

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 70202/96

U C

AT AUCKLAND

<u>Before:</u>	S Joe (Chairperson) L Tremewan (Member)
<u>Counsel for Appellant:</u>	M Bird
<u>Representative for NZIS:</u>	No Appearance
<u>Observers:</u>	Ms E France and Mr M Hodgen (26 March only)
<u>Date of Hearing:</u>	26 March and 8 April 1997
<u>Date of Decision:</u>	12 June 1997

DECISION

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

INTRODUCTION

The appellant arrived in New Zealand on 26 August 1994 and applied for refugee status upon arrival at Auckland airport. He was subsequently interviewed by the RSB in respect of this application on 10 November 1994 and 3 February 1995 respectively. By letter dated 26 July 1996 the RSB declined the appellant's refugee application. It is against this decision that the appellant presently appeals.

The appellant appeared before the Authority on 26 March 1997 and 8 April 1997 respectively.

BACKGROUND COUNTRY INFORMATION

A helpful guide to the relevant background history of the various regimes in Afghanistan and government policies can be found in the Europa Yearbook: The Far East and Australasia 27th ed: London: Europa Publications (1997) at pages 54-61. A summary of the political changes undergone in Afghanistan in recent years and the human rights abuses perpetrated since the Mojahedin takeover can be found in the Authority's previous decision Refugee Appeal No. 2516/95 re MEZ (21 June 1996) at pages 1-3, 12-13. There is no need to repeat them in their entirety here. Since the date of that decision, the Authority has obtained more recent reports on the human rights situation in Afghanistan which will be referred to later in this decision (see supra, at pages 14-17).

Regarding the changing political alliances and control of areas in Afghanistan generally, the US Department of State Country Report on Human Rights Practices in Afghanistan for 1996 (published February 1997) reports that:

Afghanistan in 1996 continued to experience civil war and political instability, although more of the country was free of fighting and violence than in past years. There was no central government. At year's end, the Pashtun-dominated ultra-conservative Islamic movement known as the Taliban had captured the capital of Kabul and expanded its control to over two-thirds of the country. General Abdul Rashid Dostam, an ethnic uzbek, controlled several north central provinces. After the loss of Kabul, former President Burhanuddin Rabbani and his military commander, Ahmed Shah Masood, controlled only three northeastern provinces. Rabbani and Dostam formed an alliance to check the growing power of the Taliban.

Taliban forces took Kabul on September 26-27 after Masood's forces retreated northward. The Taliban gained some ground north of Kabul but were pushed back by the combined forces of Masood and Dostam. The year ended in a military stalemate. Despite intensive efforts, United Nations Special Envoy Norbert Holl did not secure a cease-fire agreement but made some progress towards getting the factions to begin political talks...There is no constitution, rule of law, or independent judiciary. Former President Rabbani, relocated to Takhar in the north, claimed that he remained the head of the Government of Afghanistan. His delegation retained Afghanistan's U.N. seat after the U.N. General Assembly deferred a decision on Afghanistan's credentials. The Taliban, led by Mullah Mohammed Omar, formed a six-member ruling council in Kabul which ruled by edict. Ultimate authority for Taliban rule rested in the Taliban's inner Shura (Council), located in the southern city of Kandahar, and in Mullah Omar. In Taliban areas, order was established by disarming the local commanders and the populace and by instituting stiff punishments for crimes. Several provincial administrations maintained limited functions. Civil institutions were mostly non-existent..."

The recent Reuters news report in The New Zealand Herald dated 21 May 1997, reports that the Taleban have claimed two more cities from the control of northern opposition leader General Abdul Rashid Dostum, namely the provincial capitals of Kunduz and Sar-I-Pul (see The New Zealand Herald, "*Afghan rebels seize two cities in north*", (21 May 1997)).

THE APPELLANT'S CASE

The appellant is a 38 year old, married man born in A, in Afghanistan. He has six children by his first wife, (namely five sons and one daughter). Following the death of his first wife in 1988, the appellant re-married in 1989. He has two children by this second marriage. All of his children presently live with his current wife in refugee camps in Peshawar, Pakistan.

The appellant's father previously served for three terms as a Member of Parliament for Kunar province under the former King Shah's regime but retired after the Shah was deposed. Since his arrival in New Zealand, the appellant has received news from his wife that his father died, or has now died, of tuberculosis. His mother is cared for by his own family in Peshawar.

The appellant has seven brothers and two sisters. Apart from two of his brothers, (one of whom was a policeman), the remainder of his family fled Afghanistan following the Mojehadin takeover in April 1992 and are presently, at last contact, either in Peshawar or Bajawar. Three of his siblings who had fled had served the former Najibullah regime, either as government appointed teachers or lecturers. The appellant's sister, M, has been living with the appellant's family in Peshawar since her husband 'disappeared' prior to their leaving Afghanistan.

The appellant undertook general studies in his first year at a polytechnic institute, before commencing studies at the School of Economics in K between 1974-1978. The appellant majored in political economics and sociology. He graduated with an economics/social sciences diploma in 1978, and was subsequently placed the following year by the Ministry of Education to teach political economics and sociology at a teachers training college in J in Ningrahar Province.

From around 1976, while undergoing university studies, the appellant became aware of the then opposition communist party, the People's Democratic Party of Afghanistan (PDPA). He gained an understanding of the PDPA's objectives by

reading its manifesto which was circulated by the university Student Association. According to the appellant, the PDPA advocated social, political and economic equality.

Prior to his formally becoming a member of the PDPA the appellant became involved in propagating the Party's ideology and trying to attract new members to join. On average, the appellant estimates he did so about once a month. The appellant did not become actively involved in the PDPA until he became a member of the PDPA's Kunar branch in 1982. Whereas previously the PDPA had comprised of various competing factions, the PDPA ostensibly became a "unified" party when it assumed power in 1982. To apply, the appellant was required to specify in a brief statement the reasons why he wished to join. The appellant's application to become a member was approved after two senior PDPA members gave certifications as to his good character.

The Authority questioned the appellant about his reasons for applying for membership. The appellant merely replied that it was "his choice" why he applied, and that having seen the party's platform considered that Afghanistan would benefit from PDPA leadership. Part of the PDPA's domestic policy was to institute land reforms, re-distributing land from the landlord class to the poor. The PDPA also announced changes allowing for equal rights for women, including a right to education and property.

The nature of the appellant's activities in support of the PDPA were essentially the same even after he officially became a member. The only distinguishing feature identified by the appellant was the fact that he was now "obliged to do what he was told". He would receive his 'orders' from the persons in charge of his district, namely AMM and MNS. The appellant would attend meetings, and upon direction make various representations to tribal leaders, as required. He also distributed PDPA pamphlets.

The appellant said that, because he was a PDPA member, he was regarded as a person who could be trusted by the Party and was therefore assigned to a responsible "office". Having joined the PDPA in 1982, the appellant was re-assigned that same year to lecture in the same subjects at the military academy. This involved lecturing on Marxism-Leninism and the history of Afghanistan. He continued to do so until 1984. Due to his profession as a teacher, the appellant was exempt from performing military service.

In 1984, the appellant was once again re-assigned to different duties, this time as a consultant serving the branch office of the Ministry of Tribal Affairs situated in Kunar province. According to the appellant, given the occurrence of civil war at the time, the government sought to place persons in Kunar who enjoyed the respect of the local tribes who lived there. The government aimed to enlist tribal support away from the rival Mojahedin rebels, in favour instead of the government. The appellant, having originally lived in Kunar province was well known to the local Pashtoun and Nooristami tribes, with whom the government wished to deal.

In dealing with the tribal leaders, the appellant would work with other government appointees to persuade them of the benefits that the government had to offer and the negative effects of civil war. For example, the government advocated the preservation of their native tribal languages and, being politically expedient, even promised that they would not be obliged to comply with the reforms relating to women (e.g. regarding education) that the government had instituted.

In those situations where the tribal leaders were not receptive to the appellant's approaches, the appellant was required to report this to the Tribal Affairs Ministry. The appellant told the Authority that he did not know what transpired as a result of his reports of this nature.

By 1988, Kunar province had fallen to the opposition Mojahedin forces, and the Tribal Affairs section, of which the appellant was a part, were instructed to 'retreat' to Kabul. Thereafter the appellant lived with his family in C, in southern Kabul.

While the essential structure of the Kunar department remained the same upon their transfer, the appellant was appointed Deputy of the Tribal section and was responsible for the security of Kabul. He reported to MY, previous director of Tribal Affairs in Kunar province. The appellant claimed that his section was loosely regarded as part of the National Security department.

The appellant considered that his department was re-assigned this job simply to avoid their being made redundant. Kabul was the only major city left in Afghanistan that had not been taken over by the Mojahedin, and where there was still a need to secure people's individual lives and have any semblance of

'government'. The appellant claimed that many civil servants had become unemployed due to the civil war. He did not question his assignment and was grateful to simply have been given a job.

The appellant was involved in negotiations with the leaders of various districts within Kabul to help maintain the security of buildings, schools, and roads against the Mojahedin. Once again, the appellant was involved in persuading the residents not to shelter Mojahedin rebels. He would also instruct civilians on measures when it was anticipated counter-attacks would be made by the government's military in the area. The appellant also became inevitably involved in giving practical advice on the daily lives of persons in need, for example, to women who were pregnant or with sick children. The appellant also stated that there would be the occasional foreign dignitary visiting Kabul for a meeting, and it would be up to the appellant's department to keep the city secure.

Later, between 1990 and 1992, the appellant's section was also given a wider objective to ensure the peaceful transition of power to the Mojahedin.

The appellant continued his work in Kabul until the Mojahedin takeover which occurred in April 1992. While President Mojaddedi, the President of the interim Afghanistan administration, declared a general amnesty guaranteeing that no reprisals would be taken against, inter alia, former senior government officials, the appellant claimed that this amnesty was so undermined by the various Mojahedin forces, that in effect it lasted for only one month.

The appellant gave evidence that the news broadcasted by radio at that time urged people to preserve themselves, and informed them that the government would no longer be effective in preserving security. The majority of the population felt insecure and took whatever measures they could to protect themselves. Some of the government officials who lived closeby had moved out of the area for their safety. The appellant remained living in his home quarters which was attached to a polytechnic institute, which due to the cessation of classes, was otherwise vacated. As it was not safe for the appellant to return to work, one of the appellant's sons resorted to selling fruit and vegetables by cart on the street to help support the family's living. The appellant claimed that they barely earned enough money to survive, and had barely sufficient food.

Towards the end of August 1992, C, the southern area of Kabul where the appellant lived, was taken over by the Mojahedin forces led by Gulbuddin Hekmatyar. The Mojahedin conducted visits to civilian houses searching for those who had links with the former government. Rapes of women were also becoming a common feature of the Mojahedin's activities. The deteriorating situation caused the appellant much concern, and he feared that the Mojahedin could find him at any time. The area in which the appellant's cousin lived, namely KP, (another district in Kabul), was considered at that time to be relatively safer. According to his cousin, this area was then under the control of the Jamiat-e-Islami faction of the Mojahedin led by General Masoud, under whom no searches were being conducted for former government officials at that particular time. The appellant therefore decided to leave this area and move to live with his cousin in KP, located some six kilometres away, initially leaving his family behind in C. It was not until later, however, that the security situation in his cousin's area became worse.

Around September 1992, the appellant received a visit from his son who informed him that the Mojahedin had forced their way into the family's house and conducted a search. They demanded to know the appellant's whereabouts, saying that they had come to settle a conflict and needed to talk to him. When the appellant's wife told the Mojahedin that he was not at home, she was accused of lying. The appellant's son was also threatened and beaten. The Mojahedin left, warning that they would soon return. The appellant assumes that Gulbuddin Hekmatyar's forces had determined his whereabouts by obtaining documents showing where former government officials resided. Fearing for the safety of his family, the appellant made arrangements for his family to join him in KP, with the assistance of a friend. As far as the appellant is aware, his family relocated to KP without encountering any problems. They carried the bare minimum of necessities along with them so as not to attract attention.

After about a month, due to the deteriorating situation in KP, the appellant and his family were forced to move again, this time to another district in Kabul named TM, located some three to four kilometres away. TM was then under the control of the forces led by the interim President Rabbani. The appellant independently made his way to TM travelling by bicycle, avoiding the border guards on patrol. He occasionally took shelter at a friend's house to avoid detection. The appellant's cousin remained living in KP.

The appellant conceded that as a stranger to a new area, he ran the risk of his presence being noticed, but considered that in the civil war conditions that prevailed, it was not uncommon for there to be a constant flux of people entering and leaving the area. The appellant also took the precaution of changing his appearance to look less 'western', for example, by growing a full beard.

By January 1994, the political dynamics of control in TM had changed yet again, with war having broken out between the opposing factions of the Mojahedin, led by General Masoud and Gulbuddin Hekmatyar. Searches were being conducted in the area, and while the appellant did not know whether he was specifically being searched for, he considered he could be found at any time. In February 1994, the situation had deteriorated further. Searches were being conducted, women were being raped and along with others, killed. People were being openly killed in the streets. The appellant recounted to the Authority how he had personally seen corpses of those who had been attacked and killed, left lying on the streets. The appellant also recalled, (as an example of the general lawlessness of the time), seeing published pictures of people, who were proclaimed 'criminals', after they had been hung in public in the yard in Kabul city. According to the appellant, no one knew the true reason why such persons had been arrested and labelled 'criminals', whether they had in fact been arrested for being PDPA members or for completely unrelated reasons. The appellant told the Authority that his fears became greater during this period, and that he felt that he could not tolerate what was going on around him. He therefore resolved that his family should try to leave Afghanistan for Pakistan.

The appellant, his parents, sister and family members subsequently left Kabul, and through the assistance of family and friends, were able to make their way through to district K in Jalalabad, an open area considered to be part of Afghanistan, but which joined the independent frontier bordering Pakistan. The appellant employed the services of a driver familiar with the territory, paying him some 1600 Afghan dollars to act as a guide. The group travelled by car for part of the way, before switching to a tractor to cross the more difficult terrain. His family members each took turns walking, as there was not enough room for all to be transported on the tractor. The appellant's family was also able to shelter at one of the tribal villages on the way, the appellant having previously had dealings with the tribal leader. After some two to three days by motor vehicle, the appellant and his family arrived in Jalalabad.

The appellant decided that it was safer for him to make his way to Pakistan rather than to remain in the 'independent area' bordering Afghanistan and Pakistan despite there being refugee camps set up there. He explained that most of the tribal and border areas between Pakistan and Afghanistan were 'independent' and while generally under the influence of either Pakistan or Afghanistan, had local chiefs and tribal leaders. The appellant gave two reasons for not wanting to remain in any of the refugee camps set up in such areas. First, while the roads which were under Pakistan's control, were relatively safe, the roads leading to the refugee camps in the villages were not. Secondly, thousands of people lived in these refugee camps, some of whom were former government officials like himself. The appellant did not want to live in any camp as this, he considered, would increase the likelihood of his being harmed 'by association' with other persons such as him living there. He based these fears on news he had earlier heard in Kabul concerning one of his friends who had also served in Kunar, who had been killed even upon reaching the independent area.

The appellant and his family reached M in Bajawar, by July or the end of August 1994. M was an independent area located in North-west Pakistan, in between Pakistan and Afghanistan. The appellant had considered sending his son back to the Kunar province in Afghanistan to find out what the situation was like there, but finally decided that this would be too dangerous. He had received news from his son, who had read in a local news journal, that the then Governor of Kunar province had issued a statement proclaiming that former government servants were "godless", and would be killed. Their property was also liable to confiscation, and became "Islamic property".

The appellant decided to continue to travel on to Peshawar in Pakistan, leaving his family behind in Bajawar in the company, and under the protection of, a trusted friend. The appellant told the Authority that in the circumstances he did not know what would happen in the future, and so decided to leave his family behind. The appellant's friend gave the appellant some money and promised to help him get out of Pakistan. The appellant was told how he could contact an agent in Peshawar who could help him travel overseas.

The appellant accordingly managed to make his way to Peshawar, and upon his arrival, found that life for the Afghan refugees in Pakistan was no better. Many who had belonged to political parties in Afghanistan and who were now based in Pakistan were, according to the appellant, waging their own wars, even ordering

the execution of Afghan refugees upon their arrival in Pakistan. The appellant also claimed that many who tried to return to Afghanistan or others who happened to be temporarily living in Peshawar were also killed. The appellant recalls hearing of a former Governor, S, from Kunar province and another teacher from the appellant's home town being killed in Peshawar.

The appellant made contact with an agent who was able to arrange for the appellant to be issued with an Afghan passport and to fly to New Zealand on payment of a fee which he met by loans from friends and the whole of his life savings. The appellant does not know whether or not the passport issued to him was genuine, although it was in his own name.

The appellant, using this documentation, travelled with his agent from Pakistan to Singapore. The agent left the appellant to board his flight bound for New Zealand from Singapore airport using his boarding pass. The agent instructed the appellant to request that he be allowed to apply for refugee status once he arrived at the airport in New Zealand. At the time, the appellant only had a very general understanding of what a Convention refugee was, but had considered that he, like the other Afghans seeking refuge in camps in Bajawar or those living in Pakistan, were commonly known as 'refugees'.

The appellant arrived in New Zealand on 26 August 1994. Since that time he has only had sporadic contact with his family, given that the postal communication system in Pakistan is unreliable. The appellant has entrusted the occasional letter to another Afghan whom he knew was travelling to Peshawar, to send to his family upon arrival in Pakistan. Other letters, he believes, have been lost in the mail and were not received by his family at all. The appellant said he tries to contact his family by telephone when he has important news, (for example, to notify them of his appeal hearing before this Authority), but making contact with third parties to arrange for his family to talk to him by telephone was a complicated arrangement which he did not find convenient.

From the limited correspondence he has received, the appellant claimed his family situation is not good. In support of his case, the appellant submitted three letters he had received from his wife. The first was undated, the second is dated 20 March 1995 and the third letter is dated 15 February 1996. In her letter of 20 March 1995, the wife writes:

"...G paid us a visit so I gave him this letter to send it to you. I must also give the unfortunate news that your father has passed away in Jalalabad. May God bless his soul I first thought of not letting you know but then decided to write to you because there is no point not letting you know. Your mother and sister M are sending their assalams as well.

I must say that the people who are looking after us are getting tired of it. When the Pakistani Army bombed Bajawar to crush the clerical rebellion many Afghan refugees suffered in the process as well. This too has added to the problems we already had. The money we were left with is almost finished. Please send us some money as soon as you can."(sic)

And in her most recent letter, dated 15 February 1996, which pre-dates their move to Peshawar, she writes:

"Life for all the refugees in Pakistan is getting harder. I have heard the International Committees have stopped their assistance to the refugees. Because of that the refugees have found it hard to survive and some of them have resorted to stealing and armed assaults on people. We feel quite scared during the night, but some attacks on people have come even during the day. I have been telling the children to be extra careful these days.

There was also a huge explosion in Peshawar a few days ago. The Pakistan Government is blaming the Afghans for it and they have arrested quite a large number of Afghan refugees. There is the rumour that all the refugees are to be sent back to Afghanistan. You know what would happen to us if that is the case...

...Because, as I said in my previous letters, [Z] has moved his family to Peshawar, we find it increasingly harder to live on our own. This has increased the risk of we being attacked by the Mujahideen. We still have not been able to find another place simply because the popple in [M] do not give their houses to Afghan refugees. Even when you find a house, the rents are so high that we cannot afford them."(sic)

The appellant also told the Authority he had received news that the Pakistan government was becoming more strict in its treatment towards Afghan refugees. On one occasion when his daughter required medical treatment for her leg, the Pakistan police prevented them from travelling on to Peshawar in order to obtain treatment for her.

The appellant also received news from his family that since the Taleban in Afghanistan enjoyed the support of the Pakistani government, the Pakistani government has been trying to force the Afghan refugees to return to Afghanistan. Sometime in 1996, after the Taleban came to power in Afghanistan, the 'independent areas' were opened, causing his family to flee to Peshawar.

The appellant fears that if he returned to Afghanistan he would be killed due to his previous service under the communist (PDPA) Najibullah regime. He also has fears for the safety of his family whom he has left behind in Pakistan.

Counsel, Mr Bird, submitted that there was a real chance the appellant's fear of persecution would be realised. He submitted that Afghanistan continues to be in a state of upheaval, and to all the warring factions, (whether it be the Mojahedin or the Islamic fundamentalist based group, the Taleban), the appellant represents someone who supported a government (namely, the PDPA) that all factions opposed. While the Mujahedeen posed a clear and proven danger, counsel further noted it was the Taleban that was responsible for killing and stringing up the bodies of Najibullah and his brother in Kabul, and it was the appellant's party which Najibullah had belonged to. Should the Taleban continue to wield continued control over the large areas of the country, the danger to the appellant was clear. It was therefore submitted that the appellant had a well-founded fear of persecution on political grounds.

THE ISSUES

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

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

In terms of Refugee Appeal No. 70074/96 Re ELLM (17 September 1996), the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
2. If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

We consider first the issue of the appellant's credibility.

Of some concern to the Authority was the appellant's evidence regarding his work for the tribal affairs department and the fact that his division was considered,

subsequent to his transfer to Kabul in 1988, to be a part of the National Security department in Kabul. Country information available to the Authority indicated that during the period of the Soviet occupation of Afghanistan, the Ministry of Tribes and Nationalities involved the state intelligence services or secret service (Khad). Dr Najibullah, as head of Khad was in charge of tribal affairs via this Ministry. The Department of Clans and Tribes within the Ministry was the main agency of the Khad in tribal areas, whereas the Khad operated independently in non-tribal spheres (see *The War in Afghanistan* by Brigot and Olivier, published in 1988 at 70-72). The appellant was questioned as to his knowledge of the various sections of the National Security Department in light of this information. The appellant was clear in his evidence that he had no knowledge of such matters and was not in a position to comment one way or another about this information. He emphatically denied personally having any connection with the secret police in Afghanistan and that his duties were solely confined to ensuring the physical security of Kabul and safety of its inhabitants. We have no reason to doubt the appellant's evidence on this issue, given our overall finding that the appellant was a credible witness and that his account is accepted as truthful. Our reasons for finding in favour of the appellant's credibility are set out below.

The appellant was closely questioned by the Authority at length in the course of two days of hearing, and he provided the Authority with an extremely detailed account in respect of all issues material to his claim. We found the appellant to be frank and matter-of-fact in the manner in which he delivered aspects of his evidence which served to reinforce the credibility of his claim. It was clear to the Authority that the appellant was describing actual events that he had experienced and seen occurring around him. He made no apparent attempt to exaggerate or embellish his claim. His evidence before the Authority regarding his experiences following the Mojahedin takeover in April 1992 was also consistent with the country information available as to the then prevailing situation of changing political alliances and control of territory by the Mojahedin in Afghanistan. The appellant's account was also generally consistent with that given previously before the RSB and in his supporting statement for refugee status. For all of these reasons we accept the appellant is an honest witness and that his account is a credible one.

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

The Authority finds that there is a real chance that the appellant would face persecution if he returned to Afghanistan.

There are numerous and consistent reports that persons such as the appellant, namely former government officials of the Najibullah regime, are specifically at risk from all factions of the Mojahedin, notwithstanding the initial amnesty which was declared by the first Interim President after the takeover in April 1992 (refer also Refugee Appeal No. 2516/95 re MEZ (21 June 1996)). The Authority further finds that the appellant is also at risk of persecution from the reigning Taleban, which is said to now enjoy a two-thirds majority control of Afghanistan.

(a) Fear of Persecution vis-a-vis the Mojahedin

In terms of the well-foundedness of the appellant's fear of persecution at the hands of Mojahedin factions, apart from the appellant's own evidence that he was being searched for by the Mojahedin in Kabul prior to his departure, the country information to support his claim is clearly overwhelming. A UNHCR Canberra response to an inquiry on the human rights situation in Afghanistan dated 23 July 1993 stated the position as thus:

"Since April 1992 when Mojahedin fighters took control of Afghanistan from Najibullah's regime, gross abuses of human rights have continued to be perpetrated by every group involved in the civil war against those considered to be political, religious and ethnic enemies...During this period, some high-ranking officers and officials - and in some instances middle and low-level functionaries of Najibullah's government - were either killed on the spot by those arresting them or executed after torture and summary trials...The amnesty declared in April 1992 for members of the former regime cannot generally be relied upon to provide a protective shield against violation of fundamental human rights, especially against groups enumerated above in most areas of Afghanistan when they were targeted by various groups of Mojahedin."

Subsequent and more recent reports confirm that this continues to be the state of affairs. An Amnesty International report entitled "Afghanistan: The Human Rights Crisis and the Refugees" (February 1995), at page 2, described the situation in Afghanistan as follows:

"Grave human rights violations are reported from all parts of the country and are reportedly perpetrated by virtually all the armed Mojahedin. In a number of areas, some political or ethnic groups may be temporarily safe, but the changing political

alliances and the frequent changes in the control of territory, can create an unexpected political atmosphere conducive to human rights violations.

“... In Afghanistan, all sections of the population have been subjected to human rights violations and continue to be at risk of being subjected to further human rights violations including torture and killings. Those most at risk include members of specific ethnic, religious or political groups in areas controlled by warlords hostile to them, educated Afghan women, secular-minded individuals, Afghan academics and professionals, *officials of the former government* and journalists covering the political crisis.” (Own emphasis added).

And later, at page 5:

“... There is no civilian political structure with substantive authority in place, and armed political groups are able to act with total impunity. The judicial system is virtually non-existent in most parts of the country and armed faction leaders sentence prisoners to execution, stoning to death or whipping, with no legal safeguards. In a few areas, Islamic courts are reported to conduct trials leading, in some cases, to public flogging or execution. Thousands of people have been unlawfully imprisoned in detention centres maintained by Mojahedin factions on grounds of political opinion, religion or ethnic origin. Hundreds of people have “disappeared”.”

In a summary of the same report, it is stated:

“No effective central authority has yet been established in Afghanistan, and the UN efforts to promote a broad-based government acceptable to the various factions have so far been unsuccessful.”

In the Amnesty International Report entitled “Afghanistan: The World’s Responsibility” Amnesty International Briefing (November 1995) at page 4, the political crisis in Afghanistan is said to continue unabated:

“Some of the killings are motivated simply by revenge. Others are rooted in hostility to rival ethnic and religious groups, or hatred of educated individuals or former government officials. Whatever the motive, the pattern is always the same: armed guards can kill anyone they please; for the unarmed victims, there is no-one to turn to for protection.

In one incident in May 1992, a man suspected of being a member of the former ruling party was arrested in the Ministry of the Interior by the armed guards of *Shur-e Nezar*. Eyewitnesses said that an armed guard tied him up and kicked him down a flight of stairs. On the ground floor, a Mojahedin fighter allied to the new government reportedly clubbed him with a rifle butt. He then reportedly fired at least 10 bullets ...”

And later:

“The vast majority of those held in unacknowledged detention are people suspected of supporting a rival faction or associated with previous governments.”

Further, in the Amnesty International Report 1996 on Afghanistan, at page 68, that former government officials continue to be targeted remains clear. The Report states that:

“Individuals associated with the previous government were also targeted, In February government officials found Hajera Zeray, her eight-year-old daughter, Jamila, and her 12-year-old son, Arsala dead in their Kabul flat. All had their throats cut. Hajera Zeray was the wife of Dr Saleh Mohammad Zeray, an Afghan politician who held senior government positions between 1978 and 1985.”

(b) Fear of Persecution vis-a-vis the Taleban

The Authority also finds the appellant to be at risk of persecution at the hands of the Islamic Taleban who now have effective control of Kabul, and almost two thirds of Afghanistan.

Country information shows that former government servants of the Najibullah regime are also at risk of persecution from the Taleban, who arbitrarily carry out public executions and ‘summary justice’ at will. That there is a real chance of former government officials being at risk of being dealt with by the Taleban with similar impunity, as is the case with factions of the Mojahedin, can be exemplified by their treatment of the former president Najibullah in September 1996. The Amnesty International Report, “*Afghanistan: Grave abuses in the name of religion*” (November 1996) at page 26 refers:

“Former Afghan president Najibullah and his brother were on 26 September 1996 dragged from the UN compound in Kabul where they had found refuge, without obtaining permission from the UN. They were reportedly beaten severely and then hanged on lamp posts in central Kabul. Noor Hakmal, a Taleban commander who entered the city from Charasyab, south of Kabul overnight, told Reuters news agency: “We killed him because he was the murderer of our people.” Mullah Mohammad Omar, leader of the Taleban, later exonerated the killers by saying Najibullah had deserved his fate.”(sic)

In a report published in The Economist, “*Enter the Taliban*” (5 October 1996) at page 19, it was reported that “when [the Taleban] take a town, they set up a *shura* (assembly), made up of the most senior Taliban members in the area plus an ex-enemies they have done deals with and any religious or tribal figures important enough to warrant inclusion. Each *shura* collects taxes locally: there has been no co-ordination at national level. The Taliban have now set up a provisional government for the whole of Afghanistan, but it has yet to impose its authority on the local *shuras*”.(sic) The report goes on to say that when they “strung up the mutilated body of ex-President Najibullah”, the Taleban made it “brutally clear”

that, in the areas of their control, they had become both “accuser and judge” (supra at page 20).

Such indications are also apparent in this extract from an article published in The Bulletin, “*Peace or persecution*” (15 October 1996) :

“In some instances the new laws [of the Taleban] are brutally enforced. Aid workers witness a man, presumably a money lender, tied spread-eagled to the back of a truck and dragged through the streets, his mouth stuffed with dirty bills. On the traffic policeman’s tower where the last Soviet-installed president, Najibullah, was hanged two weeks ago, red and white graffiti issued a warning: WHEN A PERSON IS LIKE NAJIBULLAH, HE WILL HANG HERE.”

To similar effect the US Department of State Country Report on Afghanistan for 1996 (February 1997) at page 1408 refers:

“A number of personal and politically-motivated killings reportedly took place during the chaos when the Taliban took Jalalabad in mid-September...When the Taliban captured Kabul in late September, one of their first acts was to invade the U.N. compound, seize former President Najibullah and his brother and summarily execute them. Najibullah was head of the secret police during the Soviet occupation and President of Afghanistan from 1986-92. The corpses were hung in the street for 2 days following the executions...The Taliban used swift summary trials and implemented strict punishments according to Islamic law; the Taliban ordered public executions and death by stoning”.

And later, at page 1409:

“With the absence of formal legal and law enforcement institutions, justice was not administered according to formal legal codes. Judicial and police procedures varied from locality to locality. Little is known about the procedures for taking persons into custody and bringing them to justice. In both Taliban and non-Taliban areas, the practices varied depending on the locality, the local commanders, and other authorities...”(sic)

Conclusions on the Real Chance Issue

We are satisfied, on the basis of all of the country information, that there is a real chance that the appellant would be apprehended and killed or dealt with extra-judicially (e.g. by execution) either by factions of the Mojahedin or the Taleban militia, due to his prior service for the former regime. There is, in reality, no effective government in Afghanistan, but a situation in place where a number of warring factions remain at large administering their own arbitrary versions of ‘justice’ in the communities they have assumed control. Rather than being able to access effective state protection, then, we find that there is a real chance that irrespective of which region the appellant returned to live in in Afghanistan, the ruling factions of such areas represent a source of persecution, rather than

protection, to the appellant. We therefore find in the affirmative in terms of issue one.

2. If the answer is yes, is there a Convention reason for that persecution?

The Authority further finds that the persecution likely to be visited on the appellant should he return to Afghanistan would be by reason of the adverse political opinions imputed to him by the Mojahedin and/or Taleban, due to his former service under the Najibullah regime. Accordingly, on this issue, the Authority similarly finds in the affirmative.

CONCLUSION

For these reasons we find that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

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Chairperson