



Department of Immigration and Multicultural

Office of the Secretary

PSS\RRT sub\Afghanistan\letter to RRT may02

Mr Steve Karas
Principal Member
Refugee Review Tribunal
Locked Bag 3
SYDNEY SOUTH
NSW 2000

Dear Mr Karas

I am writing to you to make a submission to the Tribunal under s423(2) of the *Migration Act 1958* on a number of matters of relevance to current refugee assessments in relation to Afghanistan.

The Afghan caseload has raised important country information and legal issues on which it is appropriate to provide guidance to decision-makers at this time, especially in view of recent developments in Afghanistan.

The attached information paper has been sent to DIMIA decision-makers. I am incorporating this paper as part of this submission to the Tribunal because it is relevant to Tribunal decision-makers dealing with protection visa review assessments from Afghan nationals. The intention of the submission is to provide guidance and country information relevant to the assessment of protection claims by Afghan nationals and provide legal advice on principles to be followed in assessing protection claims made by those applicants.

This submission provides advice to assist the Tribunal in such matters, in the interests of maintaining consistency of interpretation in accordance with Australian law and policy.

I would appreciate your assistance in circulating my submission to Members of the Tribunal.

Yours sincerely

W.J. Farmer
May 2002



COUNTRY INFORMATION AND LEGAL ISSUES OF RELEVANCE TO CURRENT REFUGEE ASSESSMENTS IN RELATION TO AFGHANISTAN

INFORMATION PAPER

Purpose

The purpose of this information paper is to:

- Provide guidance and country information relevant to the assessment of protection claims by Afghan nationals
- Provide legal advice on principles to be followed in assessing protection claims by Afghan nationals, and of broad relevance to other nationals.

2. The information paper is relevant to DIMIA and RRT decision-makers making refugee status determinations under the Refugees Convention for the purposes of protection visa assessments, and refugee assessments under the Refugees Convention in excised offshore places or declared countries.

Country information relevant to Refugee Convention assessments

3. The situation in Afghanistan remains complex and fluid. A careful monitoring of developments and a consideration of the individual circumstances of each applicant is necessary.

4. However, in the context of the fall of the Taliban and the establishment of the Afghan Interim Administration (AIA), refugee decision-makers need to bring a sharp focus to their assessment of the claims of Afghan applicants and country information. Some of the relevant considerations are outlined below.

Scale, distribution and profile of returns

5. While it may be stating the obvious, decision-makers need to take into account the fact that significant numbers of Afghans who had fled Afghanistan for various reasons over the past 20 years are beginning to return home.

6. While the situation is changing daily, as of 30 May 2002 more than 800,000 people had participated in the assisted return program facilitated by the AIA, UNHCR and IOM.¹ This includes more than 730,000 from Pakistan and 60,000 from Iran² (although returns from Iran are now reportedly running

¹ UNHCR Afghanistan humanitarian update no.61 at <http://www.reliefweb.int/w/rwb.nsf/480fa8736b88bbc3c12564f6004c8ad5/76b270cb654d> regular updates can be found on this web site, or on UNHCR's Briefing Notes at <http://www.unhcr.ch>, or in IOM information at <http://www.iom-rqa.org>.

² UNHCR Afghanistan humanitarian update no, 61

at around 2,000 per day³). An additional 60,000 Afghans from Pakistan and 40,000 from Iran are estimated to have returned to Afghanistan independently of the facilitation program.⁴

7. UNHCR and the AIA envisage that approximately 1.2 million Afghans will return this year.⁵ Current indications are that this may be a conservative estimate, with estimates of likely voluntary repatriation from Pakistan alone recently being revised upwards from 400,000 to 800,000.⁶ However, returns will be influenced by a range of factors, including security conditions, drought, repatriation assistance, infrastructure re-development, de-mining operations and logistical issues.

8. Returnees are reported to include Pashtuns, Tajiks, Uzbeks, Hazaras and other minority groups.⁷ They do not always return to source and most are going to urban rather than rural areas.⁸ According to the UN Office for the Coordination of Humanitarian Affairs (OCHA),

Initial statistics indicate that the vast majority of returnees from Pakistan are returning to the provinces of Nangarhar, Kabul and the provinces surrounding the capital region. Non-Pashtun refugees from Pakistan are returning to the north of the country, while most refugees from Iran are returning to the west and centre of the country.

9. The ethnicity and destination of returnees is being monitored by UNHCR. UNHCR report that as at 14 June 2002 with assisted voluntary repatriation from Pakistan, approximately 88,719 Pashtun families (51.65%), 59,121 Tajiks (34.42%), 11,926 Hazaras (6.94%), 4,840 Turkmen (2.81%) and 6,566 Uzbeks (3.82%) have returned to Afghanistan.⁹ During March and April about 80 per cent of the Hazaras went to Kabul Province, but small numbers also went to provinces such as Wardak, Bamyan, Baghlan, Balkh, Parwan, Ghazni and Samangan.¹⁰

³ CISNET Doc No: CX 64702 (Cable of 3 May 2002 from Geneva)

⁴ CISNET Doc No: CX64325

⁵ CISNET Doc No: CX63940; also statement by the Afghan Minister for the Return of Refugees, Enayatullah Nazeri, World News, 26 April 2002, <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opedoc.htm?page=news&tbl=NEWS&id=3ccd054d0>, CISNET Doc No: CX64274.

⁶ CISNET Doc No: CX64588

⁷ CISNET Doc No: CX64325. See also CIS Library Ref No: CIS#13390; and CISNET Doc No: CX64549.

⁸ CISNET Doc No: CX 64702 (Cable of 3 May 2002 from Geneva). It may be noted that UNHCR and IOM have agreed to share information on any protection issues that may arise in regard to returnees and IDPs. UNHCR has also reported that a district profiling system is being developed on governance and protection issues in 300 districts in Afghanistan to provide up-to-date information to potential returnees and third countries. These profiles will be a valuable source of information for decision-makers. A number of district profiles are already available at the UNAIDS web site (<http://www.hic.org.pk>).

⁹ UNHCR, Voluntary Repatriation Statistics, Update No.13 – 14 June 2002

¹⁰ UNHCR, Assisted Voluntary Repatriation Report for March 1 2002 to April 30 2002, CIS Library Ref No: CIS#13390. In terms of returns from Iran under the voluntary repatriation program, UNHCR reported in early May that 60 per cent identify as Tajiks, 15 per cent as Hazaras and 10 per cent as Pashtuns. So far 29 intended destinations had been logged by UNHCR, including Kabul, Heart, Parwan, Takhar and Ghazni. See CISNET Doc No: CX 64549.

10. There is still some outflow, particularly of Pashtuns from northern Afghanistan.¹¹ According to OCHA,

While many are returning home, others are attempting to leave, due mostly to ethnic persecution. An estimated 40,000 for example, have amassed at the transit centre at the Chaman border crossing with Pakistan ... A survey of families in the waiting area revealed that as many as 50 per cent are Pashtuns originating from northern Afghanistan ... [However] about 30 per cent of the total number would be willing to return to their homes if helped to do so. After interventions by the Interim authority, discrimination is reported to be decreasing especially in the west.¹²

11. Returnees to Afghanistan are in effect 'voting with their feet' about developments in their home country. The scale, distribution and profile of the returns raises serious questions about current protection claims by Afghan applicants under Convention criteria, which can only be resolved in the context of careful scrutiny of the merits of each individual case.

Questions of access

12. In regard to access to Afghanistan of returnees from countries not neighbouring Afghanistan, Kabul airport reopened in January 2002. A refurbishment was completed in April. Ariana Afghan Airlines has regular scheduled flights between Kabul and neighbouring countries including Pakistan, India, Iran and Tajikistan.

13. IOM charter flights facilitating returns commenced with a flight from Cambodia to Kabul on 13 April. Charter flight of returnees from Indonesia commenced in mid-May 2002.¹³

14. According to UNHCR in early May 2002, 'seventy to eighty per cent of Afghanistan is safe for return ... Current exceptions are Paktia and Paktika Provinces, and areas around Gardez'.¹⁴

Benchmarks of change

15. Attention needs to be given to the achievement of important benchmarks of change in the political and security situation in Afghanistan.

16. These benchmarks are relevant to an assessment of whether the changes in Afghanistan in the last 6 months are substantial, effective and durable, in the sense that they may lead to an applicant being unable to

¹¹ UN Office for the Coordination of Humanitarian Affairs (OCHA), OCHA Afghanistan Brief, 2 May 2002, <http://www.relief.web.int>, p 2, CISNET Doc No: CX64262; also CISNET Doc No: CX64325.

¹² UN Office for the Coordination of Humanitarian Affairs (OCHA), OCHA Afghanistan Brief, 2 May 2002, <http://www.relief.web.int>, p 2, CISNET Doc No: CX64262.

¹³ According to a Joint Media Release on 1 March 2002 by the Australian Minister for Foreign Affairs, the Indonesian Minister for Foreign Affairs and the Afghanistan Minister for Justice, 'Agreement has been reached that Afghanistan will accept the immediate return of any Afghans not in need of protection who arrive through illegal means in Indonesia or Australia from now on'; CISNET Doc No: CX64318.

¹⁴ CISNET Doc No: CX64588.

sustain a claim of having a well-founded fear of persecution either now or in the reasonably foreseeable future. Important benchmarks to date include:

- The overthrow of the Taliban regime;
- The signing in Bonn on 5 December 2001, under the auspices of the United Nations, of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions;¹⁵
- The establishment of the AIA in Kabul on 22 December 2001;
- The gradual deployment of the International Security Assistance Force (ISAF) in Kabul city and surrounding areas, and advice that it has effective control of Kabul and good relations with the AIA;¹⁶
- The commencement of UNHCR-facilitated return programs from Pakistan (since 1 March 2002) and Iran (since 9 April 2002);
- The return on 18 April of the former King of Afghanistan, Mohammed Zahir, exiled since 1973, and his declaration of support for the AIA and its Chairman, Hamid Karzai;¹⁷
- The relatively peaceful lead-up to the Emergency *Loya Jirga*, planned for 6-10 June, which is expected to establish a new transitional authority to take over from the AIA on 22 June 2002. The first local assembly was held on 14 April in Jowzjan Province and 10 others have been held since;¹⁸
- Reports of UN access to 80-85 per cent of the country¹⁹ and the presence of large numbers of international organisations;
- The issue of public invitations by the AIA to Afghan asylum-seekers and refugees in countries such as Australia and Indonesia to return, and public assurances that they will not be stigmatised for leaving Afghanistan.²⁰

¹⁵ CISNET Doc No: CX60563.

¹⁶ Second Report on the Activities of the International Security Assistance Force in Afghanistan, 24 April 2002, CISNET Doc No: CX64290.

¹⁷ Report by UN Under-Secretary General, Kieran Prendergast, to Security Council, 25 April 2002, SC/7376, CISNET Doc No: CX64290.

¹⁸ Report by UN Under-Secretary General, Kieran Prendergast, to Security Council, 25 April 2002, SC/7376, CISNET Doc No: CX64290. It may be noted that some Pashtuns have been chosen in areas where they are in a minority.

¹⁹ UN Office for the Coordination of Humanitarian Affairs (OCHA), OCHA Afghanistan Brief, 2 May 2002, <http://www.relief.web.int>, p 7, CISNET Doc No: CX64262.

²⁰ Statement by Afghan Minister for the Return of Refugees, Enayatullah Nazeri, World News, 26 April 2002, <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.htm?page=news&tbl=NEWS&id=3ccd054d0>, CISNET Doc No: CX64274. See also Article 8(2) of the Agreement titled 'Joint programme between the Government of the Islamic Republic of Iran, the Interim Authority of Afghanistan, and UNHCR for voluntary repatriation of Afghan refugees and displaced persons', 3 April 2002, according

Willingness and ability of authorities to protect returnees

17. The risk of Convention-based harm, and the ability of the AIA, ISAF or other authorities to provide effective protection from such harm, is an important issue for decision-makers. As noted in the UN Secretary-General's report to the UN Security Council on 28 March 2002,

*Risks to peace remain ... Questions about future stability are raised not only by continued fighting between coalition forces and Al Qaeda and Taliban fighters, but also by mistrust between rival factions.*²¹

18. Similarly, in a report to the Security Council on 25 April, the UN Under-Secretary General for Political Affairs stated that while the political and humanitarian progress of the last several months was very encouraging, the progress 'was by no means assured'. He added that 'security remained a major challenge in many parts of the country'.²²

19. UNHCR too has said that, in its view,

*One significant factor for consideration is the extent to which persons can avail state protection if necessary. This may be an issue where potential for difficulties remains high and the capacity of the central or regional authority is limited.*²³

20. That said, in assessing the willingness and ability of authorities in Afghanistan to provide effective protection in cases where this may be appropriate, decision-makers need to take into account relevant information and a number of important developments.

21. For example, as noted above, the AIA has issued public invitations for refugees and asylum-seekers to return to Afghanistan, and given public assurances that they will not be stigmatised. On 13 February 2002 the Afghan Minister for the Return of Refugees stated that the AIA had contact with local authorities to provide returnees with a safe return. According to the Minister, local authorities had given their assurance of assistance, and people are able to return to Kabul and other parts of the country safely.²⁴

22. The AIA also appears willing to respond to complaints of possible Convention-based harm, and with some effect. Evidence includes the recent OCHA report which cited outflows based on ethnic persecution, adding that,

to which 'the Interim Authority will, inter alia, issue general amnesties, formal guarantees or public assurances to encourage the refugees and displaced persons to voluntarily repatriate'; source: UNHCR, Geneva, CISNET Doc No: CX63468.

²¹ CISNET Doc No: CX63370.

²² Report by UN Under-Secretary General, Kieran Prendergast, to Security Council, 25 April 2002, SC/7376, CISNET Doc No: CX64290.

²³ CISNET Doc No: CX64588.

²⁴ Statement by Afghan Minister for the Return of Refugees, Enayatullah Nazeri, World News, 26 April 2002, <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opedoc.htm?page=news&tbl=NEWS&id=3ccd054d0>, CISNET Doc No: CX64274. Also his interview with OCHA on 13 February 2002, 'Afghanistan: IRIN interview with refugee affairs minister', <http://www.reliefweb.int/w/rwb.nsf>, CISNET Doc No: CX62066.

'After interventions by the Interim Authority, discrimination is reported to be decreasing, especially in the west'.²⁵ Similarly, in early April, responding to an alert from UNHCR about allegations of harassment against minority Pashtuns, authorities in Herat changed the guards at the Maslakh camp, which hosts some 117,000 internally displaced Afghans.²⁶ Elsewhere, in response to reports of human rights abuses in Mazar-e-Sharif, the AIA is reported to have established a commission to investigate and address the issue and UNHCR is increasing its protection capability in the area with a view to minimising future displacement.²⁷

23. In other relevant developments, according to an ISAF report to the UN Security Council on 25 April 2002,²⁸ the AIA police, with the assistance of ISAF and the international community, 'are improving in organisation and effectiveness' and that a German-led police training program, which is now under way, should improve this still further. The report noted that the 1st Battalion of the Afghan National Guard, the first multi-ethnic, centrally commanded battalion of the new centrally directed national army, completed training on 4 April. It also noted that a process was in place for security sector reform, concentrating *inter alia* on building a national army and police, and strengthening the courts, the penal system and the administration of justice.

24. Clearly, decision-makers have an on-going responsibility to keep abreast of country information developments, with the help of the DIMIA and RRT country research areas. Recent country information from authoritative sources about general matters of relevance to refugee assessments is provided in Attachment A, although the list is by no means meant to be exhaustive.

Persons where particular care may be required in refugee assessments

25. According to UNHCR in February 2002,²⁹ persons with the following profiles might be at risk of violence; harassment or discrimination were they to return:

²⁵ UN Office for the Coordination of Humanitarian Affairs (OCHA), OCHA Afghanistan Brief, 2 May 2002, <http://www.reliefweb.int>, p 2, CISNET Doc No: CX64262. According to the report (at p 2), 'While many Afghans are returning home, others are attempting to leave, due mostly to ethnic persecution. An estimated 40,000, for example, have amassed at the transit centre at the Chaman border crossing with Pakistan, awaiting permission by the authorities to cross. A survey of families in the waiting area revealed that as many as 50 per cent are Pashtuns originating from northern Afghanistan and about 30 per cent of the total number would be willing to return to their homes if helped to do so'.

²⁶ 'UNHCR Afghanistan humanitarian update no. 60', 24 April 2002, p 3, <http://www.reliefweb.int/w/rwb.nsf>, CISNET Doc No: CX64012.

²⁷ UN Office for the Coordination of Humanitarian Affairs (OCHA), OCHA Afghanistan Brief, 2 May 2002, <http://www.reliefweb.int>, pp 4-5, CISNET Doc No: CX64262. A peace and cooperation agreement between rival warlords in northern Afghanistan is reported to have been signed on 8 May 2002; see CISNET Doc No: CX64545.

²⁸ Second Report on the Activities of the International Security Assistance Force in Afghanistan, 24 April 2002, CISNET Doc No: CX64131.

²⁹ UNHCR, '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', Geneva, 13 February 2002, para 11, CISNET Doc No: CX63046.

- Persons at risk of persecution on political grounds by groups now in control of their area of origin;
- Persons originating from and returning to areas where they constitute an ethnic minority;
- Persons who have sympathised with or are perceived to have been associated with the Taliban regime which came to power in Kabul in 1996;
- Persons associated or perceived to have been associated with the Communist, pre-mujaheddeen regime which was overthrown in 1992, as well as others who have campaigned for a secular state.

26. UNHCR does not say that persons falling into these groups will necessarily have a well-founded fear of harm amounting to persecution for a Convention ground. However, in its view, claims from such persons:

*... should be carefully and individually considered in order to ascertain the need for international protection. Given the complex, fluid and still fragile situation in Afghanistan, all individual claims, not only those falling in these categories, will need to be considered on a case by case basis, although a priori they may not be as compelling.*³⁰

27. In April, UNHCR noted that Convention exclusion provisions could apply to some persons in the above groups. It also said that two additional groups may face particular problems: women facing gender-related persecution and persons belonging to other religious minorities (Christians and Jews).³¹

Distinguishing Convention-related harm from general security concerns

28. As noted in security updates provided by the Humanitarian Information Centre for Afghanistan (HICFA),

*Currently within Afghanistan, there always exists the threat from either mines, unexploded ordnance, renegade combatants, tribal factional fighting or simple banditry.*³²

29. The recent report by OCHA also notes the incidence of banditry, particularly in the south-west of Afghanistan, criminality in the north, Kandahar, Jalalabad and the outskirts of Kabul, and unrest caused by the AIA's Poppy Eradication campaign.³³ The return and reintegration of refugees and IDPs is also reported to be hindered in some areas by landmines and

³⁰ Ibid, para 12

³¹ CISNET Doc No: CX64325.

³² See HICFA, 2001 Security updates (<http://www.hic.org.pk/security/security.html>) and Map: 'Afghanistan UN Security Update 10/04/2002' (http://www.hic.org.pk/security/10_04_02.pdf (see also map of 2 April 2002).

³³ UN Office for the Coordination of Humanitarian Affairs (OCHA), OCHA Afghanistan Brief, 2 May 2002, <http://www.relief.web.int>, pp 7-8, CISNET Doc No: CX64262.

other obstacles such as property disputes.³⁴ Concerns have been raised about personal feuds in some areas with persons likely to be in positions of power, for example, the local village headman, or a local mujihadheen commander. Personal feuds with persons holding political power do not provide the basis for a well-founded fear of persecution unless there is a Convention reason involved which can be said to be the essential and significant reason (or one of them) for the persecution feared. (See s.91R of the Migration Act)

30. In considering applicants' claims and the country information relating to developments in Afghanistan, decision-makers must therefore be careful to limit their assessment of evidence and the credibility of the claims in a manner that is consistent with their task of refugee status determination under the Convention.

31. Country information which is relevant to other concerns, for example the broader security (eg law and order) and humanitarian (eg infrastructure, services, housing, drought, food insecurity, unemployment, mines and unexploded ordnance) situation in Afghanistan, may be important for other purposes, for example the potential timing of returns. However, in the absence of a well-founded fear of persecution for a Convention reason, this information is generally not relevant to the refugee assessment.³⁵ Other mechanisms exist to ensure that any concerns that may arise because of such information are taken into account, as and when appropriate.³⁶

Legal considerations

The test for a well-founded fear has a prospective focus

33. When undertaking a refugee assessment, the proper construction of Article 1A of the Convention is to determine whether a person has a well-founded fear of persecution for a Convention reason were he or she to return to the country of origin at the time of determination³⁷ or in the reasonably foreseeable future.³⁸ Importantly, this test has a prospective rather than historical focus.³⁹

34. According to the Full Federal Court in *Singh*,

³⁴ CISNET Doc No: CX 64702 (Cable of 3 May 2002 from Geneva, para 7).

³⁵ A possible exception may be when considering the feasibility of internal relocation as a means of avoiding Convention-based persecution in one part of Afghanistan. See discussion of internal relocation below.

³⁶ For example, through Ministerial intervention powers relating to failed asylum-seekers onshore, and offshore the scope for the government to decide whether to offer alternative visa arrangements or make special arrangements for their staged return to Afghanistan.

³⁷ *MIEA v Singh* (1997) 142 ALR 191

³⁸ *Chen v MIMA* (1995) 58 FCR 96; *MIMA v Wu Shan Liang* (1996) 185, CLR 259

³⁹ As UNHCR has noted, 'Refugee status determination is always prospective, and decision-makers must have regard to what is likely to occur in the future to the asylum seeker, and not only what has happened in the past': in 'Relocating internally as a reasonable alternative to seeking asylum (The so-called 'internal flight alternative' or 'relocation principle')', UNHCR Position Paper, February 1999, p 7, fn 8.

*To require an applicant to show a well-founded fear at the time of determination rather than at the time of lodgement of the application produces a sensible result in cases where events occurring between the two dates makes a choice between them necessary. To choose the application date is to risk rejecting the claim of a person who in fact satisfies the requirement at the date when the question of return arises, and to countenance the possibility of accepting as a refugee a person who may have satisfied the requirement at the date of application but, because of improved conditions in the country of nationality or habitual residence, no longer satisfies it at the date when the question of return arises.*⁴⁰

35. However, in light of the recent High Court decision in *Miah*,⁴¹ decision-makers should provide an opportunity for applicants to comment on the impact of developments in Afghanistan subsequent to their application if the decision-maker is minded to rely on those developments to reject the application.

36. Decision-makers should also note that applicants do not need to show past persecution before a finding can be made that they have a well-founded fear that persecution would occur on return or in the reasonably foreseeable future.⁴²

Protection need not be 'guaranteed'

37. A decision-maker does not need to 'guarantee' to an applicant that they will be protected from Convention-based harm on return before being able to determine that the applicant's fear of persecution is not well-founded.⁴³ As noted by the Administrative Appeals Tribunal in the case of *SRPP*, referring in that particular instance to the quality of protection able to be provided by a country's authorities:

*[T]he case law ... indicates the standard of effective protection is not a guarantee of protection. On the contrary, the authorities support the [view that] in order to conclude that there is ineffective protection there must be before us clear and convincing confirmation of this fact: otherwise effective protection should be assumed.*⁴⁴

The significance to be accorded past persecution

⁴⁰ *MIEA v Singh* (1997) 142 ALR 191 at 194

⁴¹ *MIMA v Miah* (2001) HCA 22

⁴² *Abebe v Commonwealth of Australia* (1999) 162 ALR 1

⁴³ See, for example, *MIMA v Yasouie* (2001) FCA 1133 at 41-44; also *Horvath v Secretary of State for the Home Department* (2000) 3 WLR 379, where it was said, 'Certainly no one would be entitled to an absolutely guaranteed immunity. That would be beyond any realistic practical expectation'.

⁴⁴ *SRPP v MIMA* (2000) AATA 878 @ 66. According to the House of Lords in *Horvath v Secretary of State for the Home Department* (2000) 3 WLR 379, 'The standard to be applied is therefore not that which would eliminate all risk and thus would amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its nationals'.

38. Evidence of past persecution can be relevant, for example in some cases as a possible indicator of current or future treatment. However, as the High Court said in *Guo*,

*The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity.*⁴⁵

39. In addition, past persecution is important for the purposes of the refugee assessment only where the evidence discloses that the circumstances which gave rise to that persecution are still current. This can include situations where a well-founded fear is found to have arisen as a result of past circumstances and there is no evidence to indicate a substantial or material change in those circumstances.⁴⁶

Material change in the country situation

40. Evidence of material change in the situation in Afghanistan in the past 6 months is relevant in refugee assessments to the extent that it may either support an applicant's claims of a well-founded fear of persecution for a Convention reason, or indicate the removal of the basis for such a fear.⁴⁷

41. In the case of the latter, relevant questions for a decision-maker include whether the changes are:

- Substantial – in the sense that the power structure under which persecution was deemed a real possibility no longer exists;
- Effective – in the sense that they exist in fact, rather than simply promise, and reflect an ability and willingness on the part of the AIA, other authorities in Afghanistan, ISAF and the international community to protect the returnees; and
- Durable – rather than transitory shifts which may last only a few weeks or months.

42. Importantly, the only material changes that need to be considered by decision-makers to fulfil their responsibilities properly are those which are relevant to an assessment of a protection need under Article 1A of the Convention. (Some of these changes are reflected in the benchmarks outlined earlier).

43. Evidence of material change – or the lack of it – in relation to other aspects of the situation in Afghanistan will usually not need to be taken into

⁴⁵ *MIEA v Guo* (1997) 191 CLR 559 at 574-5

⁴⁶ *Chan v MIEA* (1989) 169 CLR 379

⁴⁷ The Federal Court has recently upheld several decisions of the Refugee Review Tribunal in which it was found that there was no longer a well-founded fear in an applicant returning to Afghanistan in view of recent changes there; see *SBBi v MIMIA* (2002) FCA 552 and *SBBB v MIMIA* (2002) FCA 546.

account by decision-makers for the purposes of a refugee assessment. Circumstances where it may be relevant include when considering whether internal relocation is reasonable (see discussion below), and whether there is a possible mix of Convention and non-Convention reasons (eg banditry, criminality, property disputes, etc) contributing to a fear of possible future harm on return.

Issues in considering the 'reasonably foreseeable future'

44. As the High Court said in *Guo*,

*A fear is "well-founded" when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution [for a Convention reason]. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.*⁴⁸

45. This need to identify a real substantial basis for a fear applies whether consideration is being given to possible treatment immediately on return or in the reasonably foreseeable future. Despite the speed and fluidity of change in Afghanistan, decision-makers must be guided as to what is reasonable in each particular case, based on matters of fact (in regard to country information) and common sense.

*The possibility of internal relocation*⁴⁹

46. Where a case involves an applicant returning to the place from which they came in their country of origin, and a well-founded fear of persecution for a Convention reason in relation to that place is absent, then concerns that may exist about the 'reasonableness' of the person's return to that area (eg because of general humanitarian and security issues) are not relevant to the refugee assessment. As noted earlier (at p 8), other mechanisms exist – such as Ministerial intervention powers or scope for the government to decide whether to offer alternative visas or make special arrangements for returns – that permit any such concerns to be taken into account, as and when appropriate.

47. However, where return to the place from which a person came may not be possible owing to a well-founded fear of persecution for a Convention reason in that area, an analysis by decision-makers of the possibility of internal relocation can be an important part of the holistic analysis of whether

⁴⁸ *MIEA v Guo Wei Rong & Anor*, 13 June 1997, per the majority (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, and Gummow JJ).

⁴⁹ A detailed discussion of internal relocation from the perspective of Australian case law and policy can be found in: 'The Internal Flight Alternative: An Australian Perspective', a paper prepared as a contribution to the UNHCR's expert roundtable series, Refugee & Humanitarian Division, DIMIA, December 2001, www.immi.gov.au/refugee/publications/unhcr/index.htm (or for primary decision-makers also on the ONPRO Bulletin Board).

an applicant's fear of persecution is well-founded in respect of the country as a whole.

48. A person cannot be said to be at risk of persecution in his or her own country of origin if he or she can access effective protection in some part of that country and it is reasonable to expect them to do so. This is consistent with the principle underlying the Convention that protection by the international community is only appropriate if the person cannot find protection anywhere within his or her country.⁵⁰

49. In considering the possibility of internal relocation for Afghan applicants, the following general principles or criteria should be borne in mind:

- It should not be assumed that local difficulties will translate to country-wide problems (this is particularly important in Afghanistan, where local and regional situations can vary considerably, especially at present);⁵¹
- A decision does not need to be reached about whether an applicant's fear is well-founded in at least one part of the country before consideration is given to the availability of internal relocation in other parts.⁵² However, where the applicant appears to have a well-founded fear in relation to parts of the country, decision-makers must query whether that well-founded fear extends to all parts of the country,⁵³ in the sense that the risk of harm is inescapable within the country's borders. This is a finding of fact that requires consideration of each applicant's individual circumstances;
- So long as a person can safely relocate to an area, and the consequence of that relocation is that any fear of harm on return he or she may have is not well-founded, it does not matter whether the protection that is available is from state or surrogate authorities, for example the AIA, ISAF, or indeed local warlords;⁵⁴

⁵⁰ *Randhawa v MILGEA* (1994) 124 ALR 265; *MIMA v Prathapan* (1998) 156 ALR 672

⁵¹ *Khatteer v MIMA* (2000) FCA 1338

⁵² Provided that the right test is applied – namely, is there a well-founded fear of persecution for a Convention reason if the applicant returned to the country of origin – then the question of internal relocation may be legitimately addressed at different points in different decisions. See *Syan v RRT & Anor* (1995) No NG846 of 1994 Fed No 1053/95. It follows too that there will be no need to assess internal relocation if there has been a finding that there is no Convention basis for the applicant's fear of harm; see *Pirapakaran v MIMA* (2000) FCA 624. In considering the possibility of internal relocation, decision-makers need of course to be informed by the nature or type of fear claimed by the applicant.

⁵³ *Sabaratnasingam v MIMA* (2000) FCA 261; *Bhupinder Singh v MIMA* (2000) FCA 1014

⁵⁴ As stated by Judge G de Moffarts of Belgium, 'The Geneva Convention does not give a definition of the agent of the country that can give protection. If central authority only controls a very small part of the territory or if there is no central authority in a country, 'de facto' authorities may eventually give meaningful protection to their 'de facto' citizens' ... [E]ffective protection by anyone, be it a clan or militia, should be considered in conformity with the Geneva Convention': 'Refugee status and the IFA', in *Refugee and Asylum Law: Assessing the Scope for Judicial Protection*, International Association of Refugee Law Judges, Second Conference, Nijmegen, 9-11 January 1997, cited in Hugo Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined', *International Journal of Refugee Law*, vol

- Whether issues relating to return and access to a place of internal relocation require consideration, and if so the degree of specificity required, will largely depend on the case put by an applicant and his or her individual circumstances;⁵⁵
 - It will not usually be necessary that decision-makers pinpoint the specific city or region where an applicant does not have a well-founded fear or how an applicant might access that place;
 - While reliance by the decision-maker on the principle of internal relocation will require consideration of whether it is reasonable to expect the applicant to relocate (as to which see below), it will be for the applicant to raise any impediments to relocation that are personal to him or her;
- If considered, issues relating to return and access should be addressed as matters of practical fact and reality;⁵⁶
- A mere reluctance on the part of an applicant to return to their country of origin and relocate is not sufficient to convert into a refugee a person who would not otherwise be entitled to international protection;⁵⁷

10, no 3, p 503. This approach finds support in Australian case law. In *Siaw v MIMA* (2001) FCA 953 at 8, Sundberg J says, 'The political composition of those who are keeping the peace and making an area secure is not relevant to the assessment of whether an applicant has a well-founded fear. In this connection I see no difference between cases [this particular one involved an applicant from Sierra Leone] where adequate protection is provided entirely by government forces, by a combination of government forces and friendly forces, by forces from a neighbouring country or ally, by mercenaries (alone or paid to assist government forces) [or] by United Nations forces invited to assist government forces'. See also *Cole v MIMA* (2001) FCA 76.

⁵⁵ *Randhawa v MILGEA* (1994) 124 ALR 265. At 17 Black CJ states, 'Once the question of relocation had been raised for the delegate's consideration she was of course obliged to give that aspect of the matter proper consideration. However, I do not consider that she was obliged to do this with the specificity urged by counsel for the appellant. I agree that it would ordinarily be quite wrong for a decision maker faced with a relocation possibility to take the general approach that there must be a safe haven somewhere without giving the issue more specific attention, but the extent of the decision maker's task will be largely determined by the case sought to be made out by an applicant'. The latter comment is important in explaining some apparent inconsistencies in the case law. For example, in *Umerleebe v MIMA* (unreported, Marshall J, 28 August 1997 at 6), the Federal Court considered that the decision maker was not expected to determine exactly where the person will live (or to find a house or job for him), while in *Ahmad v MIMA* (unreported, Sundberg J, 20 May 1997 at 12), the Court appeared to suggest that a failure to identify a particular place could potentially constitute an error.

⁵⁶ See for example, *Randhawa v MILGEA* (1994) 52 FCR 437, *Perampalam v MIMA* (1999) 84 FCR 274, *Al-Amidi v MIMA* (2000) FCA 1081, *Montes-Granados v MIMA* (2000) FCA 60, *Ismail v MIMA* (2000) FCA 194, *Franco-Buitrago v MIMA* (2000) FCA 1525. For example, if there is no indication that a particular applicant would be able to obtain travel documents, or enter the proposed place of internal relocation safely, or if return would need to be effected through an area where a well-founded fear of persecution exists, then internal relocation may not be a reasonable option for that person.

⁵⁷ *Abdi v MIMA* (2000) FCA 242

- There is no specific duty under the Convention to assess the 'reasonableness' of relocation to an area where a well-founded fear does not exist. However, case law⁵⁸ and procedural advice, including from UNHCR,⁵⁹ invariably provides for such a test.
 - While there is scope for variation in decision-makers' views on whether relocation is reasonable in any particular case, it is important to recognise some of the more generally accepted upper and lower limits of the test. For example, personal preference, the prospect of a mere deterioration of living standards, a lack of friends and relatives, or a lack of suitable work, have been held in refugee law commentary and international jurisprudence to generally be insufficient grounds for deeming relocation unreasonable.⁶⁰ On the other hand, minimum requirements for relocation would seem to include that the place is habitable and one in which a person can at least subsist.
 - Importantly, it is appropriate that the assessment of whether relocation is reasonable is taken in the context of conditions generally prevailing in the applicant's home country; that is bearing in mind the general economic, social and political conditions experienced by others living in Afghanistan.⁶¹
- The process of considering internal relocation, like other aspects of a refugee assessment, is subject to procedural fairness considerations. If a decision-maker intends to rely on the possibility of internal relocation to reject a claim, that possibility should be canvassed with the applicant,⁶² unless the issue of relocation has already been raised or is inherent in the nature of the claim.

50. In considering the issue of internal relocation for a particular applicant, decision-makers should therefore give attention to questions such as:

⁵⁸ See, for example, *Randhawa v MILGEA* (1994) 124 ALR 265; *Al-Amidi v MIMA* (2000) FCA 1081; *Franco-Buitrago v MIMA* (2000) FCA 1525; *Subarakan v MIMA* (2000) FCA 630; *Barnes v MIMA* (2000) FCA 563.

⁵⁹ For example, the UNHCR Handbook (at para 91) advises against excluding a person from refugee status who could have relocated internally, 'if under all the circumstances it would not have been reasonable to expect him to do so'.

⁶⁰ See, for example, commentary and jurisprudence referred to in Vermeulen Ben et al, 'Persecution by Third Parties', Centre for Migration Law, University of Nijmegen, May 1998 (a study commissioned by the Research & Documentation Centre of the Ministry of Justice of The Netherlands), and Hugo Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined', *International Journal of Refugee Law*, vol 10, no 3.

⁶¹ Attention is drawn to DIMIA's Guidelines on Gender Issues for Decision-Makers', 1996, as of possible relevance in some cases.

⁶² In *David v MIEA* (Wilcox J, unreported, 12 October 1995), the Federal Court held that it was unfair that the decision-maker did not raise with the applicant his conclusion that it was possible for the applicant to relocate, nor canvass the practicalities of the relocation issue. While a different approach was taken in *NABM v MIMIA* (2002) FCA 335, where Beaumont J rejected the view that the Refugee Review Tribunal was obliged to give an applicant an opportunity to respond to any adverse finding the Tribunal was to make in relation to the question of relocation, it would appear prudent to follow the advice given here.

- Does the applicant's subjective fear of persecution extend to all parts of the country, that is, beyond his or her home locality or region?
- Are the applicant's fears about conditions elsewhere well-founded and for a Convention reason?
- Is the absence of a well-founded fear elsewhere likely to persist for the reasonably foreseeable future?
- Is there a foreseeable risk of the applicant being forced to return to the area where the well-founded fear exists?

51. Importantly, there will be cases where events subsequent to the refugee decision may demonstrate that return to the place of internal relocation needs to be delayed or is not ultimately possible. For example, problems may arise with reception arrangements by UNHCR or other agencies, or with a sudden and unexpected change in conditions in that place. These are important considerations. However, they are matters for consideration by Government at that later time, when addressing its options in regard to the person's return and the implications of those options (including those which may subsequently arise relating to new protection-related concerns). As noted earlier, there are mechanisms in place, such as the s48B provisions for onshore refugee status assessments and the ability to commission fresh refugee status assessments offshore, to address these issues should they arise.

Credibility assessments and 'a positive state of disbelief'

52. Some uncertainty may exist in relation to credibility concerns and the expression 'a positive state of disbelief'.⁶³ It is important that this uncertainty be addressed to avoid possible misinterpretation of the expression and its inappropriate use.

53. The expression 'positive state of disbelief' was used by Foster J in *Guo*, who stated that,

*Mere doubts or concerns as to the applicant's credibility would not be sufficient to exclude the possibility [that a particular fact asserted by the applicant is correct]. For this result, a positive state of disbelief would be required on the part of the decision-maker.*⁶⁴

54. This statement should not be taken as requiring a decision-maker to have such a belief before being able to reject a claim on credibility grounds. As later explained by the Full Federal Court in *Kopalapillai*, there is no rule that a decision-maker must hold such a 'positive state of disbelief' before

⁶³ As used, for example, in the recent Information Paper by Onshore Protection Branch titled, 'Illegal Departure, Voluntary Return and Imputed Political Opinion in Relation to Iraq', 24 April 2002, at para 37.

⁶⁴ *Guo Wei Rong v MIEA* (1996) 64 FCR 151 at 191

making an adverse credibility assessment in a refugee case. The Court went on to clarify the context of the statement by Foster J as follows:

*The reference by Foster J ... in Guo's case ... to a requirement for a 'positive state of disbelief' was not directed to this issue of the determination of credibility, but rather to the question of when an adverse credibility finding will logically found a positive finding that a particular fact asserted by the witness does not exist.*⁶⁵

55. A decision-maker can make an adverse credibility assessment provided the assessment is reached by a process of reasoning which has regard to the available evidence. As the Full Federal Court noted recently in relation to a credibility finding by the RRT: 'Where the question of credibility is determinative of a tribunal decision, to simply assert that the tribunal considers the applicant's account to be "implausible" or "highly unusual" does not constitute a finding on the question raised. Such expressions are more in the nature of observations or side comments rather than findings. The reasoning process and supporting evidence that forms the basis on which a finding that evidence is rejected should be disclosed and clear findings made in direct and explicit terms'. (*W148/00A v Minister* (2002) 185 ALR 703 at 717)

56. Reinterviews were arranged for Afghan asylum seekers to enable new claims to be advanced in light of changing circumstances in Afghanistan. Decision-makers need to be satisfied as to the reliability of any new claims put forward, and it is open to decision-makers to not accept as reliable claims put forward which are inconsistent with or contradict earlier claims. The UNHCR Handbook (paragraph 205) notes that applicants have a responsibility to tell the truth and assist the examiner to the full in establishing the facts of his case.

Onshore Protection Branch
Refugee & Humanitarian Division
20 June 2002

(This information paper has been prepared by Onshore Protection Branch in consultation with Special Counsel - Immigration (Australian Government Solicitor) and Legal Policy Section, Parliamentary & Legal Division)

⁶⁵ *Kopalapillai v MIMA* (1998) 88 FCR at 558

ATTACHMENT A: COUNTRY INFORMATION DEVELOPMENTS

Advice on 13 February 2002 by UNHCR that,

The overthrow of the Taliban regime, the establishment of an Interim Authority and the gradual deployment of an international security assistance force in Kabul city and surrounding areas, paved the way for a significant improvement in the situation for Afghans, particularly in urban centres, where the previous situation of systematic discrimination by the Taliban regime no longer prevails. In other parts of Afghanistan, however, the security situation has not improved, but deteriorated and pockets of instability remain or re-emerge, often as a result of unsettled power-sharing arrangements.⁶⁶

Advice on 2 April 2002 by DFAT that,

Contacts working in UNAMA ... have reported that, as a general rule, Afghans from the various ethnic groups (Pashtun, Tajik, Hazara, Uzbek, Qizilbash, etc) would not face specific problems in resettling in areas where they form an ethnic majority. Kabul, currently patrolled by troops from the ISAF, is at present considered the safest city in Afghanistan for returnees. However, given the high level of political instability and uncertainty within Afghanistan, it is not possible to make predictions about Kabul's future stability/security. Afghans from the various ethnic groups can generally traverse areas where other groups are in the majority. Many parts of Afghanistan are insecure – but the level of lawlessness applies generally rather than to any ethnic minority traversing the territory. Illiterate Pashtun farmers from Paktia Province would not face additional difficulties in resettlement, beyond the general poverty of the area. Returnees would face less suspicion and harassment by resettling to areas in which they formed an ethnic majority. The potential for harassment would be drastically reduced if the returnees had family/property ties to the area of resettlement. Severe atrocities have been committed against Pashtun minorities in northern Afghanistan. Some anti-Pashtun violence has also occurred in western Afghanistan and in areas of eastern Afghanistan which form the border between Pashtun and Hazara territory. It is not advisable to resettle Pashtuns in these areas.⁶⁷

Advice also on 2 April by DFAT that,

[T]here is a sizeable minority of Hazaras in Oruzgan. According to UNAMA there have been no reports of violence or harassment against this group.⁶⁸

Advice on 11 April 2002 by UNHCR that,

[A]reas identified as of particular concern at present were Paktia and Paktika Provinces, and the eastern part of the country of the country which remains insecure and returns to these areas is not yet recommended.⁶⁹

In the same advice, UNHCR confirmed that there was evidence of persecution and human rights violations against the ethnic Pashtun minority in

⁶⁶ UNHCR, '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', Geneva, 13 February 2002, para 4. CISNET Doc No: CX63046.

⁶⁷ CISNET Doc No: CX63521.

⁶⁸ CISNET Doc No: CX63508.

⁶⁹ CISNET Doc No: CX64325.

the northern provinces of Kunduz and Takhar and around Mazar-e-Sharif. In addition, it advised that,

*[T]he homes of a number of Tajiks in the Bamiyan district have been occupied by Hazaras, the dominant ethnic group in that area, and they [ie the Tajiks] could conceivably have difficulty recovering their property at this stage ... The district of Bamiyan/Hazarajat continues to experience difficulties from Hazara (Hezb-e-Wahdat) and Tajik armed groups at this time.*⁷⁰

Advice on 30 April 2002 by UNAMA that,

*The overall security situation has improved in recent months but large pockets of risk/insecurity remain, particularly in the east. Over recent weeks there had been some credible threats to foreign aid workers, resistance to poppy eradication efforts, armed clashes in or around Herat, Kandahar and Gardez, and ethnic tensions around Mazar-e-Sharif. Some people from minority ethnic groups were moving south.*⁷¹

Advice on 2 May 2003 by UNHCR that,

With the falling away of Taliban-related persecution claims, the main protection issues now relate to Pashtuns living in the north. Others may have had very valid claims of persecution when they arrived in Pakistan during Taliban times, but this no longer holds in many cases. While valid claims for individuals will always exist, it is now necessary to look deeper for these; for example, pre-Taliban persecution by Mujahideen ...

*[UNHCR] confirmed a substantial change in [the situation of Hazara] since the overthrow of the Taliban. There is now significantly less discrimination against Hazaras. Hazarajat is largely stabilised, and there is no apparent problem for Hazaras in Kabul. The UNHCR expects a significant increase in the return of Hazaras over time, and will closely monitor developments in returns from Quetta.*⁷²

Memorandum of Understanding

A Memorandum of Understanding between Afghanistan and Australia on the 'Voluntary Return of Afghan Refugees and Asylum Seekers' was signed in Kabul on 16 May 2002. The MOU represents the understanding reached between the two Governments on the early and voluntary return to Afghanistan of Afghan nationals who have sought the protection of the Australian Government or the UNHCR either in Australia or in its offshore processing centres (OPCs). The MOU covers those who either withdraw their application or are found not to be in need of protection.

The MOU addresses the concerns of the Afghan Interim Administration (AIA) and the UNHCR that returns be voluntary at present and that they take into account the economic and security circumstances in the country. Australia is

⁷⁰ CISNET Doc No: CX64325. See also UNHCR Mission Report in Bamiyan Province of 26 February 2002, CISNET Doc No: CX63047, according to which (at para 29), 'The major discrimination matter [in the region] is about racial discrimination carrying [sic] out against the minority Tajik ethnic groups accused by Hazaras people (majority in Hazarajat) to have supported Taliban, and have undertaken the destruction of their houses during Taliban regime'.

⁷¹ CISNET Doc No: CX 64702 (Cable of 3 May 2002, from Geneva)

⁷² CISNET Doc No: CX 64588.

therefore providing a reintegration assistance package to voluntary returnees, which includes a reintegration payment of A\$2,000 per individual, or up to A\$10,000 per family, and access to vocational training where needed.

The MOU acknowledges the inherent right of Australia, if and when necessary, to involuntarily return Afghan nationals who have no right to remain under Australian jurisdiction. However, the MOU does not in itself form the basis for undertaking such returns which are to be the subject of further negotiations with the Government of Afghanistan. Involuntary returns to Afghanistan are not being considered at present.

Please note that the information paper "Illegal departure, voluntary return and imputed political opinion in relation to Iraq" of 11 April 2002 addresses the issue of refugee assessment where the person would not be a refugee, but for their refusal to return home voluntarily.