Afghanistan (1)

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United Nations High Commissioner for Refugees
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ROBNC/0016/05

31 January 2005

Dear Mr Jespersen,

Re: Considerations Relating to Cessation on the basis of Article 1C(5) of the 1951 Convention with regard to Afghan refugees and persons determined in need of international protection

I refer to your letter dated 5 November 2004 as well as discussions between your Board and our Office earlier this year. Attached you will find a note which has been prepared in relation to the the application of the cessation clauses to Afghan refugees and persons determined in need of international protection. It is UNHCR's opinion that at present the application of the cessation clauses in the context of Afghanistan is premature. We would therefore urge your Board to make a finding in cases which take account of this view.

We understand that further UNHCR guidelines and/or an updated country of origin documentation on Afghanistan are being prepared. We cannot provide a specific date for the finalisation of this documentation, but we will be sure to share it with your Board at the earliest opportunity.

Your attention to this matter is appreciated. Please accept our sincere apologies for the delay in replying.

Yours sincerely,

Annika Linden
Deputy Regional Representative

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Considerations Relating to Cessation on the basis of Article 1 C (5) of the 1951 Convention with regard to Afghan refugees and persons determined in need of international protection

Under Article 1C of the 1951 Convention, refugee status may cease either through the actions of the refugee (contained in sub-paragraphs 1 to 4), such as by re-establishment in his or her country of origin or through fundamental changes in the objective circumstances in the country of origin upon which refugee status was based (sub-paragraphs 5 and 6). The latter are commonly referred to as the "ceased circumstances" or "general cessation" clauses.[1] When interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Accordingly, cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should not result in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution and could also cause additional or renewed instability in an otherwise improving situation. It supports the principle that conditions within the country of origin must have changed in a profound and enduring manner before cessation can be applied.

UNHCR's Executive Committee has developed guidance in the form of Executive Committee Conclusion No. 69 (XLIII) (1992). These have been further elaborated in Guidelines on International Protection.[2] A key element of the assessment is the fundamental, stable and durable nature of the changes which have taken place in the country of origin, and the extent to which the causes of displacement are addressed. Where the changes have taken place "violently", that is by the overthrow of a regime and military means, (as in Afghanistan), a longer period of time is required in order that the changes are given time to consolidate and national reconstruction can take root.

In applying and assessing some of the considerations, set out in the guidance on the application of the ceased circumstances clause, to the situation in Afghanistan, the following are UNHCR's observations:

Fundamental character of change: The process of political transition in Afghanistan, which began with the fall of the Taliban regime in late 2001 and the Bonn Agreement, marked the beginning of a fundamental change in the country with which the causes of displacement are gradually being addressed. The phasing of this important transition and therefore the solidification of the change require, in UNHCR's view, the successful completion of this transition process *before* assessing general cessation. An important consideration for this caution is the fact that Parliamentary elections, which would provide for participation of Afghans as members of parliament from all provinces and districts in the government of a currently very fragmented country, have not yet taken place. These elections are seen as key for the stability of the country and the completion of the transition process.

Linked to the causes of displacement, and end to hostility, the return to a situation of peace and stability as well as a complete political change are important indicators of a fundamental change and therefore for the application of general cessation. With military action to address anti-government insurgency ongoing in several provinces, some of which are not entirely in control of the government and its forces, armed hostilities have not ceased. While progress is being made, the national police and/or the Afghan National Army (with minimal external support) do not manage to exercise exclusive authority in many parts of Afghanistan and are not expected to be completely deployed until 2007 and 2008 respectively. The DDR programme has made notable progress but has not been completed, and not much has been done as yet to tackle the problem of unofficial militias (so-called Informal Military Forces or IMFs). A situation of stability has therefore not as yet been finally established.

Enduring Nature of Change: It is recommended that developments which bring about significant and profound change are given time to consolidate, particularly where the changes have taken place *violently* through the overthrow of a regime. Given the difficulties in progressing towards genuine reconciliation in post-conflict situations involving different ethnic and political groups, the human rights situation and peace-

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[1] A strict interpretation of Article 1C(5) and (6) would allow their application on an individual basis. Yet Article 1C(5) and (6) have rarely been invoked in individual cases. States have not generally undertaken periodic reviews of individual cases on the basis of fundamental changes in the country of origin. These practices acknowledge that a refugee's sense of stability should be preserved as much as possible.

[2] Based on the Guidelines for Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), UNHCR, 10 February 2003 (which resulted, inter alia, from an expert meeting held as part of the Global Consultations on International Protection in May 2001), and on ExCom Conclusion 69 (XLIII) (1992) on Cessation of Status.

arrangements need to be carefully monitored. As outlined above, one important aspect is the successful completion of the transition process through parliamentary elections (Lower House and Upper House through provincial and district council elections), as these would establish the degree to which representative national and local political institutions can bring the various segments of a fragmented and ethnically diverse society together into a non-violent framework of governance. Among others, important aspects to assess the nature of change are a significant reduction of violations of human rights, by local commanders and armed elements as well as an end to serious discrimination of ethnic minorities.

Restoration of national protection: A crucial aspect in determining whether circumstances have changed so as to justify cessation under Article 1 C (5) is whether a refugee can effectively re-avail him or herself of the protection of the country of origin. Indicators for the restoration of national protection are more broadly the respect for human rights, but in particular marked progress towards the re-establishment of functioning government and basic administrative structures, including a justice system in the country which is accessible and able to operate without discrimination. For Afghanistan, given its social and ethnic structures, the degree to which these structures extend beyond the central government level into the provinces, is important. In UNHCR's view, local government and administrative structures are not yet functioning with a reasonable degree of reliability and continuity and are, in particular, not yet sufficiently independent from those exercising armed or economic power. Similarly, access to effective remedies in the formal legal system or within traditional conflict resolution mechanisms is very limited and non-existent where the complaint involves influential persons or persons linked to commanders, who continue to act with near impunity.

UNHCR Geneva
29 January 2005.