching notes instruct her to say that she was born in Kabul.

[69] In a similar vein, the appellant denied, in her evidence before the Authority, to have ever converted from the Sunni to the Shi'a faith but gave specific evidence to the RSB that she had done so. In re-examination, she claimed confusion regarding the difference between the Shi'a and Sunni sects and confusion as to whether she had converted to the Shi'a sect after marriage. At her RSB interview she volunteered that she was a "Shi'ia Muslim" and that "I was Sunni before I married". Again, this was a matter covered in her coaching notes.

[70] The appellant's daughter gave an unsatisfactory account of her father's arrest by the Taliban. According to the appellant's refugee claim, the reason he was arrested was because he was a musician. However, when asked, the daughter said she had no idea what instrument he played. She later changed this evidence and claimed that he played the guitar and the harmonica. She also claimed that her brother had been present when her father was arrested, in contrast to her mother's account to the RSB that her son had not been present.

[71] Both the appellant and her niece were markedly evasive about the identity of the friend or family member who assisted them with their refugee claims. Both the appellant's and the niece's statements were in the same handwriting, but neither of them was prepared to disclose the author.

[72] The Authority is satisfied that the appellant is a widow and an Afghan national. It is clear however, that aspects of the claims she made to the RSB, and upon which the RSB relied, concerning her religion and place of birth, were untrue. Having heard her daughter's unsatisfactory evidence about the incident when her

father was taken by the Taliban, and considering the content of the coaching notes in which variations of this story appear, we find that this incident was a fabrication.

Procurement of refugee status by fraud

[73] A paper published by the UNHCR on cancellation of refugee status reviews the practices of a number of states, including New Zealand. At [20] it is noted that state practice for cancellation of refugee status on the ground of fraud consistently requires:

- (a) the existence of objectively incorrect statements by the interested party; and
- (b) causality between these statements and the decision to grant refugee status: Sibylle Kapferer, *Cancellation of Refugee Status*, (Legal and Protection Policy Research Series), UNHCR, March 2003.

[74] The question arises as to whether the appellant's refugee status was procured by fraud.

[75] There is no direct authority in New Zealand concerning the interpretation of the phrase "procured by fraud" as it is employed in the context of the cancellation of refugee status in ss129L(1)(b) and 129(1)(f)(ii) of the Act.

[76] The meaning of the term "procured by fraud" in s17(2) of the Citizenship Act was, however, considered in *Rajan v Minister of Internal Affairs High Court*, Auckland, M 1040/95, 5 November 1996. Anderson J noted:

"The ordinary meaning of the word 'procured' connotes causation. In a general criminal law context this is acknowledged in *R v EF* at 392, lines 39-40. There the New Zealand Court of Appeal attributed to the word 'procure' a minimal meaning of effective cause. A definition of 'procure' in the 3rd (revised) edition of the Shorter Oxford dictionary includes 'induce'. The theme of all these authorities is a connotation of substantial cause, though not a principal or overwhelming cause. In my judgement the word 'procured' in s17(2) has the same connotations of substantial although not necessarily principal or overwhelming cause, and goes beyond a mere insubstantial link in a causative chain".

[77] Anderson J's approach was followed in *Wang v Minister of Internal Affairs* [1998] 1 NZLR 309 which also considered the term "procured by fraud" in section 17(2) of the Citizenship Act. In *Wang*, Anderson J held that where a

misrepresentation was not material to the decision it could not be said to have procured the grant: p315.

[78] Criminal law authorities on fraud also require a causal relationship between the deception and the obtaining or causing of loss. For example, it was held in *R v King* [1987] 1 All ER 547 that false pretence must have been an effective or operative cause of the obtainment.

[79] The appellant's claim for refugee status was summarised in the following terms in the RSB decision in January 1999, in the following terms:

“(i) She is an ethnic Tajik Shi'a Muslim whose husband was killed by the Taleban for “un-Islamic” behaviour, contrary to Taleban law. Specifically, [she] fears that she and her four children would be killed immediately upon their return to Afghanistan.

(ii) She is a widowed woman with virtually no ability to support her family financially due to oppressive Taleban edicts against women in Afghanistan.”

[80] In analysing the appellant's claim, the RSB concluded that, based on country information about the Taliban regime, the appellant was at risk of being persecuted by the Taliban as an ethnic Tajik Shi'a woman whose husband had been killed by the Taliban. It concluded further that, in light of known information concerning ethnic displacement and ethnic cleansing by the Taliban, there was a real chance the appellant would face persecution for reason of her Tajik ethnicity.

[81] Although, as noted above, the RSB concluded that the appellant qualified for protection on the basis of her ethnicity, religion and background, it went on to consider whether the treatment the appellant was likely to face as a widow would amount to being persecuted. The plight of women under Taliban rule was canvassed at page 11 of the RSB decision. It recorded that the Taliban had forbidden women from working (or leaving their homes without an acceptable reason) and that this edict had hit hard against widows, many of whom are the sole providers of their family. It noted that “the sustained or systemic denial of the right to earn one's living is a form of persecution which can coerce or abuse as effectively as imprisonment or torture.”

[82] The appellant may have been able to satisfy the refugee definition in 1998 on the basis that she was a Tajik Afghan national, a widow, and the female head of a family upon her arrival here in 1998. However, this was not the claim she presented to the RSB. Her claim was that she was Shi'a, that she was from

Kabul, and that her husband had been murdered by the Taliban who had made threats to return and harm her and her children.

[83] The decision granting her refugee status accepted each of these elements and placed weight upon them. We have found that each of these elements is untrue. Our rejection of the appellant's account of her husband's murder by the Taliban in Kabul is significant. In the account presented to the RSB, this was the event that precipitated her departure from Afghanistan. Her claimed travel movements are therefore called into question because if she did not flee Afghanistan in late 1997 or early 1998 following the murder of her husband by the Taliban, it is simply unknown when or why she left Afghanistan.

[84] As noted earlier, the term "may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information" is deliberately imprecise and signals a standard of proof that is lower than the balance of probabilities but higher than mere suspicion. We are satisfied that in this case, that standard has been met and that the refugee status of the appellant may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

STAGE TWO

WHETHER THE APPELLANT SHOULD CEASE TO BE RECOGNISED AS A REFUGEE

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

THE ISSUES

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

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

avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

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

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

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

[88] We are satisfied that the appellant is an Afghan national from Herat of Tajik ethnicity. We have doubts as to whether she did in fact live in Kabul as she claimed but that is unimportant as she no longer has a home or relatives there and would be unlikely to return there in the event she returned to Afghanistan. She claims to have one surviving brother based in Mazar-e-Shariff, in Balkh province which has a Tajik majority. Nothing is known of his circumstances and the references to him in the coaching notes place his existence in some doubt.

[89] The question arises whether there is a real chance that someone with the characteristics of the appellant (female, elderly, single, Tajik and Sunni), would be persecuted if she were now to return to Afghanistan. It is appropriate to note counsel for the appellant’s submission on this point. In oral submissions she argued that the appellant faced the same dangers now that she did in Afghanistan in 1998. This is plainly incorrect as there has been regime change in the interim and the Taliban, while a lingering and problematic insurgency, are no longer the government. She also submitted that the appellant was at risk because of her ethnicity and religion, her status as an Afghan woman without male support and perhaps because she was “westernised”. She noted that in UNHCR guidelines (referred to below) it was recommended that women should not be returned to Afghanistan.

[90] The situation in Afghanistan was succinctly summarised in guidelines published by the UNHCR in December 2007:

“The fall of the Taliban regime in December 2001 triggered dramatic developments in Afghanistan. In the political sphere, the country held a free election for the Presidency, adopted a new Constitution and instated a National Assembly. Taliban-imposed restrictions, including on girls education and with respect to women’s fundamental rights were lifted in law, if not always in practice, and the donor community pledged support to the country’s development. There

was hope, both in Afghanistan and abroad, that with the international community's assistance, the country could turn a new page on decades of violence and impoverishment. This optimism was reflected in the return home of over 4 million Afghans since 2002.

Indeed, there have been marked improvements in some areas, such as access to health care and education. However, success in economic development and, more crucially, establishing a secure environment, has proved elusive. A re-invigorated insurgency has stepped up attacks and is affecting an ever-increasing proportion of the country. Violence connected to counter-insurgency operations and a record number of suicide bombings creates fresh displacement and discourages the return of refugees from abroad. Poppy growing and related drug-trafficking, linked to the deteriorating security situation, compounds efforts to provide safety and access to legitimate livelihoods. The reach, and indeed in some cases the presence of the central Government is limited in many districts of conflict-affected provinces": UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers* (31 December 2007).

[91] Country information considered by the Authority indicates that the insecurity in Afghanistan is increasing. This insecurity together with a lack of land, shelter and livelihoods is hampering efforts to repatriate Afghan refugees: *Afghanistan: UN prepares for repatriation of over half a million refugees* IRIN News (5 December 2007).

[92] The insecurity in Afghanistan does not in itself, however, establish that the appellant has a well-founded fear of being persecuted there for a Convention reason. As was noted in *Refugee Appeal No 75692 and 75693* (3 March 2006) at [101]:

"Those impacted by civil unrest and even generalised violence are not entitled to refugee status on that basis alone. The focus of the Refugee Convention is quite specific. First, it requires the refugee claimant to demonstrate that he or she faces a real chance of serious harm ie a well-founded fear of being persecuted and second, it requires that the anticipated serious harm is "for reason of" one of the five Convention grounds (ie race, religion, nationality, membership of a particular social group or political opinion). In the words of Professor Hathaway in *The Law of Refugee Status* at 93, refugee law is concerned only with protection from serious harm tied to a claimant's civil or political status. Persons who fear harm as the result of a non-selective phenomenon are excluded. Returning to this point at op cit 88 he emphasises again the general proposition that victims of war and violence are not but virtue of that fact alone refugees."

[93] The UNHCR guidelines identify a number of groups at risk of being persecuted in Afghanistan in the current climate. These are as follows:

- (A) Afghans perceived as critical of factions or individuals exercising control over an area;
- (B) Government officials;
- (C) Ethnic minorities in certain areas;

- (D) Converts from Islam to other faiths;
- (E) Women with specific profiles;
- (F) Unaccompanied children;
- (G) Victims of serious trauma (including sexual violence);
- (H) Individuals at risk or victims of harmful traditional practices;
- (I) Homosexuals;
- (J) Afghans associated with international organizations and security forces;
- (K) Landowners;
- (L) Afghans associated with the People's Democratic Party of Afghanistan.

[94] In the category "Women with specific profiles" it is stated:

"Afghan women, both in urban and rural areas, must conform to conservative and traditional norms of behaviour in order to be safe from physical and psychological violence or abuse. Those at heightened risk include women who are perceived as or actually transgressing prevailing social mores, foreign wives of Afghans, and women without male protection. Single women without male protection, (husband, father, brother or extended family member) will have difficulty both in sustaining themselves, given social restrictions on travelling in public without a male escort in many areas, as well as physical protection problems. Woman who suffer domestic violence and are fortunate enough to find accommodation in one of the few shelters available are unable to be integrated elsewhere in the country. Without an alternative durable solution, most eventually return to their family after assurances of safety have been negotiated. This situation reflects the inability for single women to reside safely in Afghanistan without a male family member to provide the traditional protection function." (emphasis added)

[95] With respect to the category "Individuals at risk or victims of traditional practices" it is stated:

Harmful traditional practices in Afghanistan, including forced and early marriage, honour killings, detention for behaviour not formally criminalised under national law, and blood feuds, impact both men and women though the latter are disproportionately affected. Women without effective male or family-support and single women of marriageable age are uncommon in Afghanistan, and continue to be viewed with some suspicion. They face a high risk of being married off by their families against their will. Single women are likely to be ostracized by the Afghan community or fall prey to malicious gossip which could destroy their reputation and social status. This exposes them to an increased risk of abuse, threats, harassment and intimidation by Afghan men, including risk of being kidnapped,

sexually abused and raped. In the majority of these cases, the Government is not in a position to effectively protect women.”

[96] In a United Kingdom Home Office report referred to in counsel's submissions it is stated that without family to protect them, single women are at risk of violence and can only be accommodated temporarily in safe houses run by Afghan NGOs in Kabul and Herat: Home Office and Border Security Agency *Country of Origin Information Report Afghanistan* (7 September 2007).

[97] A report published last year by the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) identifies certain Afghans who, if returned to Afghanistan, would be endangered in terms of their physical safety and well-being given their vulnerability and the nature of their special needs. These “vulnerable cases” are either individuals who lack effectively functioning community/support mechanisms and are unable to cope in the absence of such structures or who are unable to cope because of the lack of public support mechanisms and treatment in Afghanistan. The groups identified as of concern in this regard include unaccompanied females, unaccompanied elderly and persons with medical illness.

[98] In assessing the appellant's eligibility for refugee status it must be acknowledged that she appears to have presented an untrue account of the circumstances of her departure from Afghanistan to the New Zealand immigration authorities in 1998 and that she has not resiled from this account. The true circumstances of her departure are unclear. Despite this, the Authority, as noted earlier, is satisfied that she is a single, widowed, Tajik, Afghan national.

[99] There has been doubt raised as to the veracity of her claimed family relationships. The DOL's case is that her claimed niece and nephew are actually her children, while the appellant asserts that her family relationships are as she has presented them to be.

[100] The appellant gave evidence that she went to considerable lengths to bring her four children to New Zealand from Pakistan including obtaining the assistance of the Red Cross. After arriving in New Zealand, the children lived with her for several years. Her daughter DD, attended the hearing, not to give evidence but to provide assistance to her in the event she felt unwell. There appeared to be genuine current familial relationship between them.

[101] There is insufficient evidence before us to enable a finding to be made that the appellant's claimed family relationships are false and, as noted above, there is evidence, including a history of cohabitation, that her relationship with her children is genuine. However, on either scenario presented, the appellant's entire family reside in New Zealand. We are satisfied therefore that should she return to Afghanistan, she will be an unaccompanied female and it is appropriate to assess her circumstances as such. Given the paucity of information concerning her brother we do not place reliance on him as a source of protection for the appellant in Afghanistan.

[102] The country information clearly establishes that single women in Afghanistan cannot live independently from family and that unaccompanied Afghan females are at risk of harassment, intimidation and violence.

[103] Given the country information and the appellant's personal circumstances, the Authority is satisfied that should she return to Afghanistan, there is a real chance that she would be subjected to treatment that can properly be characterised as persecution. As to the Convention ground, it is noted in a report by the UN High Commissioner for Refugees that:

"The vulnerability of unaccompanied female Afghans is the result of social traditions and gender values in Afghanistan, where women cannot live independently from a family".

[104] The Authority has previously determined that gender can be the defining characteristic of a social group and that "women" may be a particular social group: *Refugee Appeal No 71427* (16 August 2000) at [106]. The reason why the appellant is at risk of being persecuted in Afghanistan is because of her status as a woman. The relevant Convention ground is particular social group. The second framed issue is answered in the affirmative.

CONCLUSION

[105] The following determinations are made:

- (a) The grant of refugee status made on 19 January 1999 may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.
- (b) The appellant currently has a well-founded fear of persecution in

Afghanistan for a Convention reason. It is therefore not appropriate to cease to recognise her as a refugee.

[106] The appeal is granted.

"M A Roche"
Member
M A Roche