IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 14, 15th March 2012

Date Sent

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Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE DAWSON

Between

AK (AFGHANISTAN)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Vokes and Ms E Rutherford, instructed by Blakemores Solicitors
For the Respondent: Mr D Blundell instructed by Treasury Solicitor

A. Law etc:

(i) The Tribunal continues to regard as correct the summary of legal principles governing Article 15(c) of the Refugee Qualification Directive as set out in HM and others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC) and more recently in AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) and MK (documents - relocation) Iraq CG [2012] UKUT 00126 (IAC).

(ii) The need, when dealing with asylum-related claims based wholly or significantly on risks arising from situations of armed conflict and indiscriminate violence, to assess whether Article 15(c) of the Qualification Directive is engaged, should not lead to judicial or other decision-makers going straight to Article 15(c). The normal course should be to deal with the issue of refugee eligibility, subsidiary (humanitarian) protection eligibility and Article 3 ECHR in that order.

(iii) One relevant factor when deciding what weight to attach to a judgment of the European Court of Human Rights (ECtHR) that sets out findings on general country condition in asylum-related cases, will be the extent to which the Court had before it comprehensive COI (Country of Origin Information). However, even if there is a recent such ECtHR judgement based on comprehensive COI, the Tribunal is not bound to reach the same findings: see AMM, para 115.

(iv) There may be a useful role in country guidance cases for reports by COI (Country of Origin) analysts/consultants, subject to such reports adhering to certain basic standards. Such a role is distinct from that a country expert.

B. Country conditions

(i) This decision replaces GS (Article 15(c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044 as current country guidance on the applicability of Article 15(c) to the on-going armed conflict in Afghanistan. The country guidance given in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC), insofar as it relates to unattended children, remains unaffected by this decision.

(ii) Despite a rise in the number of civilian deaths and casualties and (particularly in the 2010-2011 period) an expansion of the geographical scope of the armed conflict in Afghanistan, the level of indiscriminate violence in that country taken as a whole is not at such a high level as to mean that, within the meaning of Article 15(c) of the Qualification Directive, a civilian, solely by being present in the country, faces a real risk which threatens his life or person.

(iii) Nor is the level of indiscriminate violence, even in the provinces worst affected by the violence (which may now be taken to include Ghazni but not to include Kabul), at such a level.

(iv) Whilst when assessing a claim in the context of Article 15(c) in which the respondent asserts that Kabul city would be a viable internal relocation alternative, it is necessary to take into account (both in assessing "safety" and reasonableness") not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many Internally Displaced Persons (IDPs) living there, these considerations will not in general make return to Kabul unsafe or unreasonable.

(v) Nevertheless, this position is qualified (both in relation to Kabul and other potential places of internal relocation) for certain categories of women. The purport of the current Home Office OGN on Afghanistan is that whilst women with a male support network may be able to relocate internally, "…it would be unreasonable to expect lone women and female heads of household to relocate internally" (February 2012 OGN, 3.10.8) and the Tribunal sees no basis for taking a different view.

TABLE OF CONTENTS

GLOSSARY **Pages 7 – 8**

Paragraphs

INTRODUCTION **1 – 3**

The Appellant's Case **4 – 5**

Procedural History **6 – 8**

A. THE EVIDENCE

The Expert Evidence **9**

Dr Seddon **10 – 12**
Dr Giustozzi **13 – 16**

The ARC Evidence

(a) The Asylum Research Consultancy (ARC) Report, 2012 **17 – 25**
(b) Oral evidence of Ms Stephanie Huber **26 – 27**

Background Evidence **28**

Parties to the conflict
(a) Government and pro-government actors **29 – 31**
(b) The Insurgents **32 – 35**
Causes of the conflict **36**
Types and indices of violence **37 – 45**
Levels of violence:
(a) Civilian casualties **46 – 50**
(b) Targeting of civilians **51**
(c) Targeted categories of civilians **52 – 55**
(d) Combatant casualties **56**
Comparison with other conflicts **57 – 59**
Protection **60 – 61**
Corruption **62**
Socio-economic conditions/IDPs **63 – 69**
Humanitarian aid **70 – 72**
Provincial level: **73 – 76**
(a)Kabul **77 – 79**

IDPs in Kabul **80**
(b) Ghazni **81 – 83**
Returns packages **84 – 85**
UNHCR position **86 – 89**
UKBA Afghanistan OGN v9, 30 February 2011 **90 – 92**
Tribunal country guidance and related domestic case law **93 – 99**
Foreign cases:
ECtHR: **100**
(a) Case of N v Sweden **100**
(b) Case of Husseini v UK **101**
(c) JH v UK **101**
Leading Swiss cases on Article 15(c) and Afghanistan **102 – 104**
Other national decisions **105 – 110**

B. **LEGAL FRAMEWORK** **111 – 114**

C. SUBMISSIONS

Mr Vokes and Ms Rutherfords' written submissions **115 – 120**
Mr Vokes' oral submissions **121 – 132**
Mr Blundell's written submissions **133 – 138**
Mr Blundell's oral submissions **139 – 152**

D. OUR ASSESSMENT

(a) General
Initial observations **153 – 161**
The inclusive approach **162 – 164**
The expert evidence:
Dr Seddon **165 – 173**
Dr Giustozzi **174 – 176**
The ARC evidence **177 – 186**
Afghanistan as a whole **187 – 189**
UNHCR **190 – 193**
Decisions by other courts in Europe **194 – 207**
Enhanced risk categories **208 – 209**
Relevance of other metrics **210 – 212**
IDPs **213 – 214**
The situation province-by-province **215 – 226**
Internal relocation **227 – 242**
Kabul **243**
Ghazi **244**
Internal travel **245**
Previous country guidance **246 – 247**
The future situation **248**

General Conclusions **249**

(b) The Appellant's Case **250 – 254**

APPENDICES

Appendix A **Pages 79 – 81**

The error of law decision

Appendix B **Pages 82 – 85**

List of Background Country Information (COI) Documentation Considered

Appendix C
Index to Asylum Research Consultancy report **Pages 86 – 92**

GLOSSARY OF TERMS

ACBAR - Agency Co-ordinating Body for Afghan Relief

ALP - Afghan Local Police

ANSO - Afghan NGO Safety Office

ANFS - Afghan National Security Forces

ANA - Afghan National Army

ANP - Afghan National Police

ANBG - Afghanistan’s New Beginnings Group ANBG

AIHRC - Afghanistan Independent Human Rights Commission

AGEs - Anti-Government Elements

AOG - Armed Opposition Groups

AVR - Assisted Voluntary Return

ARC - Asylum Research Consultancy

CPI - Corruption Perception Index

CSIS - Centre for Strategic and International Studies

CRS - Congressional Research Service

DIAG - Disbandment of Illegal Armed Groups

EDPs - Externally Displaced Persons

ECtHR - European Court of Human Rights

FMR - Forced Migration Review

IEDs - Improvised Explosive Devises

ICG - International Crisis Group

IDMC - Internal Displacement Monitoring Centre

IDPs - Internally Displaced Persons

IOM - International Organisation for Migration IOM

IWPR - The Institute for War and Peace Reporting

ISAF - International Security Assistance Force

DESTIN - London School of Economics and Political Science, Development Studies Institute

NCTC - National Counterterrorism Centre

OHCHR - Office of the High Commissioner for Human Rights

OGN – Operational Guidance Note

PDPA - People's Democratic Party of Afghanistan

SFAC - Swiss Federal Administrative Court

US DoD - US Department of Defence

UNAMA - UN Assistance Mission in Afghanistan

UNDSS - UN Department of Safety and Security

UNDP - UN Development Programme

UNHCR - UN High Commissioner for Human Rights

UNOCHA - UN Office for the Coordination of Humanitarian Affairs

DETERMINATION AND REASONS

1. Afghanistan is not only war-stricken; it is riven by ethnic frictions, political factionalism, high levels of poverty, impunity, serious abuses of human rights by both state and non-state actors, ineffective governance, high levels of corruption, weak rule of law, an anaemic legal system, and a high risk of infiltration, cooption or subversion by insurgents, warlords and criminal groups. Despite ongoing efforts to improve training, the majority of Afghan National Security Forces (ANSF) remain poorly equipped and relatively ineffective. Afghanistan has become the world's largest source of externally displaced persons (EDPs) or "refugees" in common parlance; their estimated number of 3.1 million accounting for some 10% of its population.

2. Afghanistan's affairs are closely intertwined with those of its neighbours, especially Pakistan. Thus for example, Pakistan's neighbouring provinces provide safe havens for the Taliban insurgency and the lower prices of goods and accommodation in them mean significant numbers of Afghans spend time there. And, by virtue of the involvement since November 2001 of U.S. and other international forces, what is now known as "the Long War" also has an international dimension. Whilst a recent strategic agreement of 1 May 2012 reached between Presidents Obama and Kharzai confirms that the departure in 2014 of NATO and other international troops will not result in a cessation of U.S. support of various kinds, the consequences of that departure are the subject of much debate.

3. Bearing in mind the global resonance of this conflict, it is as well that we emphasise at the outset that our task as judges in this case is a limited one. It is not to pronounce on the political and social conditions in Afghanistan or the rights and wrongs of the conflict, but only to furnish answers to a question relating to how the claims of the appellant and other failed asylum-seekers and/or enforced returnees to Afghanistan are to be assessed so as to decide whether they can be returned consistently with Article 15(c) of Directive 2004/83/EC (the "Qualification Directive"). At the same time, our task has wider implications because we have to tackle it in the knowledge that this case has been identified as an intended country guidance case, designed to consider among other things, whether increasing levels of violence in Afghanistan require us to take a different view than has been taken in previous country guidance cases as to the application of Article 15(c), GS (Article 15(c): indiscriminate violence) Afghanistan CG [2009] UKIAT 00044 in particular.

The Appellant's Case

4. The appellant is a national of Afghanistan, born on 1 January 1990. It is not in dispute that he arrived in the UK on 31 October 2008, claiming asylum straightaway. The principal basis of his claim was that he had fled his home area of Ghazni to escape persecution at the hands of the family of a powerful war lord, Jumra Khan, who had discovered the appellant had

begun a relationship with Khan's niece. The fact that the appellant's family had been high-ranking members of Dr Najibullah's Communist regime had added to his difficulties. On 31 July 2009 the respondent rejected his claim, finding it lacking in credibility. In his subsequent appeal, before Immigration Judge Obhi, the appellant's claim was again rejected as lacking in credibility. The judge had nevertheless gone on to allow his appeal on the basis that the evidence before him demonstrated that his home area of Ghazni was unsafe for Article 15(c) purposes because of the ongoing armed conflict there and that Kabul would not be a viable internal relocation alternative. On 19 March 2009 the judge's decision was found to be vitiated by legal error in relation to his assessment that in both Ghazni and Kabul the appellant would face a real risk of serious harm, contrary to Article 15(c).

5. As was made clear in the decision finding that the IJ had materially erred in law (for the text of which see Appendix A), there was no challenge brought against the judge's adverse credibility findings; and directions for this appeal have always taken them as a starting point. All that is accepted is that he is male, aged 22, able-bodied and from Ghazni. Also preserved is the judge's finding that he has an uncle in Kabul.

Procedural History

6. When setting aside the decision of IJ Obhi, the Tribunal took steps to progress the appeal as a potential country guidance case "intended to examine whether circumstances have changed since the Tribunal CG case of GS as applied to Kabul and other parts of Afghanistan". A decision was then taken to await the decision of another Upper Tribunal panel in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC) dealing with some Article 15(c)-related issues albeit mainly in the context of risk to children. In the event the determination in AA was not promulgated until 6 January 2012. In the meantime, however, the Tribunal conducted several Case Management Review (CMR) hearings of the instant case with a view to clarifying the scope of the issues, the expert evidence and the preparation of background materials. The Tribunal is greatly indebted to both parties for their considerable effort and diligence.

7. It was intended that at the present hearing the Tribunal would hear oral evidence from Dr Giustozzi but regrettably that proved not possible because of his involvement in a car accident, but Mr Vokes was content for his written report to stand as his only evidence. He sought and obtained permission to call a different witness, Ms Stephanie Huber of Asylum Research Consultancy (ARC), whose evidence is set out below at paras 17-27.

8. At the close of the hearing on 15 March 2012, the Tribunal indicated that it sought further materials from the parties in respect of several matters. It is unnecessary to specify what these were except to note that one concerned further details of recent case law by courts of EU (or EU-

associated) Member States dealing with Article 15(c) risk in Afghanistan. During the hearing the Tribunal alerted the parties to the existence of three leading decisions made in 2011 by the Swiss Federal Administrative Court (FAC) addressing whether safe returns to Kabul, Herat and Mazar-i-Sharif were possible. The Tribunal also received swift responses from the parties to further directions sent on 9th May.

A. THE EVIDENCE

The Expert Evidence

9. The two experts instructed by the appellant's representatives to furnish reports for this appeal were Dr Seddon and Dr Giustozzi.

Dr Seddon

10. Until his early retirement in 2006, Dr Seddon was a professor in sociology and politics at the University of East Anglia with a breadth of academic experience in conflict and development studies as well as in migration studies. In the 1990s and early 2000s he was a conflict adviser to the British and Canadian governments and several NGOs with respect to conflicts in Nepal, Algeria, Western Sahara, Israel/Palestine, DRC and South Africa. His report for this case is dated 10 October 2011. Its first part discusses and analyses the Tribunal country guidance case of GS, taking the expert witness in that case, Professor Farrell, to task for concluding that figures for battle deaths and civilian casualties in Afghanistan, although on the increase, had remained relatively low, a conclusion which Dr Seddon considers to underestimate significantly the scale of casualties, due to over-reliance on figures from the Brookings Institute. His report then proceeds to give his own assessment of levels of indiscriminate violence between 2005-2010, stating at para 4.3 that they had experienced a "dramatic leap" in 2009-2010 as a result of the surge implemented by the coalition forces and the insurgent response. He adds that there is "no clear indication yet that 2011 has experienced a significantly lower level of violence and insecurity". At paras 4.6-4.7 he discusses the report by Wikileaks of July 2010 alleging that official records significantly underestimated the actual number of civilians injured and killed by coalition forces. At paras 4.16-4.22 he addresses the issue of the large numbers of IDPs and EDPs. Whilst acknowledging that there are many factors contributing to the high level of refugees from Afghanistan, he considers that: "it seems reasonable to assume that the continuing and indeed intensifying and expanding scope of the conflict, and the increasing level of violence and insecurity, is a major factor"

11. Dealing with the issue of state protection, Dr Seddon quotes a BBC interview dated 7 October 2011 during which President Karzai said to the reporter, John Simpson, that his government and the coalition 'had failed to provide adequate security for the Afghan people' . As regards the Afghan police, Dr Seddon quotes sources describing them as poorly

trained, incompetent, under-resourced and corrupt: "the objective evidence suggests that, even now, the police have neither the capacity nor the willingness to provide protection for individuals at risk from particular non-state actors". He describes protection by the Afghan government in Kabul as ineffective, with security in that city having deteriorated still further recently. He says he views Tribunal country guidance cases considering Kabul a viable internal relocation alternative, "even if it was not the case previously, [to be] no longer valid, and that Kabul, like virtually all other places in Afghanistan, is insecure and unsafe". Internal relocation to Kabul "would not", he states, "ensure that a returnee would be able to live there freely and without fear and maintain a viable private and family life there". The International Security Force (ISAF) and the Afghan army "are clearly no longer able to provide adequate security, even in Kabul….".

12. Dr Seddon concludes that in his opinion "the point has been reached where it is time to revise the current country guidance and revise the [GS view] so that "the level of indiscriminate violence in Afghanistan is now [recognised to be] high enough to meet the criteria of Article 15(c)".

Dr Giustozzi

13. Dr Giustozzi is currently a visiting research fellow at the London School of Economics and Political Science, Development Studies Institute (DESTIN). His numerous publications include the book, Empires of mud: wars and warlords in Afghanistan, 2009. He has extensive field experience in Afghanistan, most recently in September-October in Kabul to research corruption in the police and the organisation of the Taliban. Dr Giustozzi's report is dated 2 December 2011. He also provided a brief response to two clarificatory questions asked by the Treasury Solicitor in a letter of 27 February 2012 about certain observations made in his report. Paras 4-18 of his report address evidence relating to the leftist People's Democratic Party of Afghanistan (PDPA)/Homeland Party, targeting of former leftists, the poor record of Afghan law enforcement agencies, both in Afghanistan as a whole and in Kabul, land grabs as a source of conflict, attitudes of the population towards extramarital affairs, honour killings and blood feuds. Paragraphs 19-20 address the level of violence in Afghanistan. Mainly by reference to UNAMA and ANSO statistics, Dr Giustozzi states that the level of violence has quadrupled since 2007 and appears set to show further increases by the end of 2011. Dr Giustozzi observes that the actual number of deaths is likely to be higher than those recorded by UNAMA, "as for example Afghan police, army and security services never report killing any civilians. Finally, a larger number of civilians have been injured and maimed, but there are no exact statistics in this regard".

14. At paras 21-24 Dr Giustozzi deals with the likely risks the appellant would face on return. Since, like the first eighteen paragraphs, they are written on the assumption that the appellant's account of his past experiences was accepted as credible, they have limited relevance, but even so they identify the lack in Afghanistan of a state benefit system, the limited

nature of medical services and the great difficulties that would face returnees in Kabul in finding accommodation and employment (unemployment being estimated at 35-50% and rates of pay being very low ($4 a day).

15. At para 25 Dr Giustozzi concludes:

> "In summary, the risk deriving from indiscriminate violence has increased, even if the overall number of civilian casualties remains relatively modest relative to the size of the population. Most indiscriminate violence occurs in the shape of pressure mines, which are indiscriminate by nature. The risk is mainly on the roads connecting the provincial and district cities to the villages. In Kabul city the risk deriving from indiscriminate violence is mainly limited to occasional terrorist attacks, mostly in the central parts of the city, where most government offices and international targets are located…".

16. Mention should also be made that the background evidence before us also includes a report written by Dr Giustozzi for the Norwegian organisation, LANDINFO, dated 9 September 20011, to which we refer on several occasions below.

The ARC Evidence

(a) Asylum and Research Consultancy (ARC) Report, February 2012

17. The authors of the Asylum and Research Consultancy (ARC) Report begin by describing their background and experience as researchers. In addition to having worked as researchers for UK organisations, both have also worked as researchers for the European Council on Refugees and Exiles (ECRE) and the Office for Democratic Institutions and Human Rights (ODIR/OSCE). Ms Williams holds an MA in Social Anthropology and Development from SOAS and an MA (Hons) in Philosophy from Edinburgh University. Ms Huber holds an MA in the Theory and Practice of Human Rights from the Human Rights Centre at the University of Essex, an MSc in Violence, Conflict and Development from SOAS and a BA in Contemporary History from the University of Sussex. The authors explains their methodology as being to provide objective evidence available in the public domain so as to draw out the salient issues that illustrate the country conditions in Afghanistan in relation to people such as the appellant. "We have not knowingly omitted any fact that could materially affect our comments given above". The salient issues are those identified in five questions posed by the appellant's solicitors.

18. The first question concerns the security situation in Afghanistan, especially in Kabul and Ghazni province, with reference to (a) the number of attacks; (b) the number of casualties; and (c) the level of insurgent activities. The report gave its response by way of citing excerpts from various sources. Under the sub-heading "B: Security situation in Kabul", the report states that:

> "The information included in this section demonstrates that despite the fact that Kabul is considered safer than other provinces, it has become increasingly insecure as demonstrated by the incidence and strength of insurgent attacks carried out in the capital, including in fortified areas."

19. Under a sub-heading, "C: Security situation in Ghazni", the report recalls that the December 2010 UNHCR Eligibility Guidelines had listed Ghazni as one of five provinces which it considered could be characterised as in a situation of generalised violence (the others being Helmand, Kandahar, Kunar and parts of Khost). As with Khost, UNHCR only considered parts of Ghazni to be in such a situation. The ARC Report notes that the FCO currently advises against all travel to Ghazni; that in November 2011 the BBC reported that the "volatile Ghazni province had been named as among those due to be handed over by NATO to Afghan control" and that the International Crisis Group(ICG) reported in June 2011 that the province had slipped from being one of the most stable to the third most volatile after Kandahar and Helmand with its security rating downgraded by ISAF. Further reports are cited highlighting that in Ghazni the Taliban had extensive territorial control and that much of the insurgent activity targets the provincial capital, Ghazni city, and the districts in the south and the east.

20. The second question addressed by the ARC Report is "The prospects for a young man to secure accommodation, employment, means of support in Afghanistan, especially in Kabul and Ghazni province". The report draws attention to sources detailing the country's huge number of IDPs (351,907 according to Amnesty International in May 2011) and the low living standards, (said by the CIA World Factbook to be among the lowest in the world). The report cites sources saying that the unemployment rate in Afghanistan is 35% and that 36% of the population live below the poverty line. Around 60% of the population suffer from mental health problems. There are real concerns about the impact the withdrawal of international troops in 2014 will have, since around 60% of GDP is in some way linked to their presence.

21. In relation to Kabul the report says the background sources establish that the situation for returnees and IDPs in Kabul is "dire", that IDPs live in worse conditions than the urban poor, that shelter is scarce, with 80% of the population living in squatter settlements, that the rental market "prices out" even the middle classes from adequate accommodation and that there are an estimated 50,000 street children in Kabul.

22. Concerning Ghazni, the ARC Report marshals sources indicating that the economic situation there is poor.

23. The third question addressed is, "The availability of effective protection, especially in Kabul and Ghazni". The ARC Report notes ongoing concerns about the ability of the ANSF to provide effective protection, given lack of resources, broader governance deficiencies, high levels of corruption, politicisation and insurgent infiltration and a climate of impunity. There is

substantial scepticism within the U.S. defense establishment that the Afghan National Army (ANA) can assume full security responsibility by 2014. In areas under government control, the rule of law is said to be weak. In some areas under the Taliban control this organisation is said to operate a highly repressive parallel judicial system.

24. As regards Kabul, the ARC document cites reports that the ANA took over security of Kabul city from Italian forces in August 2008 and Kabul province since early 2009. It has established a layered defence system in and around Kabul, which (according to the Center for Strategic and International Studies (CSIS), 15.11.2011) has resulted in improved security, although (according to the same source) Kabul continues to face persistent threats, particularly in the form of high-profile attacks and assassinations. Infiltration by the Taliban and other insurgent groups is a significant problem.

25. Regarding Ghazni, the ARC Report records, *inter alia*, the Afghanistan Research and Evaluation Unit stating in October 2011 that the general perception is that while the government has maintained control over Ghazni city, it has largely lost control over the districts and rural areas in the province.

(b) Oral evidence of Ms Stephanie Huber

26. Ms Huber confirmed that she is a consultant for ARC. ARC had been established in 2010 by her and her colleague, Liz Williams. In preparing the ARC Report in mid December 2011 they had adopted and applied the criteria set out in the Common EU Guidelines for Processing Country of Origin Information (COI) in full. Their report sought to synthesise from the mass of materials from recognised sources available on Afghanistan relevant information relating to the questions they had been asked to address. It did not seek to provide their personal opinion. Where their report records opinions (e.g. that the situation for IDPs and returnees in Kabul is “dire”) that was simply summarising the effect of information from other sources: Amnesty International, for example, had used the word “miserable” to describe the same situation. She considered that information that had become available since they signed off their report confirmed the overall picture they had given. In its February 2012 report, UNAMA, for example, had said that 2011 was the fifth consecutive year in which there had been an increase in civilian deaths. Whilst she considered it was necessary to examine the methodology of all the bodies that published data relating to the armed conflict in Afghanistan, she attached significance to the fact that UNAMA has a presence on the ground in most parts of Afghanistan and is committed to regular updating. ANSO was another body whose reports are well-respected for their independence.

27. In reply to questions from the panel, Ms Huber said that the observation at p.6 of the ARC Report that Kabul was becoming increasingly insecure was one informed by their researches. They took a similar starting point to that taken by Home Office COIS Reports, but the materials they cited were

those they considered relevant to the questions asked. She accepted there would always be some material they did not mention, but they did not seek to select sources in favour of one view only. Their principal task was collating and condensing information. She was asked if the ARC Report would have included reference to the CSIS study dated February 2012, had it been available earlier. She said that the ARC would definitely have consulted it but would have gone to the actual sources. ARC primarily used reputable sources, but they tried to take account of the agendas of the different bodies providing data: some international agencies or NGOs might, e.g. sometimes be inclined to report in a particular way for funding purposes. ARC Reports would also draw on information provided by anti-government or pro-government sources even if not established or reputable. ARC left it to the sources to provide assessments. We reproduce at Appendix C the index of sources for their Report supplied to us by ARC.

Background Evidence

28. The sources of background evidence we have considered are listed in Appendix References to the COIS are to its October 2011 report on Afghanistan.

Parties to the Conflict

(a) Government and pro-government actors

29. The ANSF includes the Afghan National Army (numbering 171,600), the Afghan National Police (ANP) (numbering 136,000), the National Directorate of Security and the Afghan Public Protection Force (COIS, 10.01, 10.04). As at October 2011, the overall strength of ANSF was 305,600. In July 2010 the government set up the ALP (Afghan Local Police) to act as "local security organs". Its strength is 7,000 but it is due to grow to 30,000 by end of 2012 (COIS, 10.23). There is also an Afghan National Air force and an elite Afghan National Guard (COIS, 10.25).

30. The international forces are the ISAF (International Security Assistance Force), although this remains a subordinate headquarters within NATO's command structure (COIS, 10.02). In February 2011, ISAF troop numbers stood at 130,000, from 48 countries.

31. Private security firms also have a strong presence in Afghanistan, especially Kabul (COIS, 10.69).

(b) The Insurgents

32. The three main forces comprising the insurgency are the Taliban (f the Quetta Shura) the Haqqani Network and the Islamic Movement of Guldbuddin Hakmatyar (Hezb-e-Islami). Additionally, especially in the north, there are transnational organisations of foreign fighters such as the Islamic Movement of Uzbekistan, the Islamic Jihad Union and Al-Qaeda. Although fragmented, the insurgency shares a common aim of seeking to weaken or overthrow the government and the international military forces

(LANDINFO, 20 September 2011). Major reports refer to insurgents as Anti-government elements (AGEs).

33. Following the US led surge launched in late December 2009/early 2010, the insurgents have switched their tactics to avoid large-scale confrontations with ISAF forces and to rely instead on "asymmetric" tactics featuring an increase in the use of IEDs and "high profile" attacks on "soft targets" (US Department of Defense (USDoD), October 2011). Whilst ISAF Forces have enjoyed some success in clearing insurgents from their strongholds, holding them has proved difficult (COIS, 8.24). According to the IGC report, The Insurgency in Afghanistan's Heartland, 27 June 2011:

> "The insurgency has expanded far beyond its stronghold in the south east. Transcending its traditional Pashtun base, the Taliban is bolstering its influence in the central-eastern provinces by installing shadow governments and tapping into vulnerabilities of a central government crippled by corruption and deeply dependent on a corrosive war economy. Collusion between insurgents and corrupt government officials in Kabul and the nearby provinces has increased, leading to a profusion of criminal networks in the Afghan heartland."

34. According to the LANDINFO, Human Rights and Security Situation report of Dr Giustozzi, 9 September 2011, although the Taliban has suffered setbacks in the north-east and is under greater pressure in the south, the number of insurgent-initiated attacks has grown and insurgent numbers have grown. There is little indication that the U.S.-led surge has made the insurgency crack.

35. It must not be overlooked that the above identifies only the main actors to the current conflict; it does not identify all those involved. Dr Giustozzi's report at p.25 notes that according to the Disbandment of Illegal Armed Groups (DIAG) UN Development Programme (UNDP) database maintained by Afghanistan's New Beginnings Group (ANBP) and the Disarmament Commission, as of late 2006 there were 5,557 illegal armed groups, a figure likely to have increased since.

Causes of the conflict

36. On the causes of the current armed conflict in Afghanistan, (Professor) Theo Farrell & Olivier Schmitt in their March 2012 study published by the Division of International Protection UNHCR entitled "The Causes, Character and Conduct of Armed Conflict, and the Effects on Civilian Populations, 1990-2010", state:

> "Internal armed conflict in Afghanistan has had multiple causes. Much like the jihad against Soviet forces from 1979-89, the conflict since 2001 is an Islamic insurgency against an infidel invader, currently led by Taliban in alliance with the other two major insurgent groups in the east (the Haqqani network and Hekmatyar's HIG). The current conflict is also a civil war. Some view it as a war between Ghilzai Pashtuns (who form the core of the Taliban) and the victorious Northern Alliance (Durrani Pashtuns, Tajiks,

Uzbecks and Hazaras). However, the Taliban appear to draw support from all Afghan ethnic groups. At the local level, competition between kinship groups frames a violent competition for resources (land, water, control of routes, and narcotics revenue). For example, the conflict in Northern Helmand is primarily a struggle between three Pashtun tribal groups, the Alizai, Alikozai, and Ishaqzai. The situation in central Helmand is less defined along tribal lines due to the complex tapestry of kinship groups, but still much of the insurgency is defined by various groups resisting abuse by the Afghan police who are locally dominated by the Noorzai tribe. This illustrates the larger point that since Afghan politics is based on patrimonialism, the natural order is for government positions to be used to sustain one kinship group at the expense of others. This, in turn, further challenges the simple view of the conflict as an Islamic insurgency against an elected government. Finally, the conflict also has a significant transborder dimension. The Taliban developed in the 1990s with the support of the Pakistani intelligence service (ISI) in the two unruly provinces that border Afghanistan, Baluchistan and the North-West Frontier. The Taliban retreated across the border to Pakistan in 2002, and continue to generate forces and direct attacks against the Afghan government and ISAF from these two provinces with the support of the ISI."

Types and indices of violence: several observations

37. Before going any further with summarising the evidence, it will help make sense of it to make the following observations. As will be become clearer when we come to summarising the parties' submissions, it is common ground between the parties in this case that in terms of measuring the physical effect of indiscriminate violence this "metric" (to use the phraseology of Professor Farrell in GS) is chiefly to be considered in terms of violence against civilians. As Mr Blundell put it in the respondent's skeleton argument, whilst combatant casualty figures will have a role to play in assessment, "the best indication of risk to civilians will still be civilian casualty figures", these being "the most direct indication of the risk faced by civilians in the territory in question".

38. In the copious background materials there is a grim manifest of figures dealing with casualties. They cover, *inter alia*, casualties suffered by the ANSF and the ISAF forces as well as figures for violence caused by them, figures for "total weekly kinetic events", "people killed, injured, or kidnapped in acts of terrorism", "total attacks", "total victims", "security incidents", "terrorist attacks", "attack patterns", "complex coordinated enemy attacks", "enemy-initiated attacks", "caches and(Improvised Explosive Device (IED) attacks", "IED efficacy", "IED activity, "civilian casualties", "incidents of hostages and wounded", "civilian deaths", "civilian deaths by parties to the conflict", "total civilian deaths and injuries" "causes of civilian deaths and casualties"," targeted killings and assassinations". In the Brookings Afghanistan Index, January 2012 yet further indices of similar ilk are given.

39. When considering these figures we need to bear in mind that there are a number of different bodies monitoring armed conflict-related indices in Afghanistan including (the following is not necessarily an exhaustive list):

the US Department of Defence (DoD/ISAF), the National Counterrorism Center (NCTC), various arms of the UN (Office of the High Commissoner for Human Rights (OHCHR);UN Assistance Mission in Afghanistan (UNAMA); UNDP; UN Office for the Coordination of Humanitarian Affairs (UNOCHA); and UN Department of Safety and Security (UNDSS), the Afghan NGO Safety Office (ANSO), the Afghanistan Independent Human Rights Commission (AIHRC) and the Brookings Institute. It appears that data-collection of this kind only began on a systematic basis in 2007. Not all these organisations employ the same methodology or measure precisely the same thing. ISAF itself, for example, is said to have confirmed that "[f]igures for ANSF-caused civilian casualties are not monitored by ISAF, and reporting of insurgent-caused civilian casualties is based on what is observed or on reports that can be confirmed by ISAF; it therefore presents an incomplete picture" (UNAMA Annual Report, 2011). Whilst we were not presented with full details of the methodologies of all the data-gatherers involved, it is clear that the figures produced by the following four organisations are widely referred to by commentators: UNAMA, ANSO and to a lesser extent the National Counter Terrorism Centre (NCTC) and the DoD/ISAF.

In relation to UNAMA's figures, its annual reports contain a detailed description of their methodology and confirm they are based on on-site investigations wherever possible and consultation with a broad range of sources and types of information with corroboration and cross-checking in order to evaluate reliability. Even so, its 2011 report (the latest to hand), emphasises that "UNAMA does not claim the statistics presented in this report are complete; it may be that UNAMA is under-reporting civilian casualties given limitations associated with the operating environment"(Annual Report 2011, p.ii). ANSO is another organisation that provides figures which also enjoy a reputation for reliable and comprehensive data-gathering. The materials we have do not explain the precise methodology used by ANSO, although from a 2009 article in the Journal of Conflict Studies[*] Vol.29 (2009) we glean that ANSO was formed in 2002 and is currently funded by the European Union, Swiss Aid and the Norwegian government. It has five offices (Kabul, Jalalabad, Herat, Kandahar and Mazar-i-Sharif) with a staff of around 50. The Kabul office collects security information from the regional security advisors in each of the five operational regions.

40. We allude to the NCTC and DoD/ISAF figures largely because they are discussed in the CSIS February 2012 report. Unlike the other aforementioned bodies, the NCTC and the DoD/ISAF figures expressly exclude all UK/ISAF/ANSF-inflicted casualties and violence.

41. We shall, of course, set out below the evidence before us giving figures relating to violence and the parties' submissions about them, but in order to help the reader make sense of the figures we make three other observations here. First, the figures provided by the above bodies exhibit

[*] David T MacLeod, "Leveraging Academia to Improve NGO driven Intelligence".

certain differences, most notably the fact that whereas UNAMA records a rise in civilians deaths from 2,790 in 2010 to 3,021 in 2011, ANSO records a reduction from 2,534 in 2010 to 2,427 in 2011. There is also reference to a drop in the number of "enemy-initiated attacks" in 2011. Nevertheless the picture the various figures convey of overall trends in the levels and patterns of violence is relatively similar. Following the previous practice of the Tribunal in country guidance cases dealing with Article 15(c), which seeks to take proper account of possible or likely underreporting and the problem of establishing precise and accurate figures, we shall for the most part try and highlight those giving the highest figures, which are by and large, the UNAMA figures and those of other UN bodies. ANSO figures are also noted because they are an independent body and are widely cited.

42. A further observation is this. We will seek to evaluate the evidence later on, but it can be noted now that in respect of virtually every indicator tracked by UNAMA and other UN bodies, violence in Afghanistan is on the rise. The United Nations Department of Safety and Security (UNDSS) estimate of total incidents shows an increase from 11,524 in 2009, 19,403 in 2010 to 22,903 in 2011. The UNAMA figures show the number of civilian deaths increasing from 2,412 in 2009, 2,790 in 2010 to 3,021 in 2011 and the total number of civilian casualties (deaths and injuries) increasing from 5,978 in 2009, 7,158 in 2010 to 7,528 in 2011. According to ANSO, conflict-related civilian fatalities increased from 1,590 in 2009 to 2,027 in 2010 but later figures given are 2,534 civilian deaths in 2010 and (as just noted) a slightly lesser figure for 2011: 2,427. At the same time, the ANSO figures also show that, in comparison with the second quarter of 2010, the second quarter of 2011 showed a countrywide attack pattern up from 19.6 incidents to 40.9 per day.

43. A final observation we make at this stage is that many studies refer to a distinction between "targeted" and "indiscriminate" violence" without, so far as we can see, furnishing any precise working definition of what they mean by these terms. It is easy to think of hypothetical examples which are clearly one or the other: e.g., as an example of the former, a single assassin's bullet aimed at a senior ANSF officer; and, as an example of the latter, a large bomb left in a civilian market place where there is known to be a broad mix of different types of civilians. But, to echo the words of Mr Vokes in his oral submissions, often there may not be any "bright lines" between the two categories of violence. For example, a bomb intended to hit an ANSF regiment might by mistake kill and injure many civilians going by in a bus; for example, a bomb seemingly placed in a mixed civilian site might in fact cause wholly or mainly police casualties or particular types of civilian casualties only. Hence, there is a need to treat references to these two types of violence with considerable caution.

44. At the same time, it is clearly important for us to set out (and later to analyse as best we can) the evidence relating to the targeting of civilians in particular, since, in general terms the more the evidence shows civilian casualty figures to be comprised of certain types of civilians singled out for

attack (e.g. provincial and district governors) the more difficult may become the case (depending, *inter alia*, on the extent of the casualty figures) for saying that mere or ordinary civilians face a real risk of indiscriminate violence within the meaning of Article 15(c).

45. With these observations in mind, we return to summarising the evidence and submissions.

Levels of violence: (a) Civilian casualties

46. On the situation facing civilians, Farrell and Schmitt in their March 2012 study for UNHCR write:

> "Between 600,000 and 2.5 million civilians were killed in the Soviet War. The Mujahideen Civil War also saw widespread indiscriminate violence against civilians; for example, around 10,000 were killed in the struggle for Kabul in 1993. In contrast, civilian fatalities since 2006 have been relatively modest. Starting from under 1,000 in 2006, direct civilian deaths from the conflict have risen by approximately 500 each year to over 2,700 in 2010. Civilian casualties caused by ISAF attract much media attention and Afghan government criticism, but most civilians are killed by insurgent action (ranging from a low of 55 per cent in 2008 to highs of 72 per cent in 2006 and 75 per cent in 2010). Afghanistan is the largest producer of refugees in the world, both in absolute numbers and as a proportion of the national population. Between 2006-2009, around 2 million Afghans were refugees (out of an estimated Afghan population of 30 million). Many of these are legacy refugees from the 1980s, when punishing attacks on the population caused 5 million to flee into Iran and Pakistan; the Mujahideen Civil War that followed discouraged many from returning. But it is also indicative of the general lack of security, especially in the Southern and Eastern provinces. In rural communities, civilians face daily threats of violence from corrupt security forces, insurgents, organised crime, and other armed groups. Afghan police commonly prey on the civilian communities they are supposed to protect (though this problem has improved since 2010). In the 1990s, the Taliban were responsible for some massacres, most notably in Herat. Since 2006, the Taliban have exercised more discipline, in order to win local consent. However, when they are unable to subvert tribal clans through subtle means, the Taliban will use violence and intimidation."

47. Acceptance on all sides that the level of violence experienced by civilians in Afghanistan is generally increasing is expressed by UNAMA in its July 2011 report thus: "the rising tide of violence and bloodshed in the first half of 2011 brought injury and death to Afghan civilians at levels without recorded precedent in the current armed conflict". According to the latest Brookings Institute study, "injury and deaths to Afghan civilians are at levels without recorded precedent in the current armed conflict".

48. As well as being responsible for numerous actual incidents of violence, the insurgency has relied heavily on threats and acts of intimidation. As noted by UNAMA in its July 2011 report, the Taliban, in addition to acts of violence such as abductions, "...continued to use intimidation tactics such

as night letters, verbal threats… and illegal checkpoints to force communities to support them."

49. In 2010, increased efforts were made by international and Afghan forces to reduce civilian casualties by putting into place Tactical Directives, Standard Operating Procedures and reinforced counterinsurgency guidelines restricting the use of force and emphasising protection. Search and seizure operations and night air raids were reduced. Nevertheless, although UNAMA in July 2011 estimated that pro-government forces were responsible for 14% of civilian deaths, a decrease of 9% over the same period in 2010, in his 21 September 2011 report, the UN Secretary General noted an increase in civilian casualties caused by pro-government forces. Although the Taliban has on occasions made statements claiming their fighters were instructed to avoid or minimise civilian casualties, the Report of the UNHCHR of 18 January 2012 observed that "[d]espite these public commitments, the Taliban have made no apparent efforts to adhere to international humanitarian law standards or to take action against their commanders or member who disobeyed them".

50. A UNAMA report from 9 March 2011 attributed 55% of civilian deaths in 2010 to anti-government elements. A huge number, nearly a third of these, were assassinations. Both the UNAMA reports covering 2010-2011 and the January 2012 UNHCHR document note that AGEs continue to carry out indiscriminate attacks against hospitals, religious places and other places protected under international law and that AGEs increasingly employed unlawful means of warfare, particularly victim-activated press plate IEDs that act like anti-personnel landmines. It is said in the latter report (para 12) that IEDs accounted for 2,278 civilian casualties (888 deaths and 1,390 injuries) making it the single largest killer of civilians in 2011. The UNAMA Annual Report for 2011 notes as well that the civilian death toll from suicide attacks rose dramatically in 2011. There were 431 civilians who were killed in such attacks. "While the number of suicide attacks did not increase over 2010, the nature of these attacks changed, becoming more complex, sometimes involving multiple suicide bombers, and designed to yield greater numbers of dead and injured civilians".

Levels of Violence: (b) Targeting of Civilians

51. Evidence dealing with the targeting of civilians reveals a very similar picture. As noted already, Dr Giustozzi in his 9 September 2011 report for LANDINFO stated that the ongoing Afghan conflict was "not particularly bitterly targeted at civilians". Figures indicated, he said, that "the parties in the conflict have been trying to restrain themselves and contain civilian casualties". In relation to insurgent acts:

> "…episodes of targeting of civilians because of their association with one of the parties in the conflict have been rare. The main exception is represented by government officials, whom the insurgents have been proactively targeting and increasingly so… ethnic and religious minorities have not been targeted."

When talking about the situation in the cities in government-controlled areas, Dr Giustozzi states:

> "In sum, for the Afghan urban dweller, there are two main sources of risk: one, quite small, is to get caught in a terrorist attack, usually taking place in city centres. The other is to get caught in the repression, which is only likely for those of recent immigration into the city from a village or from the refugee camps in Pakistan."

Levels of violence: (c) Targeted categories of civilians

52. Major reports highlight that the insurgents have targeted two main types of civilians: (a) those associated with the coalition forces and other international bodies; (b) those associated with the government at central and provincial levels.

53. For 2010 the Afghanistan Independent Human Rights Commission (AIHRC) and UNAMA recorded 381 assassinations and executions – more than double the number for 2009. There were also 251 incidents where at least 559 civilians were abducted. Abductions targeted senior provincial officials, tribal elders, aid and construction workers and educational officials among others. The majority of victims were abducted on suspicion of spying for the government and international military forces. At the same time, the AIHRC and UNAMA human rights estimated that in 2010 these abduction figures included at least 151 ordinary civilians (UNAMA Report, 9 March 2011). The UNAMA Annual report for 2011 states that it had documented 495 targeted killings in 2011, exceeding the high rate recorded for 2010. It is said that women and children increasingly bore the brunt of the armed conflict.

54. The insurgents have targeted in particular coalition forces, UNAMA, international NGOs, aid workers and foreign diplomatic missions as well as civilian personnel working for the international bodies or projects.

55. As regards targeting of those associated with the Afghan government, according to UNAMA's July 2011 report:

> "Targeted killings continued at last year's high rate. The report notes that those targeted are in general those civilians perceived to support the Afghan government or international forces. It noted attacks on provincial and district governors, provincial council members, chief of police, members of peace councils, tribal elders and fighters entering the reintegration program, off-duty police, teachers, educational officials as being singled out for targeted killings. Between January and June 2011, UNAMA documented 190 targeted killings compared to 181 in the same period in 2010."

Levels of violence (d) Combatant casualties

56. The Brookings Institute provides a graph of US and coalition troop figures showing casualty figures of 514 in 2009, 711 in 2010 and 566 in 2011. The same body records the number of insurgents killed as approximately 3,200 in 2011, a very considerable increase from the 1,066 in 2010.

Comparison with other conflicts

57. We noted earlier references in Dr. Seddon's report to comparisons made by Professor Farrell in GS between the armed conflict in Afghanistan and that in several other countries, including Iraq. Although expressing doubt these were proper comparators, Dr Seddon himself did not furnish any further data about such comparisons.

58. The respondent relied on very recent comparative data set out in CSIS study by A Cordesman & A Burke, "Afghanistan: The Failed Metrics of Ten Years of War" dated 9 February 2012. It focuses on comparison with Iraq and Pakistan.

59. In his 9 September 2011 LANDINFO report, in a passage we have already quoted, Dr Giustozzi, without explaining his points of comparison, wrote that:

> "[i]n comparative terms the on-going Afghan conflict has not been particularly bitterly targeted at civilians. Although civilian casualties have gradually increased year-on-year, they have done so less than proportionally with the increase in the number of violent incidents from 2008 onwards. This suggests that the parties in the conflict have been trying to restrain themselves and contain civilian casualties."

The Swiss Federal Court judgment SA v Federal Office for Migration (16 June 2011) 9.7.4 – see below para 102 - notes that the Heidelburg Institute for International Conflict Research in its "Conflict Barometer 2009" rated 31 conflicts around the world as "extremely violent" and classed seven of these as wars, including Afghanistan's (no more information is given than that).

Protection

60. According to the CRS Report of 22 September 2011, the Kharzai government is estimated to control only about 30% of the country. Insurgents control 4%, but have some presence in another 30%. The remainder are controlled by tribes, warlords or local groups (COIS, 8.02). Criminality, weak governance, insecurity and a weak rule of law are prevalent. The Fund for Peace (20 June 2011) has ranked Afghanistan in the top ten on its Failed States Index for the past five years due to "security challenges" and the lack of any functioning government capable of providing access to the basic necessities and able to implement public services in the face of pervasive corruption and drug lord challenges to state legitimacy.

61. A number of leading commentators are sceptical that the "Transition" which started in the summer of 2011 and is intended to see hand-over by ISAF of security to Afghan forces by 2014, will be successful (ARC, pp14-15). According to the UNAMA July 2011 report, as the conflict has intensified in the traditional fighting areas of the south, and the south-east and moved to districts in the west and north, civilians have experienced "a downward spiral of protection".

Corruption

62. In its 2010 Corruption Perception Index (CPI) Transparency International ranked Afghanistan at 176 of 178 countries giving it a CPI score of 1.4 (10 is "highly clear" and 0 is "highly corrupt"). Various major country reports describe corruption, nepotism and cronyism as being rampant at all levels and there being a lack of political will to protect the population against it. The massive flows of money from the military, international donors and the drug trade exacerbate the problem. A lack of political accountability and low salaries heightened government corruption including within the ANP. It is said that the average Afghan is forced to pay five bribes a year; averaging $156 per bribe.

Socio-economic conditions/IDPs

63. Afghanistan is a poor country by any reckoning. The World Bank calculates the country's "poverty headcount" to be 36% and illiteracy as high. Yet the economy has grown so that since 2002 GDP has increased from 182 to 592 dollars (Institute for War and Peace Reporting, 22 August 2011). Although there are huge disparities in wealth, with 35.4% of the workforce unemployed, the country has moved from 181st (second to last) in 2009 to 172nd on the HDI Index for 2011, with a strong growth rate.

64. Rapid urbanisation has seen some 70% of the urban population living in unplanned areas or illegal settlements; the pace of growth exceeding the planning and management capabilities of the government.

65. There is said to be a significant incidence of secondary displacement (returning IDPs who move again). According to the latest COIS, IDPs have been vulnerable to food insecurity, while physical insecurity and the absences of basic services in places of displacement have forced many IDPs into protracted secondary displacement in urban areas. "The Afghan government is generally unable or unwilling to assist IDPs. Hundreds of thousands of IDPs have been assisted by international agencies, but assistance outside camps has been short-term and restricted by problems of funding and access" (COIS, 31.02). A Danish Refugee Council report of 8 September 2011 states that according to UNHCR since 2002 over 5.6 million Afghan refugees have returned to that country, yet more than 40% have not fully integrated. The repatriation programme that began in 2002 is the largest UNHCR-assisted programme in almost 30 years.

66. In an April 2011 report the IDMC recorded that 730,000 people have been internally displaced in Afghanistan due to conflict since 2006. At the end of January 2011, 309,000 people remained internally displaced due to armed conflict, human rights abuses and other generalised violence (COIS, 31.02). The UNAMA report for 2011 states that "[c]onflict and insecurity displaced 185,632 Afghans in 2011, an increase of 45% from 2010."

67. According to the Internal Displacement Monitoring Centre (IDMC), 13 March 2011, a significant number of IDPs have found at least minimal

livelihoods and live in similar conditions to the rest of the urban poor, although it should be emphasised that many urban IDPs remain vulnerable.

68. In August 2010 flooding across the country displaced 200,000 persons (US State Department Report, 7 April 2011), p.20).

69. Under the UNHCR repatriation programme, which entered its 10th year in 2011, every returnee receives US$150 upon arrival to cover their transport and some initial costs (IRIN, 9 November 2011). The return of large numbers of refugees since 2002 has placed huge pressure on Afghanistan absorption capacity (Forced Migration Review (FMR), 8 September 2009).

Humanitarian Aid

70. In terms of development aid, overall figures for the amount of money the international community has spent on or promised to Afghanistan are hard to come by, but over $67 billion has been pledged at four donor conferences since 2002 (Central Intelligence Agency (CIA) World Factbook, September 2011, COIS, 2.02). The CRS Report for Congress, Feb 6, 2012 breaks this down, identifying $39 billion of that amount as being to equip and train Afghan forces, For 2012 it is said that pledged amount is "… in addition to about $90 billion for U.S. military operations there".

71. According to the Agency Co-ordinating Body for Afghan Relief ((ACBAR), June 2010) there are approximately 1,300 national NGOs, 300 international NGOs and 16 UN organisations involved in humanitarian and development assistance in Afghanistan as of January 2010.

72. The Institute for War and Peace Reporting (IWPR) (22 August 2011) has warned that the planned withdrawal of international troops in 2014 may mean the Afghan economy faces a "sharp shock" as 60% of the country's GDP is in some way linked to the foreign troop presence.

Provincial level

73. We have already noted evidence indicating both a geographical shift and expansion of the armed conflict in Afghanistan from the existing areas in the south and south east to the east and to a lesser extent in the west and north, although we lack precise graphs with a breakdown of civilian deaths and casualties and security incidents for each province. The UNAMA report covering 2011 notes that the southern and southeastern regions accounted in 2011 for 64% of all incidents (32% each), although a steep decrease after September 2011. Under a subhead, "Geographic Shift in the Conflict", it states:

> "As the year progressed, the conflict gathered intensity outside those southern provinces where fighting has historically been concentrated and worsened in several provinces in the southeastern and eastern regions. In the last half of 2011, although Kandahar and Helmand remained the provinces with the highest number of civilian deaths with 290 civilians

killed; this number is a 39 per cent decrease compared to the same period in 2010.

In contrast, the southeastern provinces of Khost, Paktita and Ghazni and eastern provinces of Kunar and Nangarhar saw a combined total of 446 deaths, a 34 per cent increase compared with the same period in 2010. Between July and December 2011, civilian deaths in the central region jumped from 128 to 230, an 80 per cent increase from the previous year. This rise was prominent in Kabul province, where civilian deaths increased from 23 in the last half of 2010 to 71 in 2011. 61 of the 71 civilian deaths in Kabul during this period occurred as a result of six suicide attacks.

Although targeted killings by AGEs decreased in the southern, central and northeastern regions in 2011, country-wide such killings rose by six per cent, with huge increases in the western region (255 per cent), the southeastern region (14 per cent) and the eastern region (107 per cent). This shift was particularly evident in the second half of the year…."

74. This report also gives a graph of "Targeted killings by Region July to December" which notes that of the 495 targeted killings Afghanistan-wide, the highest numbers were in the southern eastern and southern provinces. The pattern overall was a decrease in the south, central and northeast regions but increases in other parts of the country.

75. The ANSO report for 1 Jan-31 December 2011 provides a table showing "comparative attack rates per province" from which it can be seen that the provinces with the highest AOG attack rates in 2011 were Helmand with 2,416, Ghazni with 1,679, Kandahar with 1,285, Kunar with 1,280 , Paktita with 1,106 and Khost with 1,106. A graph in the earlier Jan 1-Sep 30th 2011 report sets out the "comparative attack rate – 2011 v 2011 which contains the comment that "Ghazni and Khost – and to a lesser extent Paktya and Paktita – joined Helmand, Kandahar and Kunar as the most violent provinces". Kabul was said to show a reduction in attack rates.

76. These figures have to be read against the backdrop that the first "tranche" of the "Transition" process transferring responsibility for security from ISAF to ANSF, began in July 2011, the seven areas chosen being the provinces of Kabul (excluding Sarobi district), Panjshir and Bamiyan and the municipal districts of Mazar-e-Sharif (Balkh province), Lashgor Gal (Helmand province) and Herat (Herat province); and the Mehtor Lam Municipality, not including the rest of the capital district (Laghman province). A second "tranche of provinces/districts was announced on 27 November 2011; it included "those areas of Kabul province not transitioned already (Sarobi district)".

(a) Kabul

77. Kabul is home to nearly one fifth of the population and is the largest city. The ANA took over security in Kabul city from ISAF in early 2009. In November 2010 the Kabul police chief was reported as saying that the city needed 20,000 more police (BBC Monitoring South Asia, 18 November

2010). The Taliban have been able to infiltrate entire units of the police and army (New York Times, 21 May 2011). In June 2011 LANDINFO described the security situation in Kabul, Herat and Mazar-e-Sharif as having improved. On 15 November 2011 the CSIS noted that ANSF has established a layered defence system in and around Kabul which has resulted in improved security and the ANSF continues to respond effectively to threats and attacks. The city has been the target of high-profile attacks on so-called "soft targets", like the Intercontinental Hotel (June 2011), the British Consulate (August 2011), the US Embassy and ISAF Headquarters (in September 2011). The US Department of Defence, October 2011 stated that "Kabul remains a persistent strategic target for high-profile attacks and assassination attempts". Although most of the attacks have been on government or diplomatic or ISAF-related targets in the centre of the city, this has not been entirely so, as illustrated by the attacks on the 'Finest' supermarket on 28 January 2011, the attack on a shrine packed with worshippers on Ashura day on 6 December 2011. Similar attacks have occurred in early 2012.

78. At the same time, huge resources are being poured in to bolster security in Kabul. The Congressional Research Service in a 22 November 2011 report noted that approximately "$2.7 billion worth of vehicles, weapons, equipment and aircraft as being provided during August 2011 – March 2012".

79. There is considerable evidence that increases in rent in Kabul have been steep, pricing out even the middle classes from adequate accommodation (ARC, p10).

IDPs in Kabul

80. In October 2010 IRIN wrote that IDPs in Kabul had said "they had been abandoned by the government and aid agencies". On 16 February 2011 the Danish Refugee Council stated that many returnee families had no choice than to set up tents with only limited assistance. According to a July 2011 IRIN report, some 70% of the urban population of Kabul live in unplanned areas or in illegal settlements, with poor sanitation and lack of access to safe drinking water.

(b) Ghazni

81. The LANDINFO report of 9 September 2011 (prepared by Dr Giustozzi) notes that Ghazni is the only province of the south-east where the Taliban has extensive territorial control, with insurgents having virtually full control in districts such as Andar, Moquer, Qarabagh, Giro, Gelan and Nawa. A further report from the same body dated 20 September 2011 explains that "[m]uch of the insurgent activity in the province targets the provincial capital, Ghazni city, and the districts in the south and east".

82. As already noted in the ARC report, the ICG in its 27 June 2011 report described Ghazni province as having slipped from being one of the most

stable to the third most volatile after Kandahar and Helmand with its security rating downgraded by IASF. It wrote:

> "As in other provinces, the Taliban combines assassination and intimidation to consolidate its hold on Ghazni, particularly targeting local Afghan security forces."

In October 2011 the Afghanistan Research and Evaluation Unit noted that:

> "[c]ertain groups were also identified to be more at risk in the current period. First, the Taliban target anyone who is perceived to be working for the current government, in any position. Many respondents in Ghazni city were identified to have government-related positions in a variety of roles – in the police, as government staff and even as teachers… Second, anyone who was identified as supporting or [being] part of the Taliban faced being raided, interrogated or killed by the government and coalition forces."

83. The same report noted that there was a general perception, particularly in the rural areas, that international troops killed more civilians than insurgents. According to the LANDINFO Giustozzi report, 9 September 2011, there was evidence that the Taliban, at least in Ghazni, threaten or kidnap family members of government officials to force them to quit their jobs.

In Ghazni unemployment is said to run high and the economic situation is said to be poor (ARC, p.12).

Returns Packages

84. In a note produced by UKBA dated March 2012, assistance to returnees to Afghanistan is said to be of two kinds:

(1) Assisted Voluntary Return (AVR) packages
For those in the asylum stream they consist of £500 cash on departure with a further £1,000 reintegration assistance (£1,500 for family cases) as cover for flights and onward travel. For irregular migrants, assistance is limited to flights and onward travel, although for vulnerable persons there is an option for Refugee Action to apply for up to £1,000 reintegration assistance. Until August 2012 the provider in Afghanistan is the International Organisation for Migration (IOM). It is said to provide a meet and greet service at the airport and to deliver reintegration assistance. The latter consists of non-cash payments for certain activities, goods and services in Afghanistan that help build a new life. Reintegration options are co-ordinated at IOM Kabul's main office. Post-arrival, IOM assists with onward transportation and/or temporary accommodation if required.

(2) Reintegration Services for enforced returnees
This service, which is part of the UK/Afghanistan/UNHCR Tripartite Returns Memorandum of Understanding, currently consists, *inter alia*, in reception at Kabul Airport by IOM staff and an IOM doctor, onward transportation to the returnee's final destination, temporary

accommodation with full board for up to fourteen days at the Jangalak Reception Centre. The reintegration component is said to consist, *inter alia*, in assistance in vocational and educational training, in kind, support towards the development of a small business and employment/job referrals for those interested in direct employment.

85. The note states that UKBA has a Migration Delivery Officer based at the British Embassy in Kabul who "oversees the provision of services to returnees". The officer liaises directly with the Afghan Ministry for Refugees and Repatriation to resolve any problems identified by returnees or regarding conditions on return, as appropriate".

UNHCR Position

86. Reference has already been made to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, 17 December 2010. They include references to a considerable body of empirical data about conditions in Afghanistan, as well as UNHCR's evaluation of it in the form of guidelines. The Guidelines identify two types of risk category. The first concerns persons with a specific risk profile:

> "UNHCR considers that individuals with the profiles outlined below require a particularly careful examination of possible risks. These risk profiles, while not necessarily exhaustive, include [NB. For convenience we start each subcategory on a separate line:]
>
> (i) individuals associated with, or perceived as supportive of, the Afghan Government and the international community, including the International Security Assistance Force (ISAF);
>
> (ii) humanitarian workers and human rights activists;
>
> (iii) journalists and other media professionals;
>
> (iv) civilians suspected of supporting armed anti-Government groups;
>
> (v) members of minority religious groups and persons perceived as contravening Shari'a law;
>
> (vi) women with specific profiles;
>
> (vii) children with specific profiles;
>
> (viii) victims of trafficking;
>
> (ix) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals;
>
> (x) members of (minority) ethnic groups; and
>
> (xi) persons at risk of becoming victims of blood feuds.

87. The second type of risk category is based on risks to persons arising from generalised violence in particular parts of Afghanistan. Concerning it, the Guidelines state that:

> "In light of the worsening security environment in certain parts of the country and the increasing number of civilian casualties UNHCR considers

that *the situation can be characterized as one of generalized violence in Helmand, Kandahar, Kunar, and parts of Ghazni and Khost provinces*. Therefore, Afghan asylum-seekers formerly residing in these areas may be in need of international protection under broader international protection criteria, including complementary forms of protection. In addition, given the fluid and volatile nature of the conflict, asylum applications by Afghans claiming to flee generalized violence in other parts of Afghanistan should each be assessed carefully, in light of the evidence presented by the applicant and other current and reliable information on the place of former residence. This latter determination will obviously need to include assessing whether a situation of generalized violence exists in the place of former residence at the time of adjudication." (Emphasis added).

In relation to internal relocation the Guidelines state:

> "UNHCR generally considers internal flight as a reasonable alternative where protection is available from the individual's own extended family, community or tribe in the area of prospective relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. Given the breakdown in the traditional social fabric of the country caused by decades of war, massive refugee flows, and growing internal migration to urban areas, a case-by-case analysis will, nevertheless, be necessary."

88. In a 2011 UNHCR country operations profile (circa early 2011) UNHCR re-affirmed its December 2010 Guidelines.

89. In Safe at Last: Law and Practice in Selected EU Member States with respect to Asylum Seekers Fleeing Indiscriminate Violence, UNHCR, July 2011, the authors note in relation to Afghanistan at p22 that:

> "…it was UNHCR's view at the time of the research in 2010 that there was a worsening security situation in certain parts of the country – in particular Helmand, Kandahar, Kunor and parts of Ghazni and Khost province – with high levels of violence and human rights violations linked to the conflict. Moreover, other provinces including Uruzgon, Zabul, Paktita, Nangahar, Badghis, Paktya, Wardak and Kunduz were also experiencing significant although fluctuating levels of violence. The violence continued to cause significant population displacement and high numbers of civilian casualties, in particular due to suicide attacks and the use of improvised explosive devises. UNAMA documented 3,268 civilian casualties during the first six months of 2010 alone."

UKBA Operational Guidance Note (OGN) v9, 20 February 2012

90. UKBA Operational Guidance Notes are not, of course, a source of COI, although they do sometimes contain some references to relevant COI; they are essentially a source of guidance to caseworkers on relevant issues related to country conditions: see EM and others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC), para 114. The paragraphs of the current OGN dealing with Article 15(c) are 3.6.11-3.6.12. They state:

"3.6.11 At the end of 2010, UNHCR considered that the worsening security environment and increasing number of civilian casualties was such that the situation in Helmand, Kandahar, Kunar, and parts of Ghazni and Khost provinces could be characterised as one of generalised violence. However, whilst there is indiscriminate violence in some parts of Afghanistan, it is not currently at such a level in Afghanistan *generally* or a material part of it, that substantial grounds exist for believing that any civilian would, solely by being present there, face a real risk of serious harm. Given the complexity and fluidity of the situation, asylum applications by Afghans claiming to flee generalised violence in parts of Afghanistan should each be assessed carefully, in light of the current country information specific to the profile of the applicant.

3.6.12 To establish a claim under Article 15(c) of the Qualification Directive it will therefore be necessary for a claimant to establish that particular factors place him or her at additional risk above that which applies to the civilian population generally, such that he or she is at real risk of serious harm from the levels of indiscriminate violence that do exist, and that internal relocation to a place where there is not a real risk of serious harm is not reasonable. Case owners must consider carefully whether the existence of such factors mean that the harm they fear is not in fact indiscriminate, but targeted, if not at them personally, at a Refugee Convention defined population to which they belong, in which case a grant of asylum is likely to be more appropriate."

91. At paras 2.3.7-2.3.8, in a subsection dealing with actors of protection, the OGN states:

"2.3.7 State protection outside of Kabul will only be accessible in exceptional cases. In Kabul the authorities, including the ISAF forces, are in general willing to offer protection to citizens. However, case owners must bear in mind that for the reasons above, their ability to provide effective protection is limited. It is important that case owners refer to the most up to date country information to ascertain whether in the circumstances prevailing at the time the decision is made, effective protection is available in Kabul for an individual applicant, taking full account of their personal circumstances.

2.3.8 Effective protection is not available, even in Kabul, for single women or female heads of household without a male support network."

92. In the subsection dealing with internal relocation the OGN states at paras 2.4.5-2.4.7:

"2.4.5 The traditional extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism, particularly in rural areas where infrastructure is not as developed. Afghans rely on these structures and links for their safety and economic survival, including access to accommodation and an adequate level of subsistence. In certain circumstances,

relocation to an area with a predominantly different ethnic/religious make-up may also not be possible due to latent or overt tensions between ethnic/religious groups.

2.4.6 In practice, all returns are currently to Kabul. Careful consideration must be given to any other place of proposed internal relocation and how it will be accessed, taking account of the latest security, human rights and humanitarian conditions in the prospective area of relocation at the time of the decision, including the availability of traditional support mechanisms, such as relatives and friends able to host the displaced individuals; the availability of basic infrastructure and access to essential services, such as sanitation, health care and education; and their ability to sustain themselves, including livelihood opportunities. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control.

2.4.7 Unescorted internal travel for single women and female heads of household who do not have a male support network can be extremely difficult. Discrimination and harassment are common, as would be establishing themselves in an area where they did not have such a support network. Sufficient protection is not available to them, even in Kabul, and it would therefore generally be unduly harsh to expect single women and female heads of household who have a well-founded fear of persecution in one part of Afghanistan, and who do not have a male support network, to relocate internally."

Tribunal Country Guidance and related domestic case Law

93. In PM and Others (Kabul – Hizb-e Islami) Afghanistan CG [2007] UKAIT 00089, the Tribunal held that it was possible for failed asylum seekers to relocate to Kabul if they had a well-founded fear of what might happen to them in their home areas. In RQ (Afghan National Army – Hizb-e Islami – risk) Afghanistan CG [2008] UKAIT 00013 the Tribunal expressed a similar view.

94. The main focus of this case being on Article 15(c), however, it is essential to focus primarily on Tribunal country guidance cases that have addressed the applicability of this provision to conditions in Afghanistan in the light of the legal guidance given by the CJEU in Case C-465/07 Elgafaji [2009] WLR and QD (Iraq) v Secretary of State for the Home Department [2009] EWCA Civ 620.

95. The first such case was GS (Article 15(c): indiscriminate violence) Afghanistan CG [2009] UKIAT 00044. This held that the objective evidence did not establish that the Article 15(c) threshold was reached for mere civilians in any part of Afghanistan. At para 117 the Tribunal stated:

> "In assessing the evidence, the one thing which struck us particularly was Professor Farrell's assertion that the number of civilian fatalities directly caused by both sides to the conflict in Afghanistan (including those assassinated by the Taliban/Al Qaeda) was low in comparison with conflicts

of a similar size elsewhere. This emerges in particular from the questions put to Professor Farrell regarding page 17 of his report. Whilst it is apparent that any assessment of risk to civilians needs to cover not only those casualties, but also those who are injured as a result of intimidation by insurgents (which the table on that page does not cover and as to which no reliable data was presented), Professor Farrell was nevertheless clear that the current conflict in Afghanistan cannot be said to involve a high level of civilian casualties (albeit that he urged us to take account of what he considered were the conflict's indirect effects). We conclude that the number of direct victims of indiscriminate violence, arising as a result of the armed conflict, does not demonstrate that the appellant, upon whom the burden of proof lies, has established that there is such a high level of indiscriminate violence that there are substantial grounds to establish that he would, solely by being present in that country, face a real risk which threatens his life or person. We reach this view bearing in mind what the Court of Justice had to say. The appellant has not shown that incidents of indiscriminate violence are happening on so wide a scale, and/or in such a way, as to pose a serious threat of real harm. So far as indirect effects of violence are concerned, we have already explained why we do not consider that these can be said to fall within the scope of Article 15(c)."

96. The next CG case to address Article 15(c) risks was HK and Others (minors – indiscriminate violence – forced recruitment by the Taliban) Afghanistan CG [2010] UKUT 378 (IAC). Whilst confined to issues relating to risks to minors, including Article 15(c) risk, the Upper Tribunal noted that it saw no reason to take a different view from GS regarding Article 15(c) risks in Afghanistan more widely.

97. Likewise, in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)**,** whilst focusing its guidance on children, the Tribunal at para 65 again saw no reason to take a different view more widely about Article 15(c) risks in Afghanistan, although it noted at paras 47-66 that the background material demonstrated an increase in indiscriminate violence since 2009 (paras 47 and 63), a worsening security environment in certain parts of the country and increasing civilian casualties (paras 48-53). It noted at para 53 that the situation in Kabul had been reported as deteriorating and that many returning refugees were going hungry and were unemployed (paras 56 and 58). It highlighted sources noting the shortcomings in the ability of the Afghan government to provide effective protection (para 60), but concluded that "the evidence as to state failure does not demonstrate a significant decline since 2009" (para 66). In the same para it noted that "there is no clear evidence as to the scale of increase in displaced persons since 2009".

98. It is to be noted, of course, that in HK (Afghanistan) and Ors v Secretary of State for the Home Department [2012] EWCA Civ 315 the Court of Appeal remitted the appeals of HK and two others to the Upper Tribunal on the basis that HK was on all fours with DS. DS's appeal had earlier been remitted to the Upper Tribunal in DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305 so that the Tribunal could give consideration to the best interests of the child duty under s.55 of the

Borders, Citizenship and Immigration Act 2009 and to the significance of efforts made by the Secretary of State to discharge her duty under Article 19(3) of the Reception Directive as implemented into domestic law by the Asylum Seekers (Reception Conditions) Regulations 2005. That duty is to endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum (reg 6). It is significant, however, that the Court of Appeal in HK (Afghanistan) made no comment on the country guidance given in HK and that in any event the Tribunal's current country guidance in HK now has a separate (and updated) basis as set out in AA.

99. We should also make mention at this stage of two further country guidance cases of the Upper Tribunal, which although not dealing with Afghanistan, have examined both the law on Article 15(c) and its application to armed conflicts situations: AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) and MK (documents - relocation) Iraq CG [2012] UKUT 126 (IAC). Both of these post-date the Court of Appeal judgment in HM (Iraq) [2011] EWCA Civ 1536 holding that HM and others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC) (hereafter "HM") in the Tribunal was vitiated by legal error.

Foreign Cases

(i) European Court of Human Rights (ECtHR)

(a) Case of N v Sweden, App.no. 23505/09, 20 July 2010

In N v Sweden the applicant was a female Afghan national from Afghanistan who had separated from her husband and tried in vain to divorce him. At para 52 the ECtHR stated that:

> "Whilst being aware of the reports of serious human rights violations in Afghanistan…the court does not find them to be of such a nature as to show, on their own, that there would be a violation of the Convention if the applicant were to return to that country. The Court thus has to establish whether the applicant's personal situation is such that her return to Afghanistan would contravene Article 3 ECHR."

The Court proceeded to find at para 55 that women were at risk of ill-treatment in Afghanistan "if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system". Having noted the great difficulties women faced in obtaining protection against domestic violence or after leaving their house without a male guardian (paras 57-59), the Court found at para 60 that "[w]omen without male support and protection generally lack the means of survival, given the social restrictions on women living alone, including the limitation on their freedom of movement."

(b) Case of Husseini v Sweden, App.No. 10611/09, Judgment 13 October 2011

100. In Husseini v Sweden, the ECtHR (5th Section) dealt with the case of an applicant who was an ethnic Hazara, Shia Muslim from Ghazni (his father was of Hazara ethnicity, his mother of Pashtun ethnicity). At para 84, under the sub-head "The general situation in Afghanistan", the Court in a majority decision stated that it considered "there are no indications that the situation in Afghanistan is so serious that the return of the applicant would constitute, in itself, a violation of Article 3 of the Convention".

101. In relation to internal relocation, having recited the UNHCR Eligibility Guidelines and its own case law on this question, the Court concluded:

> "9.8 In the present case, having regard *inter alia*, to the government's submission… and the UNHCR Guidelines, it appears that an internal relocation alternative is available to the applicant in Afghanistan…".

(c) JH v UK App.No.48839/09, [2011] ECHR 2251, judgment 29 November 2011

In JH , which concerned an Afghan national from Kabul, the ECtHR (4th Section), again considering *inter alia,* the December 2010 UNHCR Eligibility Guidelines together with more recent country information, reached a similar conclusion as to the general situation in Afghanistan (see para 55).

(ii) Leading Swiss cases dealing with Article 15(c) in the context of Afghanistan

102. In a decision of 16 June 2011 E-7625/2008 – ATAF (FAC) – 2011/7), S.A. v Federal Office for Migration, - the Swiss Federal Administrative Court held that return of a Hazara applicant to his home province Daikundi would lead to his "endangerment" and that despite the applicant having distant relatives in Kabul, it would not be reasonable to return him there as he had never lived in Kabul and would lack a stable social network.

103. In decision D-2312/2009 of 28 October 2011 the same court concluded in the case of a married couple of Tajik ethnicity that there were no individual circumstances that would render return to their home area of Herat unreasonable.

104. The same court's decision D-7950/2009 of 30 December 2011 dealt with whether it would be reasonable for a "Sunni Pashtun" applicant to return to Mazar-i-Sharif in Samangan province. The court held there was no general danger there, nor did the applicant's circumstances make his return there unreasonable (he had a stable family network there, he was educated and had already worked as an owner of a shop in Afghanistan prior to his departure).

(iii) Other national decisions

105. In response to a direction from the Tribunal the respondent sent a request for information about recent court decisions on Article 15(c) applicable to

Afghanistan to the relevant authorities in 14 Member States and also Switzerland. The responses confirm the view expressed by UNHCR in Safe at Last? in July 2011 that there are wide divergences of approach. The question the respondent asked was "have your superior courts recently determined a case or cases, in which they had to consider whether all or part of Afghanistan reaches the threshold for Article 15(c)?" Some of the replies went further.

106. In certain Member States, e.g. Finland, the position is reported as being that "no part of Afghanistan reaches the threshold of Article 15(c)"; this position is said to have been confirmed by the Finnish Appeals Court.

107. In other Member States certain regions of Afghanistan were considered to cross the Article 15(c) threshold or to be generally unsafe. In Belgium the majority of Afghanistan's regions are considered unsafe but not Kabul and certain northern, western and central regions (which are said to be safe). It is added, however, that the Belgian Council of State had confirmed that "more than 50% of the Afghan territory (mainly the south and east) [qualifies] under Article 15(c)". In France "indiscriminate violence has so far been determined in the provinces of Baghlan, Helmand, Kabul, Kunar, Kunduz, Bamion, Logor, Nangahar, Sorobi and Wardak", although it appears that this is in the context of cases where the applicant has "individualised" his threat. So much is suggested by the response going on to state that the French asylum court has examin[ed] this requirement of "individualisation" in Kapisa, Ghazni and Parwan, although in respect of the last mentioned, two cases of the court have reached different views.

108. In other countries there is significant disagreement even among courts within a Member State: e.g. in Germany it is reported that "[w]hile the higher administrative courts of Bavaria (VGH Munchen) and Baden-Württemberg (VGH Mannheim) are currently unmistakenly [sic] denying an overall danger for every non-military, civilian persons in all or part of Afghanistan, the higher administrative court of Hessen (VGH Kassel) maintains a somewhat different point of view".

109. In Sweden the Migration Board has found that there is violence at the level of armed conflict in several provinces, but in terms of the Article 15(c) threshold it appears to date only to have considered Ghazni province unsafe. The Board has specifically considered Kabul and Parwan provinces to be safe.

110. In Spain, Afghanistan as a whole is considered to cross the Article 15(c) threshold.

B. LEGAL FRAMEWORK

111. In view of the principal issues that arise in this appeal, it is in order to set out several key provisions of the Qualification Directive, in particular Arts 9, 15 and 8:

"*Article 9*

Acts of persecution

1. Acts of persecution within the meaning of Article 1A of the Geneva Convention must:

   (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

   (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:

   (a) acts of physical or mental violence, including acts of sexual violence;

   (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

   (c) prosecution or punishment, which is disproportionate or discriminatory;

   (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

   (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

   (f) acts of a gender-specific or child-specific nature.

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

Article 15

Serious harm

Serious harm consists of:

   (a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Article 8

Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member states shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin."

These provisions have been implemented in UK law by the Refugee or Person in Need of International Protection Regulations 2006 and certain provisions of the Statement of Changes in the Immigration Rules (HC395) (paras 334-342 in particular), but it is convenient to refer to provisions of the Qualification Directive as (except where our national provisions are more generous) these are the common point of reference for judges in the EU Member States.

In relation to Article 15(c), the Tribunal in AMM at para 328 (observing that in overturning the Tribunal country guidance in HM case, the Court of Appeal in HM (Iraq) had expressed no criticism of what was said about the applicable law) endorsed the following summary of the legal principles as set out in HM at para 67 as follows:

"(a) The Article seeks to elevate the state practice of not returning unsuccessful asylum seekers to war zones or situations of armed anarchy for reasons of common humanity into a minimum standard (QD [i.e. QD(Iraq) [2009] EWCA Civ 620] at [21]).

(b) The scope of protection is an autonomous concept distinct from and broader than Art 3 protection even as interpreted by the European Court of Human Rights (ECtHR) in NA v United Kingdom (Elgafaji at [33]-[36]; QD at [20], [35]; HH and Others) at [31].

(c) It is concerned with 'threat…to a civilian's life or person' rather than to specific acts of violence…the threat is inherent in a general situation of …armed conflict… The violence that gives rise to the threat is described as indiscriminate, a term which implies that it may extend to people irrespective of their personal circumstances (Elgafaji [34]).

(d) The Article is intended to cover the 'real risks and real threats presented by the kinds of endemic acts of indiscriminate violence – the placing of car bombs in market places; snipers firing methodically at people in the streets – which have come to disfigure the modern world'. It is concerned with 'serious threats of real harm' (QD at [27] and [31]).

(e) 'Individual' must be understood as covering harm to civilians irrespective of their identity where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian… would solely on account of his presence on the territory… face a real risk of being subjected to the serious threat' (Elgafaji [35]).

(f) 'The more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required' (Elgafaji [39]).

(g) A consistent pattern of mistreatment is not a necessary requirement to meet the real harm standard. 'The risk of random injury or death which indiscriminate violence carries is the converse of consistency' (QD at [32]).

(h) There is no requirement that the armed conflict itself must be exceptional but there must be 'an intensity of indiscriminate violence great enough to meet the test spelt out by the ECJ' and this will self evidently not characterise every such situation (QD at [36]).

(i) 'The overriding purpose of Article 15(c) is to give temporary refuge to people whose safety is placed in serious jeopardy by indiscriminate violence, it cannot matter whether the source of the violence is two or more warring factions (which is what conflict would ordinarily suggest) or a single entity or faction' (QD at [35]).

(j) 'Civilian' means all genuine non-combatants at the time when the serious threat of real harm may materialise (QD [37])."

112. More recently, the Tribunal in MK at para 101 has given a similar endorsement of the above summary.

> In relation to internal relocation, the leading UK cases are Januzi v Secretary of State for the Home Department [2006] UKHL 5 and AH (Sudan) v Secretary of State for the Home Department. In Januzi their lordships appeared to expressly reject a submission that assessment of the circumstances relevant to whether there was a viable internal relocation alternative had to be done by applying human rights norms.

113. In AH (Sudan) at para 5, Lord Bingham referred to his summary of the correct approach to the problem of internal relocation as set out in para 21 of Januzi, adding:

> "In paragraph 21 of my opinion in Januzi I summarised the correct approach to the problem of internal relocation in terms with which all my noble and learned friends agreed:
>
> > 'The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so.…There is, as Simon Brown LJ aptly observed in Svazas v Secretary of State for the Home Department, [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls… All must depend on a fair assessment of the relevant facts'.
>
> Although specifically directed to a secondary issue in the case, these observations are plainly of general application. It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evidence that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in expressing it. The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is."

114. He went on to clarify that the reasonableness test is not to be assimilated with the Article 3 ECHR issue (para 11). At para 20 Baroness Hale quoted from UNHCR's "very helpful intervention in this case":

> "As the UNHCR put it in their very helpful intervention in this case:
>
> > '…the correct approach when considering the reasonableness of IRA [internal relocation alternative] is to assess all the circumstances of the

individual's case holistically and with specific reference to the individual's personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship'.

I do not understand there to be any difference between this approach and that commended by Lord Bingham in paragraph 5 of his opinion. Very little, apart from the conditions in the country to which the claimant has fled, is ruled out."

At paras 21-22 she added:

"21. We are also all agreed that the test for internal relocation under the Refugee Convention is not to be equated either with a 'well-founded fear of persecution' under the Convention or with a 'real risk of ill-treatment' contrary to article 3 of the European Convention on Human Rights. By definition, if the claimant had a well-founded fear of persecution, not only in the place from which he has fled, but also in the place to which he might be returned, there can be no question of internal relocation. The question pre-supposes that there is some place within his country of origin to which he could be returned without fear of persecution. It asks whether, in all the circumstances, it would be unduly harsh to expect him to go there. If it is reasonable to expect him to go there, then he can no longer claim to be outside his country of origin because of his well-founded fear of persecution. Mercifully, the test accepts that if it is not reasonable to expect him to go there, then his continued absence from his country of origin remains due to his well-founded fear of persecution.

22. Further, although the test of reasonableness is a stringent one – whether it would be 'unduly harsh' to expect the claimant to return – it is not to be equated with a real risk that the claimant would be subjected to inhuman or degrading treatment or punishment so serious as to meet the high threshold set by article 3 of the European Convention on Human Rights. As Lord Bingham points out, this is not what was meant by the references to article 3 in Januzi, including what was said by my noble and learned friend, Lord Hope of Craighead, when he referred to 'the most basic of human rights that are universally recognised' at para 54. Obviously, if there were a real risk of such ill-treatment, return would be precluded by article 3 itself as well as being unreasonable in Refugee Convention terms. But internal relocation is a different question."

C. SUBMISSIONS

Mr Vokes and Ms Rutherfords' written submissions

115. The central tenet of the written submissions on behalf of the appellant was that given the very significant variations in levels of intensity of indiscriminate violence in different provinces of Afghanistan, the Tribunal should apply the same "differential" model it had applied in the Somali and Zimbabwean contexts. Accordingly the country guidance cases of GS and AA, insofar as they treated the situation in Afghanistan as a whole as decisive, should be regarded as misleading. At the very least the issue of the "differential" for indiscriminate violence in different parts of the country was not adequately explored in either GS or AA. By reference to the ARC report and the UNAMA Annual report for 2011, it was clear that the geographical reach of the armed conflict was spreading and that the south and south east regions now accounted for 64% of all incidents, with the situation in the central area, including Kabul province, becoming increasingly unstable. As a result the south east and east should be regarded as areas which had now crossed the Article 15(c) threshold, with the Central areas (including Kabul) being areas which "may" cross that threshold and the west and north as areas where there was a possibility of that threshold being crossed.

116. Given the rising figures for the number of security incidents and the number of civilians killed by IEDs, it was a "natural extrapolation to point out the risk to civilians is highest in the areas of heavier fighting, and insurgent activity". In such areas the unpredictability of the use of violence and the indiscriminate effects even of attacks targeted at specific targets (say of a local warlord) exposed ordinary civilians to greater risk. In addition, an indirect effect of the violence was lack of security due to the failure of protection by the state. In Taliban controlled areas there was the further problem that virtually anyone not a supporter of the Taliban was under potential threat and the possibility for being harmed by way of being in the wrong place at the wrong time was magnified. Persons with no professional or political affiliations would still be at risk.

117. Insofar as the Tribunal had dealt with comparison with other conflicts in the world, and had taken the view in GS that the level of civilian casualties in Afghanistan was "surprisingly low", Mr Vokes and Ms Rutherford sought to rely on the report by Dr Seddon which showed that a present comparison with the conflict in Somalia in terms of deaths and injuries would appear to show (in relation to a majority of observers) that the level of casualties is significantly higher over the immediate past period of time in Afghanistan than in Somalia: he referred to AMM, para 254.

The appellant's written submissions also sought to persuade us by reference to Elgafaji para 39 (which sets out what has become known as the "sliding-scale" principle as follows: "…the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection") and GS, paras 62 and 74, that even if we were to find that ordinary civilians are not at Article 15(c) risk anywhere in Afghanistan, we should nevertheless identify

intermediate categories of persons who might be at risk by virtue of being less able than ordinary civilians to avoid the on-going violence. We refer to these as "intermediate categories" as those submissions clearly meant to identify categories falling short of the outright risk categories ((i)-(xi)) as identified by UNHCR in its 17 December 2010 Eligibility Guidelines cited at para 86 above. Mr Vokes and Ms Rutherford gave as examples of intermediate categories:

> " fruit sellers outside public buildings, day labourers on state construction projects who need as a necessity of life to be employed in this fashion or small farmers or landless labourers who out of economic necessity have to keep farming in situations of armed warfare breaking out on their land or the land that they work. The latter category would include businessmen, more senior state officials, war lords, large landowners."

118. As regards internal relocation, it was submitted that the Tribunal should disassociate itself from the "unduly harsh" test as in its natural meaning undue harshness does not equate to reasonableness, which was a lower test. In any event, "the word "reasonable" should be read down without gloss". Even if the Tribunal was not with him and Ms Rutherford in relation to the application of the internal relocation test under the Refugee Convention, its application under Article 15(c) should be considered as a different matter, as under Article 15(c) there is a "wider differential". Recital 25 of the Qualification Directive makes clear that the sources for Article 15(c) are international obligations under human rights instruments. Thus if in the context of Article 15(c) there are breaches of fundamental rights and the norms of dignified existence cannot be met, then relocation cannot be reasonable. "In this sense the high hurdle of 'reasonableness' in relation to the Refugee/Human Rights Convention is relaxed".

119. So far as this applied to the evidence relating to conditions in Kabul, it was noteworthy that returnees/IDPs have no organisation to help them settle in Kabul; 70% have no access to electricity, adequate water and sanitation; 60% of IDPs live in tents; 80% of persons in Kabul live in squatter settlements with no access to the housing market; 35/40% of the workforce is unemployed, rising to 60% for youth; the number of displaced persons is increasing, up 45% in 2011; and there are growing security concerns due to insurgency attacks in Kabul which the authorities appear unable to prevent possibly due to infiltration of the police and the army.

120. As regards the appellant, his home province of Ghazni is one of the worst-affected areas of Afghanistan in relation to levels of violence. In such circumstances he should be considered as at Article 15(c) risk in his home area. It is accepted he has an uncle and aunt in Kabul, but it was not accepted it would be reasonable to expect the appellant to relocate to Kabul, in view of the above considerations.

<u>Mr Vokes' oral submissions</u>

121. Amplifying his and Ms Rutherford's written submissions, Mr Vokes contended that the background evidence now to hand showed that the

situation in Afghanistan had worsened since the UNHCR Report of December 2010 when five provinces (including parts of Ghazni and Khost) were considered to be in a situation of generalised violence at the Article 15(c) threshold making it unsafe to return anyone there.

122. Significant gaps in the evidence when the Upper Tribunal looked at the situation in AA (Afghanistan), e.g. as to the number of IDPs in different regions, had now been filled. The UNAMA reports for 2010-2011 showed that whilst the south and south-east provinces accounted for 64% of all security-related incidents, the armed conflict had increased its spread geographically. As Amnesty International said, it was a "deteriorating situation". In addition, the nature of the armed conflict had become more dangerous for civilians, with the use by the insurgency of IEDs having caused increasing rates of civilian death and casualties.

123. Kabul, he submitted, was increasingly insecure and the situation of returnees was most likely to be similar to that experienced by IDPs who had been identified as a stratum of society below the urban poor. So their situation would truly be dire. The unemployment rate was extremely high (60%). Protection in Kabul was ineffective, the authorities themselves having said there was a need for 20,000 more police officers. Corruption was rife. The September 2011 LANDINFO report, which had described the situation in Kabul as relatively tranquil, had to be read alongside the ICG report which took a more pessimistic view. Kabul increasingly resembled Saigon in the later stages of the Vietnam War. There was a significant level of infiltration by the insurgency of government security services. Dr Giustozzi's assessment of the ineffectiveness of the police was telling.

124. Even the FCO advised against travel to Ghazni. Ghazni was the only province in which the Taliban had extensive territorial control and it was where insurgent groups had the largest presence.

125. Mr Vokes acknowledged that in order for a person to show a real risk on return of persecution, serious harm or ill-treatment contrary to Article 3 ECHR, merely on the basis of being a civilian, there was a high threshold, but he considered that the latest evidence demonstrated that in certain areas of Afghanistan, including Kabul and Ghazni, that threshold had been crossed, at least in relation to Article 15(c) serious harm.

126. Civilian casualties had doubled since 2007. The tactics and methods used by parties to the armed conflict, particularly the insurgents, increasingly threatened and harmed civilians. Even the targeted killings, said Mr Vokes, had collateral side effects on civilians. There was no bright line to be drawn between targeted killings and indiscriminate violence. There was clearly still a significant degree of under-reporting. Bearing in mind the Upper Tribunal's acceptance that other metrics than civilian casualties were relevant, including that of population displacement, there had been a very considerable increase in the number of IDPs, from 102,658 in 2010, 143,000 in 2011 to 185,632 in the early months of 2012, which could not

be put down to natural disasters. Armed attacks had caused a great deal of displacement in the past two years. UNHCR already had real concerns at the failure to reintegrate of more than 40% of persons who had returned to Afghanistan. The UN had access to less than half the country. Tracing Tribunal country guidance cases starting with GS, it was evident that things had been getting steadily worse even before AA which itself had noted that there had been a deterioration in the situation since HK. The degree of risk had clearly increased and it was time to recognise that a significant number of provinces in Afghanistan were unsafe. There was now considerably more information available about the intense nature of the armed conflict in Afghanistan than had been before the Tribunal in GS, HK and AA. The Tribunal had to take a holistic approach to the conflict, taking into account, for example, that economic circumstances might prevent a number of persons leaving an area beset by armed conflict.

127. When it came to Article 15(c), it was important for the Tribunal to recognise, said Mr Vokes, that even if it rejected his arguments about the high levels of indiscriminate violence in Kabul, Ghazni and certain other provinces, and opted instead for identifying certain risk categories or factors, it should seek to give effect to the Court of Justice's notion of a "sliding scale" and so supplement such categories by reference to "enhanced risk categories" of civilians who were more at risk because of their occupation or likely location (or inability to move) to be in the vicinity of attacks targeting particular classes of persons (what we prefer to term "intermediate categories": see para 117).

128. In relation to the respondent's reliance on the February 2012 CSIS Report (see above para 58 and below, para 134), it was important, said Mr Vokes, not to attach any significant weight to its cross comparisons with Iraq, past or present.

129. In relation to the issue of internal relocation, Mr Vokes sought to make two main points, one about the law, the other about country conditions.

130. As to the law, Mr Vokes contended that the Tribunal should recognise that in deciding whether internal relocation was viable inside a country in a state of armed conflict or which was a war zone, it should apply human rights guarantees. If adopting a human rights approach would be to go further than was called for under the Refugee Convention or under Article 15(b) of the Qualification Directive/Article 3 ECHR, that was justified because, as Elgafaji and AMM had recognised, Article 15(c) had an additional scope. The legal criteria had to be liberalised due to the fact of there being an armed conflict. Either the terms "reasonable" or "unduly harsh" had to be read down or they had to be applied less rigorously in order to take account of the humanitarian predicament posed by armed conflict. What was especially important was the combination of security concerns and the limited protection available, coupled with real socio-economic hardships. There was considerable linkage between Articles 8 and 9 of the Qualification Directive.

131. In relation to the facts, applying his proposed analysis to the situation in Kabul, Mr Vokes said he did not seek to argue that it could not be a viable site of internal relocation for anyone, e.g. it may be that those connected with the government would have no significant problems because they would be protected, but even individual characteristics such as where a person would be likely to find work, could make a difference. In relation to the evidence that returnees from the UK would get some financial help, this would only have a temporary effect.

132. As for the appellant, Mr Vokes said that the evidence that he would face a real risk in his home area of Ghazni was compelling. He had to accept, however, that the preserved finding of fact that the appellant had an uncle in Kabul posed difficulties for his case, albeit the general plight of IDPs, who had to live in Kabul as the "poorest of the poor", was strongly demonstrated by the background evidence.

Mr Blundell's written submissions

133. Mr Blundell's skeleton argument on behalf of the Secretary of State took issue with the apparent attempt by Dr Seddon and Mr Vokes in written submissions to question the historic validity of the country guidance given by the Tribunal in GS and AA. It also maintained that Mr Vokes was wrong to portray those cases as having confined themselves to conditions in Afghanistan as a whole without regard to parts of the country; on the contrary they had properly applied the Court of Justice guidance in Elgafaji which required (see paras 35 and 43 of that ruling) asking whether there was a sufficiently high level of indiscriminate violence to reach the Article 15(c) threshold not just in a country but in any material part of it.

134. Turning to consider the evidence, in particular the UNAMA reports, relating to whether the Article 15(c) threshold was met in either Afghanistan as a whole or certain parts of it, the respondent's skeleton accepted that the situation has, to a limited degree, deteriorated since 2010, but, by reference to rates for civilian deaths etc, argued that: (i) the actual change in the number of civilian deaths is small (an increase of 231 between 2010 and 2011); (ii) the rate of year-on change has slowed substantially (from 15% in 2010 to 8% in 2011); (iii) the number of deaths whose source is not known has fallen from 326 to 279; (iv) the UN Secretary General report of 13 December 2011 refereed to a decline of "security-related events" in the last three months of 2011; (v) in contrast to the view taken in GS (which assumed a ratio of 8 injuries for every civilian death), the figures available now showed a ratio of less than 2:1; and (vi) ANSO figures for civilian deaths were in fact lower and showed a reduction in the total figure for civilians deaths from 2,534 in 2010 to 2,427 in 2011. Hence the overall picture was little different from that considered by the Tribunal in AA, with reference to the situation in May 2011. In addition, some allowance had to be made for the fact that a significant number of deaths were targeted killings: 185, 431 and 495 in 2009, 2011 and 2011 respectively. In most of these killings the victims were associated with

NGOs, local elders, private security contractors and ANP recruits or civilian government officials and workers. The number of deaths caused by pro-government forces had also significantly decreased. The figures for combatant casualties for US and collation troops were relatively low (711 in 2010 and 566 in 2011). Insurgents killed were said by Brookings Institute figures to be 3,200 in 2011; these demonstrated the success of security operations generally. Drawing on the CSIS report for 2012 (see above para 58), Mr Blundell said that comparing indiscriminate violence in Iraq, where the level of violence had decreased drastically since 2006/7, the figures of civilian casualties for the two countries in 2009, 2010 and 2011 were presently roughly the same

135. Turning to other "metrics", although the number of IDPs in Afghanistan had increased (UNHCR estimating 433,066 in June 2011), there were many factors underlying these high numbers, including previous years of conflict and natural disasters. Moreover, five million refugees had actually returned to Afghanistan since 2002 and such returns were on-going, with heavy involvement from UNHCR, ICRC and other humanitarian agencies.

136. At the provincial level, there had been a decrease in civilian casualties in the southern provinces; figures for Kabul remained low; and even though the figures had increased in Ghazni, they were still low. In both Kabul and Ghazni a very significant proportion of the attacks were targeted at persons with government or NGO connections. ANSO in 2011 had described Kabul as being one of the country's most tranquil areas with most of the violence there being targeted at the international forces and the Afghan authorities. In Ghazni city, it being a location for public service work, it was likely the same pattern applied.

137. In relation to Mr Vokes' submissions as to the law on internal relocation, the respondent submitted that he was wrong to argue that the "unduly harsh" test laid down in Januzi and AH (Sudan) was a higher test than that of "reasonableness" and wrong to submit that either or both these formulations could or should be "read down". No distinction between the different forms of international protection was made in terms of the application of Article 8(1) of the Qualification Directive. It was also important to have regard to the limitation within Article 15(c) to the effect of the indiscriminate violence on a civilian's "life or person". The respondent urged the Tribunal to endorse the position taken in GS at para 72 (and endorsed by the Tribunal in AMM at para 337) that not all forms of serious physical or psychological harm, including flagrant breaches of qualified rights, such as freedom of thought, conscience and religion, were covered by Article 15(c).

138. As to the facts of the appellant's case, the respondent did not accept that the appellant had established a real risk of Article 15(c) serious harm in his home area of Ghazni. Alternatively, if which was denied, the Tribunal should find that the Article 15(c) threshold was met in the appellant's

home province of Ghazni, then it would be reasonable for him to relocate to Kabul or, indeed, any other area of Afghanistan.

Mr Blundell's oral submissions

139. Mr Blundell began with three points about the relevant law. First, he submitted that although Mr Vokes appeared to have given ground in relation to certain arguments he had advanced in his written submissions, the Secretary of State wished to reiterate the main points raised in the skeleton argument submitted on her behalf. To the extent that the expert report from Dr Seddon sought to cast doubt on the historic validity of existing Tribunal country guidance cases, he pointed out that there was simply not the assemblage of background evidence to justify revisiting them. Insofar as Mr Vokes sought to argue that GS and AA had not undertaken an analysis of the levels of violence in Afghanistan province-by-province, that was incorrect, albeit the evidence they had was not as developed and as detailed as now available: both GS and AA did furnish a "differential" analysis by reference to the Brookings Institute data. Indeed in AA the Tribunal's guidance as set out at paras 92-93 expressly emphasised the importance of location.

140. Mr Blundell's second point was that as regards the interrelationship between Article 15(c) and Article 15(b)/Article 3 ECHR, there was no issue between the parties. The respondent accepted the position as enunciated by the Court of Justice in Elgafaji and reiterated by the Tribunal in AMM at para 334 that Article 15(c) had a wider scope.

141. Thirdly, however, submitted Mr Blundell, it was incorrect of Mr Vokes to submit that the legal test for deciding whether there was a viable option of internal relocation was less rigorous for Article 15(c) than it was under the Refugee Convention or Article 15(b)/Article 3 ECHR. That submission was contrary to the binding authority of Januzi and misunderstood that "reasonableness" and undue hardship were two sides of the same coin. It also disregarded the unificatory terms of Article 8 of the Qualification Directive, which applied uniform internal relocation criteria to both refugee eligibility and subsidiary (humanitarian) protection eligibility.

142. In reply to a question from the panel as to whether the apparent rejection by the House of Lords in Januzi of a human rights approach to internal relocation was fully consistent with the Qualification Directive, Mr Blundell made three points: (i) that their Lordships did have regard to the Directive; (ii) that their Lordships' analysis of internal relocation was consistent with the Directive; and (iii) in any event the issue of their reconcilability did not arise in this case.

143. Turning to the evidence, Mr Blundell said that whilst the respondent accepted for the purposes of this appeal that there were a number of indices or "metrics" for measuring the level of indiscriminate violence, it was always going to be critical to focus on the figures giving the number of civilian casualties. Not all "metrics" could be of equal weight.

144. Mr Blundell said that he took no issue with the evidence of Ms Huber. She was clearly a very competent researcher and a very fair witness, but she herself was adamant that she was not a country expert and that her summary had to be read along with the sources themselves.

145. As to the evidence of Dr Seddon, which asserted that the indiscriminate violence in Afghanistan had now reached Article 15(c) levels, there were a number of reasons for attaching little weight to his report. It had not been tested by cross-examination; his knowledge of Afghanistan was extremely limited; in contrast to Dr Giustozzi, he had no up-to-date information about the situation on the ground; some of his assertions, (e.g. that at para 3.8 of his report, which maintained that Professor Farrell's evidence in GS did not include civilians killed by the Taliban and other insurgent forces), were factually wrong (see GS, paras 85 and 106); it was apparent that he had not read the underlying reports disclosed by Wikileaks in 2010; his opinion sought to furnish his own analysis of legal issues, outside his own expertise.

146. As regards Dr Giustozzi, whilst the respondent accepted he had considerable expertise on Afghanistan, the report he had produced for this case had several blemishes. It was clear he had not read the appellant's appeal documentation properly; paras 1-18 of his report wrongly assumed that the appellant's account had been accepted as credible; Dr Giustozzi had committed the same error in GS (see para 76). In any event his report did not assist the appellant's case since he clearly did not consider, the level of risk in Afghanistan as a whole or in Kabul or Ghazni to be at a high level.

147. Mr Blundell turned to the general issue of the levels of indiscriminate violence in Afghanistan. The respondent accepted, he said, that there had been deterioration in the situation since AA, but it was relatively modest and the rate of increase in key indices such as civilian casualties had slowed. There was now less need to make allowances for under-reporting as accuracy in data collection had improved. As noted in the respondent's skeleton, whereas Professor Farrell had posited a ratio of 8:1 for numbers wounded as compared with numbers killed, figures now available showed less than two injuries for every death. The increased number of targeted killings did reduce the level of risk to civilians at large.

148. The respondent noted, said Mr Blundell, that Mr Vokes did not seek to argue that Afghanistan as a whole was at an Article 15(c) level of risk. The respondent did not accept, however, Mr Vokes' contention that several areas of Afghanistan were at such a level. There had been a very significant drop in levels of violence in the worst areas, Kandahar and Helmand. There had been an increase in such levels in Ghazni, but they were still modest and it was safe to infer a significant number of the casualties in that province arose from targeting by the insurgents of governmental employees.

149. As for Kabul, it was considered by the Norwegian COI service, LANDINFO, to be a relatively stable city and, again, a significant number of incidents in that city involved targeted attacks on government offices and international organisations.

150. Mr Blundell said that the respondent was not able to agree with the analysis given by UNHCR in its December 2010 Guidelines (and reiterated since then). It was pertinent that UNHCR itself was continuing to facilitate the return of large numbers of displaced persons to Afghanistan, although that body made clear its concern about the significant numbers of those who had failed to re-integrate. It was difficult to regard the serious problems of IDPs as having been the simple product of the present armed conflict; their problems had their origins in social, political turmoil and floods and natural disasters going back four decades.

151. In relation to any return to Ghazni, the evidence did not show that that province was at Article 15(c) levels of risk and, given that government security forces patrolled highways, it could not be said it was unsafe to travel there. Indeed, apart from areas controlled by the insurgents, there were no real obstacles to a person travelling anywhere in Afghanistan.

152. Even if an individual was able to establish a real risk of persecution or serious harm in his home area, Kabul would in general be a safe place of relocation. As regards the appellant, there was an additional reason why Kabul would be safe and reasonable for him; he had an uncle there who owned a clothes shop.

D. OUR ASSESSMENT

(a) General

Initial observations

153. We have to decide this case taking into account the entirety of the evidence and bearing in mind that, whilst the burden of proof rests on the appellant, the standard of proof is a relatively low one and requires us to apply anxious scrutiny. In addressing the questions raised concerning Article 15(c) of the Qualification Directive, we have to decide what the situation is in Afghanistan now so as to make a forward-looking assessment of risk.

154. We have already made several observations at paras 37-44, so as to help the reader have a better understanding of the figures set out subsequently. We shall not repeat these here, but simply note that they too form part of our assessment. We do, however, venture one further observation here. It relates to the fact that our task in this appeal is limited to an examination of the Article 15(c) question. The appellant applied for international protection and his appeal against refusal of his application by the respondent resulted in his appeal being dismissed by

the First-tier Tribunal on asylum and Articles 2 and 3 ECHR grounds but being allowed on subsidiary protection (humanitarian protection) grounds. There was no cross-appeal and permission to appeal to the Upper Tribunal was only granted (to the respondent) on Article 15(c) grounds. All case management directions and the responses by the parties have proceeded on that basis. However, the fact that we are as a result confined to a consideration of Article 15(c) should not be construed as a general message by the Upper Tribunal that when dealing with asylum-related claims based wholly or significantly on risks arising from situations of armed conflict and indiscriminate violence that it will be right for decision-makers to skip over the question of refugee status or Article 15(b) subsidiary protection status and go straight to Article 15(c). On the contrary, they should ordinarily deal first with the issue of refugee eligibility and not deal with Article 3 ECHR until last. That is so for a two main reasons. First of all, decision-makers are obliged by the structure of the Qualification Directive to give primacy to the issue of eligibility for refugee protection; whereas Articles 15(b) and (c) are species of "subsidiary" protection: see recitals 3, 5. Second, to skip over refugee eligibility would be to lend support to the misconception that persons fleeing armed conflict cannot fall within the Article 1A(2) Refugee Convention definition. That has never been so, even if there has been recurrent hesitation about the criteria that should apply to such cases: see AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 00091, paras 17, 68.

155. In relation to why Article 3 ECHR should be dealt with last, the reason is simple. By virtue of Article 15(b) of the Qualification Directive, a person who can establish an Article 3 risk, will (save in one limited respect relating to heath cases) be able to show he is entitled to subsidiary (humanitarian protection) under 15(b). By contrast with Article 3 ECHR, subsidiary protection (humanitarian protection), including under Article 15(b), entitles the beneficiary to a legal status both at the level of EU law (Article 24(2) of the Qualification Directive) and in UK law (para 339C of the Immigration Rules).

156. As regards whether or not to deal with Article 15(b) or 15(c) first, it might seem that because the Court of Justice in Elgafaji has held that Article 15(c) has an additional scope to Article 3 ECHR that it would always be easier to address Article 15(c) first as having broader scope. But establishing subsidiary protection eligibility under Article 15(b) may sometimes be more straightforward than seeking to do so under Article 15(c). This may arise where, for example, the claimant falls within a risk category but cannot show a Refugee Convention ground (e.g. where he is at real risk of persecution/serious harm at the hands of a powerful criminal gang). It may also arise where there is a recent ECHR case that establishes comprehensively that there is an exceptionally high level of generalised violence in the claimant's country that amounts to a violation of Article 3 ECHR (see NA v UK Application no. 25904/07, paras 115-116; Sufi and Elmi v UK Applications nos. 8319/07 and 11449/07, paras 218, 250) and there is no valid reason to take a different view. Another

problem is that whilst it is now established that Article 15(c) has an additional scope to Article 3 ECHR (a near equivalent to Article 15(b) of the Qualification Directive), the ascertainment of that additional scope may not always be a simple matter.

157. The sole focus of this case being nevertheless Article 15(c), we turn to the central issue for decision: whether the country guidance given by the Tribunal in 2009 in GS on Article 15(c) in the context of Afghanistan stands in need of revision. In a trite sense it must: events have moved on some three years and the state of the evidence is by definition different. But what we are concerned with is whether developments since require a different answer to be given to the question of generic risk arising under Article 15(c) of the Qualification Directive. Whilst several Tribunal country guidance cases since GS – HK and AA in particular – have inevitably had regard to the post-GS state of the evidence relating to this question, they were not convened to review it and have sought to do no more than register their understanding of the general state of affairs then current in the context of deciding more specific issues relating to children.

158. On the law pertaining to Article 15(c), this Tribunal is in a much better position than that in GS, as there has since been significant clarification of it afforded by the Upper Tribunal in HM and AMM and most recently MK (we would observe that the Tribunal panel in AMM, and a different Tribunal panel in MK, correctly in our view, did not consider that the Court of Appeal decision in HM (Iraq) contained any criticism of its summary of legal principles governing Article 15(c) (for text, see above para 111). The issues in this case do require us to consider aspects of the law relating to internal relocation - and there are one or two points we adumbrate below on that - but in broad terms both the law on that and on 15(c) is now settled. In what follows, when we refer to "the Article 15(c) threshold" we have in mind the central question posed by the Court of Justice in Elgafaji at [43], namely, does:

> "the degree of indiscriminate violence characterising the armed conflict taking place... (reach) such a high level that substantial grounds are shown for believing that any civilian, returned to the relevant country or, as the case may be, to the relevant region, would solely on account of his presence on the territory or that country or region, face a real risk of being subject to that threat ?"

159. It is right to note, however, that the Tribunal in HM considered the legal approach to Article 15(c) taken by the Tribunal in GS did not fully conform to the legal principles set out in Elgafaji and QD (Iraq) and other cases. In particular it criticised the attempt by the Tribunal in GS to rely on a distinction between targeted and indiscriminate violence (so as to exclude targeted attacks with individual caught in the cross-fire: see HM (paras 69 and 73)).

160. This criticism reflected the view embraced in HM that it was necessary in the context of contemporary armed conflicts to adopt an "inclusive

approach", so that in assessing whether levels of indiscriminate violence had reached the Article 15(c) threshold, all types of violence having a potential bearing were to be taken into account: see paras 70, 75. (We note that whilst the Tribunal in HM at para 78 appeared to consider that GS correctly took the view that, in establishing whether there was a causal nexus between the armed conflict and the indiscriminate violence, regard was had to indirect effects, it is not entirely clear that GS consistently took that view: see last sentence of para 117 cited above at para 95). However, neither party in this appeal has sought to argue that the above failure(s) of legal approach in GS had any material impact on its assessment of the levels of indiscriminate violence in Afghanistan at that time and nor do we.)

161. In any event, in this appeal we adopt and reiterate the summary of legal principles set out in the Tribunal cases of HM, AMM and MK and reconfirm the efficacy of an inclusive approach.

The inclusive approach

162. Whilst not asking us to reconsider the inclusive approach, Mr Blundell urged us not to conceive it as a fixed verity applicable to all factual situations in a uniform way, but rather as an approach responsive to contingent facts, e.g. that the figures given for civilian casualties and related incidents in present day Afghanistan are inevitably imprecise and may reflect a significant level of underreporting. He pointed out that improved levels of monitoring appear to have reduced the need to allow for underreporting as much as had been valid previously. He also cautioned against a possible misuse of the multi-factor approach to the analysis of armed conflict as advanced by Professor Farrell and others which highlights the need to consider not just figures relating to civilian deaths and injuries but other "metrics" such as degree of state failure and population displacement. We think his observations are well-made and properly reflect the careful language used in the Tribunal case of HM (see e.g. the reference in para 77 to an inclusive approach only being "ordinarily" appropriate and to the fact that "There may be armed conflicts in which civilians are little affected by the fighting going on, but far more often that is not the case").

163. We also agree that the degree of underreporting of civilian deaths and casualties and related indices is an issue of fact and it is notable that in the context of Afghanistan the systems for collecting and analysing indicators of violence in place when GS was decided have become more sophisticated so that, for example, the rough indicator used by Professor Farrell of eight wounded to every one death now appears to have been an overestimate, at least in the context of Afghanistan. Further, whilst the inclusive approach is an indispensable safeguard against any artificial exclusion of relevant types of violence, it must not lead the decision-maker to run everything together and to overlook or blur important features of the ongoing conflict, for it is only by a careful delineation and understanding of these features that a proper assessment can be made

about the levels of indiscriminate violence for Article 15(c) purposes. Ours must be a qualitative as well as a quantitative analysis. Thus, for example, in AMM at para 339 the Tribunal considered that, in addition to the level of civilian casualties, another factor leading them to conclude that in Mogadishu the Article 15(c) threshold had been crossed related to the "conduct of the parties" by reference to the highlighting in background evidence of widespread violations of international humanitarian law.

164. In the light of the above, we consider that whilst we must guard against any attempt to work with a fixed equation in which in assessing the level of indiscriminate violence targeted attacks are subtracted from the assessment of the level of civilian casualties, it is relevant in the context of Afghanistan to analyse such matters as: (i) whether the violence employed by the parties to the conflict is characterised by systematic targeting of civilians on a wide scale; (ii) whether, for example, the violence employed by the insurgents, when they have targeted civilians, focuses in large part on certain categories of civilian only; and (iii) whether when the insurgents target particular categories of civilians they routinely cause heavy "collateral" harm to civilian lives and property. None of these observations is intended to underplay the terrible toll the "Long War" is inflicting on the Afghan population; on the contrary, it is to ensure that in deciding the Article 15(c) question, due regard is paid to all relevant aspects.

The expert evidence

Dr Seddon

165. We do not consider that most of Mr Blundell's criticisms of Dr Seddon's report are justified.

166. Insofar as Mr Blundell was dismissive of Dr Seddon's credentials, we note that he has good contacts with US and British experts on Afghanistan, with the FCO and the Royal Institute of International Affairs and is currently preparing a book on 'The War in Helmand', in which, he states, a number of publishers are interested. This evinces an ongoing focus on the affairs of the country.

167. Mr Blundell sought to take Dr Seddon to task for criticising at para 3.8 of his report the estimate given by Professor Farrell of 2,118 civilian deaths in 2008 for not including those civilians killed by the insurgents. Dr Seddon regards this as demonstrating that Professor Farrell underestimated significantly the scale of civilian casualties. That would seem to be based on what was said by the Tribunal itself in GS at para 97 where they describe Professor Farrell as himself acknowledging that this figure does not cover insurgent killings. However, it may be the Tribunal in GS was confused about this since they (correctly) noted to the contrary at para 109 that that figure was based on a UNAMA Report which said that of the 2,118 civilians killed, 1,160 were caused by anti-government elements. At all events, this is an inconclusive criticism.

168. Mr Blundell expressed concern about Dr Seddon's references to the Wikileaks report of July 2010. There was nothing to show, he said, that Dr Seddon had read those materials. We are not persuaded that is a fair criticism. It does not seem to us that Dr Seddon was doing any more than setting down what had been said about the contents of the Wikileaks report in sources such as the Guardian. We cannot see that he purported to have read them himself. It might perhaps be said that another (more thorough) country expert would have, but we cannot see that Dr Seddon misrepresented the state of his own knowledge about this.

169. Another significant shortcoming with Dr Seddon's report was said by Mr Blundell to be that he appears to attempt in para 6.1 to address what is essentially a legal question about the applicability of Article 15(c) and opines that the level of indiscriminate violence in Afghanistan was now high enough to meet the Article 15(c) threshold (para 6.1). Whilst we agree that the Article 15(c) issue was outside Dr Seddon's expertise, we consider there were mitigating circumstances. He had been directly asked to consider the *evidence* about "*levels of indiscriminate violence in relation to Article 15(c)*" [emphasis added] and he had done his best to comply.

170. Whilst discounting the above criticisms, we still do not find Dr Seddon's report assists us very much. Despite being asked by Blakemores to prepare a report which considered, *inter alia*, "whether the situation in Afghanistan has changed since the case of GS", he appears to have taken that as a cue to analyse in retrospect the evidence of Professor Farrell in GS and the Tribunal in GS's own conclusion on Article 15(c). Whilst we can understand that as an academic unversed in the workings of the Tribunal country guidance system, Dr Seddon might wish to advance his own views on previous Tribunal country guidance, we find it hard to understand how he thought he was adhering to the formal instructions by devoting such space to them. In any event, as Mr Vokes confirmed, the appellant has not raised any challenge to the historic validity of GS or any other Tribunal country guidance case on Afghanistan and, as has been made clear on a number of occasions, in order for such a challenge to be made a party is expected to present all relevant evidence pointing for and against the proposed revision: see e.g. para 13(ii) TK (Tamils, LP updated) Sri Lanka (Rev) CG [2009] UKAIT 00049, AM and AM (armed conflict: risk categories**)** Somalia CG [2008] UKAIT 03444, at para 123. It cannot by any measure be said that Dr Seddon's report identified all relevant evidence; it was essentially a statement of his opinion (based on pre- and post-GS evidence supportive of his own conclusions) in opposition to the evidence and opinion given by Professor Farrell at the time of the GS hearing. On this point of criticism, we do agree with Mr Blundell.

171. Dr Seddon criticises Professor Farrell for assessing the level of civilian casualties experienced in Afghanistan as being "relatively low" in comparison with 'conflicts of a similar size elsewhere' without apparently

considering conflicts other than Somalia, Rwanda, Cambodia, etc "although there are many others that could have been considered". Yet his report fails to mention any such others or demonstrate that figures for any other country cast doubt on Professor Farrell's comparisons (at para 82 of GS Professor Farrell had given as examples three internal conflicts where the battle death threshold was less than 1,000 but where there were massive civilian losses; these were: 2 million dead in Cambodia between 1975 and 1978, 350,000 dead in Somalia between 1990 and 1991, and 800,000 dead in Rwanda in 1994). Mr Vokes in his written submissions appears to submit to the contrary, asserting that Dr Seddon in his report demonstrated that the comparison with (present-day) Somalia showed that levels of violence in Afghanistan were more severe than in that country. We cannot see that this report states that, but as it is a potentially significant proposition in its own right, we examine it separately below.

172. We observe as well that Dr Seddon's level of expertise on violence and conflict in Afghanistan is not as research-based as we would have hoped. He is principally an expert on parts of the world other than south-east Asia and, whilst noting that he is planning to write a book on Afghanistan, we find it slightly troubling that he should state that he had written on Afghanistan "most recently … on the deep history of Afghanistan" when in fact the publication concerned - the Journal of Conflict Studies - appears to be of 2003 vintage (Vol 35, issue 2, 2003). A related observation we have about Dr Seddon's report is that, if in fact his report draws on and is informed by his own network of contacts, he fails to demonstrate this.

173. In short, Dr Seddon's report for this appeal does little more than chronicle his own understanding of the trends set out in other background evidence, accompanied by his own gloss on their significance for Article 15(c) purposes, and, whilst it engages with evidence pointing in the other direction, it only does so historically, by reference to Professor Farrell's evidence in GS. It does not engage with more recent evidence to the contrary.

Dr Giustozzi

174. Dr Giustozzi has provided reports and/or given evidence in a number of Tribunal country guidance cases including GS, HK and AA. In relation to the report he wrote for GS, the Tribunal noted at para 76 that he has been accepted by the Tribunal as an expert on Afghanistan in a number of previous cases. We note from his CV for his report in this case that he has continued to publish materials on the conflict in Afghanistan and to visit Afghanistan regularly, having last been there in September-October 2011 in Kabul.

175. At para 76 of GS the Tribunal noted that his report for that appeal was of limited value "because it was prepared on the assumption that the appellant's fear of Gul Karim [a warlord] and land grabs was correct". It is somewhat unfortunate to find that Dr Giustozzi's report prepared for this

appeal makes a similar misplaced assumption in respect of the appellant's claimed fear of a different warlord. Having noted that paras 4-18 of his report (and several other passages) appear to address aspects of the appellant's account that had previously been rejected, we asked to see the letter written by Blakemores formally instructing him. It is clear from this letter that its author sought Dr Giustozzi's opinion not only on the country guidance issues the Tribunal had identified (to consider the current position with regard to Article 15(c) and whether Afghanistan had changed since GS) but also the appellant's original account. That is an unfortunate blemish on the firm's otherwise excellent preparation for and handling of this appeal and in our view it largely excuses Dr Giustozzi's faithful attempt to respond. That said, we concur with Mr Blundell that the fact that Dr Giustozzi devoted space to the appellant's account does not suggest that he had carried out in full the reading of all the case documents sent to him which he said he had done (see para 2 of his report), since those documents included the First-tier Tribunal decision and the subsequent Upper Tribunal decision stating that the findings of fact of the First-tier Tribunal Judge were to stand.

176 As regards the passages in his report that address the general situation in Afghanistan in terms of the level of violence and risk on return, we attach significant weight to them although it remains, of course, for us to consider their purport in the context of the evidence as a whole (which includes far more detailed and up to date sets of figures than those to which he refers). It would have assisted if his report could have explained whether and to what extent the opinion he expresses in it about the situation in Kabul is different from that he gave in the Norwegian LANDINFO report of September 2011. It would also have assisted if his treatment of likely accommodation problems facing returnees to Kabul had not assumed that for a single man such as the appellant there would not be the option of sharing a flat or rooms or quarters. Leaving aside the fact that it has been found the appellant has an uncle living in Kabul who has a livelihood there, we do not understand sharing of accommodation to be an option unavailable to single men in Kabul or that to expect a single man to share accommodation would of itself give rise to undue hardship.

The ARC Evidence

177. Mr Blundell did not make any criticism of the ARC Report or the oral evidence of one of its co-authors, Ms Stephanie Huber. Indeed he commended Ms Huber's evidence for its competence and clarity. We concur. This being the first occasion on which, so far as we are aware, the Tribunal has heard oral evidence from a COI analyst/consultant, it may assist if we make several brief comments.

178. First of all, we do see a useful role for reports such as the ARC Report. Whilst it is very largely a collation of extracts from background sources (as noted earlier, their index of these is included at Appendix C), it affords a helpful way of profiling particular country guidance issues. It is technically possible for the Tribunal to comb through the background evidence before

it to extract and put in the one place very much the same materials, but that is time-consuming and is far better done by professional COI analysts. Such utility depends crucially, on at least two factors. One is that the COI analysts concerned have relevant skills and experience to undertake this work (we are entirely satisfied that both authors fulfil this criterion). The second factor is that those commissioning such a report must ask pertinent questions. In the context of country guidance cases, that makes it imperative that the legal representatives make sure their questions to COI analysts are clearly confined to the identified country guidance issue(s). In our judgment, the Blakemore Solicitors' questions mostly did just that.

179. Second, Ms Huber was quick to disclaim any credentials as a country expert. We think she was entirely right to do so, but we would observe that it is not uncommon in our experience for purported country experts to do little more than combine citation of COI with their own evaluation of it. Faced with experts of that kind who do not possess the added-value of field experience or a network of contacts on the ground or academic depth of knowledge, we would far rather have a professional assemblage of COI sources seeking to address issues in a salient way unencumbered by an opinion whose added value is sometimes elusive. Such reports say what they are on the label.

180. Third, Ms Huber said that ARC's methodology did not differ significantly from that used by the Home Office COIS Reports, but the latter do not always, as the identified issues in this case illustrate, address relevant issues in a concerted or organised way, The COIS Report for October 2011, for example, covers some of the relevant matters, e.g. at 8 "Security Situation", but not systematically. In this appeal ARC was able, on the basis of a research request, to focus in a much more bespoke way on key aspects of the evidence relating to the central issue of indiscriminate violence both in Afghanistan as a whole and in specific provinces as well as in relation to certain matters relevant to issues of internal relocation. It may be that the same bespoke COI analysis can be furnished by the COIS Research Inquiry Service, but we understand there are sometimes resource considerations preventing that.

181. Fourth, the ARC Report demonstrates the value of presentation of salient COI evidence. Partly in response to criticisms for being (unduly) selective and unrepresentative, COIS reports currently sometimes resemble a collage of conflicting sources. It is not always easy to make sense of their overall purport. The ARC Report, although seeking to avoid being (unduly) selective, does endeavour to draw together what sources disclose about trends and patterns in the background evidence. So long as it does that by close adherence to established standards, both legal standards as set out, for example in Article 4 of the Qualification Directive and Article 8 of (2005/85/EC (the Procedures Directive) (see TK (Tamils – LP updated) Sri Lanka CG [2009] UKAIT 00049 and soft law standards, e.g. the Common EU Guidelines on processing Country of Origin Information (COI), April

2008, we see no drawback to such an enterprise. (Our use above of the adverb "unduly" is a considered one; in our view it is impossible in the "Age of Information" for any COI analysis, certainly on generic country guidance issues, to cover every item of material available via the internet etc.)

182. Fifth we do, however, make three criticisms: (i) If ARC is to adhere to its own claim, made by Ms Huber before us, that it does not give opinions and leaves that to the sources, then it must take care to avoid giving its own gloss, e.g. describing conditions for IDPs in Kabul as "dire", even if that gloss is consonant with evaluations given in the sources; (ii) if there is value to this type of COI analysis, it must show that it has marshalled the evidence for, as well as against, a particular view. We notice that in one or two places the report, although clearly seeking when relevant to present evidence pointing either for or against a particular view, was very sparing in dealing with one or the other side – for example, at B on page 6, the report states:

> "The information included in this section demonstrates that *despite the fact that Kabul is considered safer than other provinces*, it has become increasingly insecure as demonstrated by the incidence and strength of insurgent attacks carried out in the capital, including in fortified areas" [emphasis added].

What in our view the researcher should have added here was chapter and verse as to the sources which considered Kabul to be safer than other provinces and greater precision as to which provinces (all provinces?).

183. More importantly, (iii) reports of this kind must take care to ensure relevancy. We consider that the report's attempts to give detailed illustrations did not in at least one context exhibit sufficient relevance. When addressing "C: Security situation in Ghazni" on page 8, the report prefaces a list of incidents with the words:

> "The following incidents resulting in civilian deaths and injury detailed in this section are not exhaustive, but rather indicative of the current security situation in Ghazni province".

Yet of the fifteen incidents then listed, eight refer to deaths of police officers or insurgents [i.e. combatants] without any reference to civilian deaths or injuries. Another incident refers to the killing on 18 June 2011 of four Afghan private security guards protecting supply trucks for NATO-led troops – hardly (if at all) typical civilian casualties.

184. Whilst we regard the above blemishes as isolated ones, we hope any future reports by COI analysts will seek to avoid them. Where, as is likely to be the case with ARC, the COI consultancy body is ordinarily going to be instructed by appellant's representatives seeking help in assisting their clients in appeals, it will be especially important for the Tribunal to be reassured that reports of this kind do not seek to perform any advocacy

role, but only seek to elicit relevant COI. In the past, predecessors of the COIS reports have been criticised for seeking to perform an advocacy role for the Home Office. We must apply the same standards to both sides.

185. To summarise, we consider that in country guidance cases there may be a useful role for reports by COI analysts (such as ARC), subject to such reports adhering to certain basic standards. Such a role is distinct from that of a country expert.

186. Keeping in mind the observations we made at paras 37-44 and 153-164 above in particular, we turn then to the central topic of indiscriminate violence in Afghanistan and whether the Article 15(c) threshold is reached in respect of returnees who are ordinary civilians with no relevant risk characteristics.

Afghanistan as a whole

187. We have no doubt that in general terms the level of violence in Afghanistan is rising. Despite some indications of a downturn in some relevant indices in certain quarters of 2011 and despite significant differences between the UNAMA and ANSO figures for civilian casualties, all major studies agree the underlying trend is worsening or at least not improving significantly. We remind ourselves that we recorded earlier the number of civilian deaths according to UNAMA as having risen from 2,412 in 2009, 2,790 in 2010 to 3,021 in 2011. Civilian injuries rose from 3,556 in 2009, 4,368 in 2010 to 4,507 in 2011. Other indicators, such as "security incidents", show a broadly similar rise.

188. The respondent's position, as articulated before us by Mr Blundell and set down in its current OGN and other sources, is that nevertheless the level of violence for Afghanistan as a whole does not cross the Article 15(c) threshold. Bearing in mind, however, that (i) in December 2010 UNHCR, an international organisation with an extensive on the ground presence in Afghanistan, was of the view that even then there were several provinces where the level of indiscriminate or generalised violence had already reached the Article 15(c) threshold; (ii) the position taken by courts in some European countries is similar to that of UNHCR; and (iii) the level of violence (according to UNAMA figures among others) has risen since then, it is right that we consider this question with great care.

189. We shall begin by clarifying the approach to the UNHCR Eligibility Guidelines and to decisions by courts in Europe.

UNHCR

190. We attach considerable weight to the UNHCR Guidelines, not least because in Afghanistan UNHCR has staff on the ground at least in some parts of the country and because the Guidelines are based on a very considerable body of evidence subjected to a rigorous methodology. We also take note that these Guidelines make sufficiently clear

(notwithstanding the use of the word "may": see above para 87 and the passage "Afghan asylum seekers formerly residing in these areas may be in need of international protection....") that UNHCR considers the level of generalised violence in Helmand, Kandahar, Kunar, and parts of Ghazni and Khost provinces to cross the Article 15(c) threshold: see p3 and n.240. At paras 155-6 of AMM, in response to a submission from Counsel acting for UNHCR as an intervener that the Tribunal "should accept the assessment" set out in the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia (May 2010), with update to June 2011 Guidelines (para 154), the Tribunal stated:

> "155. Both the evidence cited in the Guidelines and the legal interpretation of that evidence, particularly as regards Article 15(c), are highly significant to our tasks. At the end of the day, however, it is our job, on the basis of all the evidence and submissions, to reach a view as to whether the evidence, properly interpreted, reaches the particular threshold, whether as regards a well-founded fear of persecution or a fear of indiscriminate violence in the context of Article 15(c). That is what Parliament requires us to do, in the context of re-making decisions on appeals under the Nationality, Immigration and Asylum Act 2002. The fact that UNHCR lawyers, on the basis of the evidence before them, have reached a particular conclusion, whilst extremely helpful, cannot be determinative.
>
> 156. The exercise undertaken by the UNHCR lawyers is also significantly different from the proceedings which have generated this determination. The parties have not only respectively sought to place before us evidence which (compatibly with their professional duties) points towards different legal outcomes; they have also probed and tested each other's evidence, not least that of the experts who gave oral evidence. It is no criticism of the UNHCR Guidelines to observe that the circumstances surrounding their compilation were very different. This is not to trumpet the merits of an adversarial system of adjudication; one can detect the same dialectic at work in the judgment in Sufi & Elmi. It is merely to be aware of the points of difference between an assessment by a non-judicial organisation tasked with pursuing humanitarian objectives and the responsibilities of fact-finding courts and tribunals..."

191. Although we have to consider a distinct set of UNHCR Eligibility Guidelines relating to a different country, it seems to us that the above observations have much the same force.

192. A further feature of the UNHCR evidence in this case is that it is not confined to that set out in its Eligibility Guidelines but also includes numerous documents dealing with its involvement in voluntary returns and repatriation programme. As the Tribunal has observed in other country guidance decisions dealing with countries in which UNHCR participates in voluntary return and repatriation programmes, it is not always easy to see how such participation is consistent with a set of Guidelines that identify certain parts of the country concerned as unsafe - unless such programmes avoid return to those parts. We are not aware

that UNHCR's programmes in Afghanistan avoid any particular parts of the country. Whilst we must do our best to reconcile these two different bodies of evidence, we shall not treat the apparent conflict in UNHCR's stance as in itself an adverse factor in this case, as we did not have proper submissions on it.

193. In addition to the above, the Eligibility Guidelines are now over 17 months old and we have to decide this case on the basis of the evidence before us, including that relating to recent incidents and events.

Decisions by other courts in Europe

194. It is a drawback that we do not have certified translations or full transcripts of all the decisions cited to us, but it has been helpful nevertheless to have translations of some and summaries of others. Whilst it seems to us highly desirable that judges in Europe (who have to apply common legal standards set out in EU law and have to have regard to ECHR jurisprudence) should look to each other's decisions as a source of assistance in terms of the application of the relevant law to facts relating to general conditions in a country such as Afghanistan, the extent of help such decisions can provide on issues related to Article 15(c) and its application must be a function, *inter alia*, of the extent to which they apply the legal guidance given in Elgafaji and the extent to which they apply that guidance on the basis of comprehensive COI and support their findings by clear reasons. We do not attempt in this decision to try and identify more precisely what is meant by "comprehensive COI" except to note that such evidence appears to be one of the elements of what Laws LJ in S and Others [2002] EWCA Civ 539 - when delineating what was necessary in order for findings of fact on general country conditions to serve as country guidance - described as the need for the decision to be "effectively comprehensive" (para 29). In relation to the decisions of the Swiss Federal Administrative Court, however, some of which (S.A. principally) do refer to a significant number of background sources, including UNAMA and ANSO reports, we would observe that in addition to Switzerland not being an EU Member State, its courts plainly do not apply the legal criteria set out in the Qualification Directive. The S.A. case was also addressing the situation 11 months ago.

195. Other things being equal, our Tribunal will be disposed to attach significant weight to judgments of the ECtHR, not simply because (at least in relation to grounds of appeal in asylum-related cases based on Articles 3 and sometimes other ECHR articles) we are obliged by s.2 of the Human Rights Act to take them into account; but also because the ECtHR has increasingly had to address applications raising generic issues about conditions in countries affected by generalised violence. In this regard we attach significance to the fact that such judgments are reached by a senior body of European judges in the context of a jurisprudence that has set out clear standards for evaluation of relevant COI: see e.g. NA v UK paras 118-122. At the same time:

(i) We are mindful that the limited supervisory role of the Strasbourg Court means that fact-finding – whether about general country conditions or any other subject – is at the outer margins of that role. Even though its clear jurisprudence establishes that in asylum-related cases it must apply an *ex nunc* or current assessment of the facts, and even though in the past few years (especially following its decision in Salah Sheekh v Netherlands App.no.1948/04 and NA v UK), it has been prepared in this context to undertake a comprehensive assessment of general country conditions, its readiness to do so appears to depend very much on whether the submissions of the respective parties and/or third-party interveners adduce what they consider to be comprehensive COI; and also on whether the Court identifies a case as a "lead case". In addition, whether the ECtHR applies its own jurisprudence setting out criteria for evaluating COI is, as always, a question of fact. A further complication is that (unlike the practice followed in our country guidance cases for a number of years now) the ECtHR does not always enumerate in full the background country materials on which it has relied.

(ii) Further, even if the Strasbourg Court has had regard to comprehensive COI, that does not necessarily mean we will follow its findings. As the Tribunal has observed in AMM at para 115:

> "…whilst the Strasbourg Court's guidance as to the general approach to evidence is part of its jurisprudence, to be followed by United Kingdom courts and tribunals to the extent demanded by the House of Lords and Supreme Court authorities, the weighing of the evidence and the conclusions as to the relative weight to be placed on the items of evidence are ultimately matters for the tribunal. Whilst the factual finding the Strasbourg Court has made as a result of applying its own guidance is something to which the domestic tribunal must have regard, the tribunal is not bound to reach the same finding."

Accordingly, one relevant factor the Tribunal will take into account when deciding what weight to attach to judgments of the ECtHR that set out findings on general country conditions, will be the extent to which the Court has before it comprehensive COI (Country of Origin Information). But even when there is a relevant Strasbourg decision that makes findings based on comprehensive COI, the Tribunal is not bound to reach the same findings.

196. What we have just said has implications for the weight we can attach to the Court's judgments in Husseini and JH. In neither case does the Court appear to have had before it a comprehensive body of COI (we reiterate the point made immediately above that the ECtHR decisions do not enumerate all the background sources to which it had regard; we can only go by what is shown on the face of the record). Further, we must not overlook that in Husseini and JH the ECtHR was not considering risk of generalised violence province by province. Nor must we forget that the CJEU in Elgafaji and our own Tribunal in AMM, have emphasised that in any

event Article 15(c) has an "additional scope" to Articles 2 and 3 of the ECHR.

197. Leaving to one side for the moment the issue of the levels of indiscriminate violence at the provincial level, we are not persuaded that the level of violence in Afghanistan taking the country as a whole is at, or is even close to, that which would cross the Article 15(c) threshold. There are a number of reasons.

198. First, although figures for civilian deaths and casualties in the low thousands must always be an acute concern, they have to be considered in the context of the size of the overall population which is widely accepted as now being in excess of 30 million. On the 2011 UNAMA figures for civilian deaths of 3,021 and injuries of 4,507 (which added together totals 7,528) there are less than 0.1 per cent of the population who are direct victims of violence. On 2011 figures as set out in the CSIS report of February 2012, the total number of casualties (adding together hostages (755), wounded (3,625) and dead (2,494) came to 6,874. That amounts again to less than 0.1 per cent of the population. (We also note that according to Farrell and Schmitt's March 2012 study, "in contrast" to the two previous wars in Afghanistan, "civilian fatalities since 2006 have been relatively modest.").

199. Secondly, the nature and extent of violence adversely affecting civilians is less intense than it has been in certain other countries in which, for some periods at least, indiscriminate violence has or may have reached a high level. Dr Seddon in his report criticised Professor Farrell in GS for only drawing comparison with Somalia and certain other countries. Whilst we would agree that in the current state of international war studies there is no comprehensive data that might enable precise comparisons and that we must approach any comparison with other countries (in respect of which the detailed evidence is not before us in this case) with caution (see the observation to similar effect made in para 258 of the Tribunal decision in HM), we note that Dr Seddon did not volunteer any better or more relevant comparators. Furthermore, the Tribunal's own experience, whilst limited to only a number of the current 30 odd major armed conflicts in the world, does aid us in gaining a greater perspective. In this regard it is particularly pertinent to look at situations where the Tribunal has previously found a country or part of a country to have crossed the Article 15(c) threshold. That was done in AM and AM ((armed conflict: risk categories) Somalia CG [2008] UKAIT 03444 and again in AMM in relation to Mogadishu where, save for very limited categories, return to that city was found to pose a real risk of an Article 15(c) violation. In both AM and AM (as noted by the ECtHR in Sufi and Elmi at para 246) and in AMM, the Tribunal attached particular weight to the figures for civilian casualties coupled with the egregious conduct of the combatants which featured frequent and systematic acts of indiscriminate violence harming civilians and targeted at civilian areas: see e.g. AMM, paras 339, 359.

200. In HM, although finding that neither Iraq as a whole nor any specific region of it was at that time at the Article 15(c) threshold, the Tribunal did indicate: (i) that it did not rule out that the levels of violence in Iraq at the height of the conflict in 2006/7 may have crossed the Article 15(c) threshold (para 255); and (ii) that the situation in Mosul/Ninewah province at the time (2010) may have been at or nearing the Article 15(c) threshold (para 263). (We bear in mind, of course, that in HM (Iraq) [2010] EWCA Civ 1322 HM was found to be wrong in law and so it lacks the status of country guidance, but, as noted earlier, the Court of Appeal made no adverse comment on the above findings).

201. Further perspective on the Tribunal's past assessments on Iraq is afforded by the evidence now to hand from the Center for Strategic and International Studies (CSIS) in its February 2012 study on "Afghanistan: the Failed Metrics of Ten years of War". Although Mr Vokes quite rightly urged that we should read this report as reflecting its authors' own agenda, he did not seek to cast doubt on its use of existing figures drawn from various established sources.

202. The comparison made in this study with Iraq, whilst we approach any comparison with caution, strikes us as of help in providing some perspective since both this country and Afghanistan have a roughly similar population and both have been embroiled in conflict in which, in addition to armed encounters between different internal actors, has featured armed encounters between various domestic insurgents (aided by foreign fighters) and international forces led by US military forces. Both conflicts are also still ongoing. The principal findings of the CSIS study, based on figures up to the end of 2010/2011, are: (i) that the figures for victims of the Iraq War in its two peak years – 2006/2007 – are nearly ten times as high as in Afghanistan currently; (ii) that in more recent years, the total number of attacks in Afghanistan, whilst higher in 2011 than in Iraq, is still lower than comparable levels in Iraq in 2009 and 2010; and (iii) that the type of violence in Iraq had produced a much higher ratio of wounded/killed (in Iraq in 2009-2010 the rate was two and a half times that of Afghanistan in 2009-2011). CSIS figure 5 shows that in Iraq in 2009-2011 the figures of killed/wounded were 3,654/13,168 (2009), 3,363/11,689 (2010), 2,310/6,848 (2011), as compared to figures for Afghanistan of 2,779/4,192 (2009), 3,205/4,877 (2010) and 2,494/3,625 (2011).

203. Mr Vokes in his and Ms Rutherford's written submissions sought to argue that on the basis of Dr Seddon's report it was evident that levels of violence in Afghanistan were now worse than in Somalia. Whilst we cannot see that Dr Seddon's report says as much, it is right that we address this contention by reference to the recent country guidance case of AMM. Whilst finding it difficult to gauge whether civilian deaths were increasing or decreasing from previous years, the Tribunal in AMM noted the very high figures for wounded – see e.g. the mention in para 271 of there being, in the nine months January to September 2010, 5,485 weapons-related injuries reported just by three Mogadishu hospitals. The population of

Somalia, of course, is roughly one third that of Afghanistan. Further, as already noted, the Tribunal clearly saw the level of intensity being aggravated by the systematic targeting of civilians including by mortar shelling.

204. A third reason relates to the fact that a significant number of acts of violence carried out against civilians in Afghanistan as a whole appear to have arisen in the context of attacks targeting certain types of civilians (essentially persons in some kind of influential position perceived by the insurgents as supporting the Afghan government or international forces (see above paras 50, 51, 75)), without such attacks having routinely caused widespread harm to other civilians unconnected with such persons.

205. As we go on to explain, our above finding does not mean that Article 15(c) has no application to civilians in targeted categories. Were it not for the fact that such persons would if facing a threat of removal be very likely to be able to establish both refugee and Article 15(b) eligibility, their being in a targeted category would be highly relevant to applying Article 15(c)'s "sliding side". But it does serve to indicate that the figures for acts of violence against ordinary civilians, grim reading though they make, remain at a relatively modest level. In this context it seems to us that the words of Dr Giustozzi (who is after all one of the expert witnesses relied on by Mr Vokes in this appeal) stating that the armed conflict in Afghanistan so far has "not particularly bitterly targeted civilians" (see above para 59), are particularly apt.

206. A further factor, although we note straightaway that we did not have full and precise evidence on the matter, is that the major reports do not appear to regard the violations of international humanitarian law presently occurring in Afghanistan as being anything like as large-scale or systematic as have occurred in the past in Iraq or more recently in Somalia. Whilst the prevalent use by the insurgents of IEDs is a major and increasing cause of civilian casualties, by the same token such devices are in general terms small-scale and their increased heavy use is regarded, by ISAF (with some justification we think), as symptomatic of the insurgency's degraded capacity to inflict large-scale violence. Even if not all the figures support Mr Blundell's contention that the deaths/wounded ratio in Afghanistan is now less than 1:2, the CSIS report of February 2012 shows that it is certainly less than prevails (even now) in Iraq.

207. We bear in mind, of course, that the targeted killing of particular types of civilians is not only murderous but also contrary to international humanitarian law and its occurrence degrades the security environment for ordinary civilians not in the targeted categories: the effects of civilian deaths, however caused, on any population may be extreme and long-lasting. Because targeted killing is one of "the varieties of ways in which civilians come to harm" (to borrow from the formulation in the Tribunal case of HM para 82), it does indirectly impact on risk to ordinary civilians. That is why it can never be right to attempt some simple subtraction of targeted violence from the overall sum of indiscriminate violence.

Nevertheless, it cannot be said that such targeting killings, without more, *directly* establish the "more general risk of harm" or that such indiscriminate violence within the meaning of Article 15(c) is the violence that ".. extend[s] to people irrespective of their personal circumstances" contemplated by Elgafaji at paras 33, 34.

"Enhanced risk categories"

208. We have referred to submissions made by Mr Vokes and Ms Rutherford seeking to persuade us by reference to GS, paras 62 and 74 that even if we were to find that ordinary civilians are not at Article 15(c) risk anywhere in Afghanistan, we should nevertheless identify "enhanced risk" categories of persons who might be at Article 15(c) risk by virtue of being less able than ordinary civilians to avoid the on-going violence. As already noted, we prefer to refer to these as "intermediate categories" as they are clearly meant to identify categories falling short of outright risk categories ((i)-(xi)) as identified by UNHCR in its 17 December 2010 Eligibility Guidelines cited at para 86 above. Mr Vokes and Ms Rutherford gave the examples (see above para 117) of fruit sellers outside public buildings, day labourers on state construction projects who need as a necessity of life to be employed in this fashion or small farmers or landless labourers who out of economic necessity have to keep farming in situations of armed warfare breaking out on their land or the land that they work. (They also added that "the latter category would include businessmen, more senior state officials, war lords, large landowners", but we must confess to finding it difficult to see how such examples come within the "necessity"-based criterion seemingly relied on in relation to all the other examples.)

209. We agree with Mr Vokes and Ms Rutherford that the "sliding-scale" element of Article 15(c) as set out by the Court of Justice in Elgafaji in para 39 would appear to make it possible for anyone with a relevant individual characteristics to be able to show a real risk under Article 15(c) even if the relevant level of violence was not at a high enough level for such a person to qualify merely as a civilian. The Court does not confine its description to civilians whose relevant risk characteristics are such as to make them at risk of serious harm under 15(a) or (b) (or indeed Article 1A(2) of the Refugee Convention or Article 3 of the ECHR). In principle, therefore, there is scope for Article 15(c)'s "sliding-scale" to protect not only recognised risk categories such as those set out (non-exhaustively) by UNHCR in its 2010 Eligibility Guidelines (i)-(xi), but also intermediate categories who do not come within the former's scope. That would appear to be consistent with the view taken by the German Federal Administrative Court in the case of BVerG 10 C 4.09, 27 April 2010 (a translated copy of this was made available to us, but we note that the same version has now been reported in the International Journal of Refugee Law, Vol 23, No 1, March 2011 as ZG v The Federal Republic of Germany, at pp. 113-131). At para 33 the Court in ZG makes this comment about the sliding-scale element:

> "If there are no personal circumstances increasing risk, an especially high level of indiscriminate violence is necessary; if personal circumstances

> increasing risk are present, a lower level of indiscriminate violence will suffice. These factors that increase risk primarily include those personal circumstances that make the applicant appear more severely affected by general, non-selective violence, for example because he is forced by reason of his profession – e.g. as a physician or journalist – to spend time near the source of danger…"

It also seems to us that this is consistent with the position set out in the UKBA OGN 3.6.12 (see above para 90). But we found Mr Vokes' and Ms Rutherford's proposed examples somewhat too hypothetical (and in part somewhat too diverse: see above para 208) and we think it unwise to attempt identification of actual categories without fuller analysis of actual existent examples in relation to specific locations. Further, and this was the point mainly relied on by Mr Blundell, in the context of Afghanistan, there would ordinarily be (save for certain categories of women) a viable internal relocation alternative for a returnee who appeared to fall into any such intermediate category. Manifestly the appellant in this case did not fall within any intermediate risk category.

Relevance of other metrics

210. In our analysis so far we have placed focus on available figures relating to civilian deaths and injuries and related measurement of violence. Mr Vokes, however, has urged us to continue the approach taken in GS and in HM and AMM of considering other relevant "metrics". Subject to insisting upon such metrics being treated as "secondary" rather than "primary", Mr Blundell did not seek to argue that such metrics were not important indicators in our holistic Article 15(c) assessment. Indeed, the documents produced by the respondent included the World Development Report for 2011 entitled "Conflict, Security and development, Ch.2 Vulnerability to violence" which advocates a similar approach to that of Professor Farrell. In our view such statistical information and data helps inform our holistic approach and reminds us of our opening words that in addition to being war-stricken Afghanistan has many other problems.

211. One such metric or indicator is state ineffectiveness. Here it seems to us Mr Vokes is able to mount a formidable argument for saying that Afghanistan is a failed state and that there is widespread evidence of its inability to protect its population in the way that a stable State can. Nevertheless, this metric must be considered in the context of the existing levels of physical violence and the related threats they pose to the civilian population. It is principally about the protection a state is able to afford its citizens in a time of war and emergency; it is not principally about whether, for example, there is a criminal justice system ensuring punishment of offenders. Further, even if a somewhat artificial effect created by the NATO intervention, the heavy involvement of the international community and more recently the building up of a very sizeable Afghan army and security force, it is an inescapable fact that by way of direct or indirect support for security from the international community, there are sources of immediate physical protection and

assistance available to the Afghan population. Even though the current timetable envisages large-scale withdrawal of international forces by 2014, it is clear that the ANSF is being expanded and trained up to some level of capability so that, even if the ANSF does significantly less well post-2014 at providing security, there will not be a security vacuum. (This appears to be confirmed by the May 1, 2012 strategic agreement reached between Presidents Obama and Kharzai.)

212. There is also a very significant level of support provided to the Afghan population by myriad aid and humanitarian agencies, domestic and international. It is of course, painfully clear that despite their efforts those agencies fail to reach and help all Afghans in need and fail to remedy the poor socio-economic conditions that face the great majority of the population. Yet it remains firstly that by dint of high levels of international support in money and in kind, the economy is improving and the country's GDP has nearly trebled in the past nine years; and secondly that despite such adverse conditions there is no evidence of significant levels of destitution. There is no reliable evidence before us that such support is likely to significantly diminish despite the anticipated change in the way the government intends to operate in the future.

EDPs and IDPs

213. We take into account the population displacement in large numbers has been and is still taking place in Afghanistan both in terms of persons leaving (EDPs) and persons returning (returning IDPs) and persons moving internally (IDPs *per se*). We attach significant weight to the views expressed by UNHCR in its December 2010 Eligibility Guidelines and their subsequent reiterations of the same. We are mindful, as well, of the huge challenges facing UNHCR and other bodies in seeking to address what is one of the world's largest IDP problems and we acknowledge straightaway that the UNHCR research and reports are studiously careful to highlight ongoing shortcomings in current return and reintegration programmes, e.g. the fact that 40% of returned IDPs appear not to reintegrate. Equally those reports show that many IDPs do achieve reintegration and that large numbers of people are making a voluntary choice to return, including to areas of Afghanistan most affected by the on-going armed conflict. By virtue of the involvement of UNHCR and other major humanitarian agencies, we cannot infer that such people are kept in the dark as to the general situation in their home areas/places of relocation.

214. As we noted earlier, we have not as yet seen any clear explanation of how, if UNHCR's International Protection Division considers return to certain provinces of Afghanistan to be unsafe due to the levels of generalised violence, other arms of the same international organisation can be active in facilitating their return. We have given thought to whether there are features that might distinguish the UNHCR-supervised returnee from the ordinary returnee sent back by the UK government. On the face of it, it is difficult to see any distinguishing features that would render the former generally safe and the latter generally unsafe, since both sets of persons,

receive cash grant as well as reintegration assistance. But in the absence of full submissions on this matter, we confine ourselves here to the fact that the evidence shows significant numbers of voluntary returns.

The situation province-by-province

215. To this point the Tribunal's view as to the absence of any Article 15(c) level of risk in Afghanistan as a whole is not one which either party to this appeal has opposed. Mr Vokes for the appellant has carefully confined his challenge to the issue of whether the situation in certain provinces (or parts of provinces) in Afghanistan now crosses the Article 15(c) threshold. He asks us to find that there are now at least several provinces in the south, south-east and east of the country that engage Article 15(c) generally, including in particular Ghazni, which is the appellant's home province.

216. It is right that we should place particular focus on the situation at the provincial level, not just because that is the approach taken by UNHCR and some national courts and/or authorities in several European countries, but because our previous summary of the background evidence has pinpointed that "much of the violence is concentrated in certain areas of the country and, in the words of the February 2012 CSIS report (to take a very recent source), "most fighting is highly regional in Pashtun areas, rather than nationwide".

217. Nevertheless, we do not think that bearing in mind their known populations the current evidence indicates that there is any province where the level of violence reaches the Article 15(c) threshold. Thus according to the UNAMA 2011 report, the two provinces with the highest number of civilian deaths were in Kandahar and Helmand, with 290 civilians killed. The combined total of the south-eastern and eastern provinces (which Mr Vokes identified as the main hub of recent increases in the levels of violence) accounted for 446 deaths. In Ghazni province, even taking into account that it has seen a significant rise in violent incidents, the figure of the numbers of civilians killed are still relatively low (even assuming for the moment that the majority of the 446 deaths recorded by UNAMA for the five south-western and eastern provinces occurred in Ghazni). A factor which appears to be particularly important in relation to Ghazni is that the background sources consider the proportion of targeted attacks to be very significant. As already noted, both the 9 September LANDINFO report by Dr Giustozzi and the October 2011 the report by the Afghanistan Research and Evaluation Unit, for example, describe the Taliban as targeting anyone in Ghazni city identified as having a government-related position in a variety of roles – in the police, as government staff and even as teachers.

218. According to statistics we have been given, the population of Kandahar is 1,127,000 and that of Helmand 1,744,700. We do not consider that, viewed in the context of the provincial populations of Kandahar and Helmand, 290 civilian deaths is a figure indicative of an Article 15(c)

threshold of violence for civilians generally. Similarly, bearing in mind that the population of Ghazni province is 1,149,400, we do not think that even if all the 446 deaths (for the south-eastern and eastern provinces) recorded by UNAMA were treated as having occurred in that province, such a figure is indicative of a level of violence giving rise to a real risk of Article 15(c) serious harm to civilians generally.

219. As regards Kabul, even confining attention to Kabul city, given the fact that this has a reported population of around 5 million and that Kabul province does not feature in any list of the most violent provinces, the argument for any engagement of the Article 15(c) threshold, if based primarily on civilian deaths, is even weaker: according to the 2011 UNAMA report, the number of civilian deaths in Kabul in 2011 was 71. We remind ourselves that the population of Kabul is around 5 million.

220. It is not entirely clear that the national court decisions that have found the level of indiscriminate violence in certain provinces of Afghanistan to cross the Article 15(c) threshold have considered the matter of civilian deaths/casualties by reference to the relevant population figures, but even assuming that is so, none of those to which we were referred, except some of the Swiss cases, appear to have looked at a comprehensive body of sources. In relation to the Swiss decisions, as noted already, they do not apply Article 15(c) and in any event their approach to internal relocation is clearly inconsistent with authorities that are binding on us (Januzi, AH (Sudan). A further consideration is, of course, that in any event we have to consider the position as of now, not as it was previously and must make our decision according to the weight we ascribe to the evidence before us.

221. Mr Vokes has sought to argue that, just as we must look at more than the metric or data relating to "civilian casualties" when considering Afghanistan as a whole, we must do likewise in relation to assessment of Article 15(c) risk at a provincial level. We agree. In this regard he highlighted various features of the evidence relating to Ghazni and Kabul especially those relating to socio-economic conditions.

222. In relation to Ghazni, it is clear that in addition to its security problems it has a growing unemployment problem, but it is far from being the country's poorest province and there is relatively little evidence of significant levels of destitution. We do not consider that the socio-economic conditions in Ghazni, even taken cumulatively with the known level of violence there and other relevant factors, suffice to establish Article 15(c) risk in this province.

223. In respect of Kabul, Mr Vokes recognises that in terms of many socio-economic indicators, its vantage point as the centre of government and international organisations and its position as the country's wealthiest province, poses problems for the argument that return there will cause serious harm arising from poor socio-economic conditions, but he rightly points out that these features continue to make it a magnet for many IDPs and other rural dwellers seeking employment and better opportunities,

with the result that the city cannot cope with the rapid expansion in its population, and returnees in particular face a life akin to that of the city's large IDP population who in general live at a lower level than the city's poor. He also points out that we have to consider matters cumulatively so that the lack of security is also treated as a relevant factor. Once again, we think that the background evidence supports much of his argument and we accept, of course, we have to consider matters cumulatively.

224. At the same time, we do not think that the situation of UK returnees to Kabul (even limiting this category to persons whose home area is not Kabul) and IDPs in Kabul are wholly the same. As noted earlier (leaving to one side irregular migrant returnees), there are return and reintegration packages available. It would be unwise to exaggerate the importance of such packages: they are chiefly designed to cushion against immediate travails on return. That said, by assisting with skills training and inquiries related to employment opportunities, they clearly do help position returnees advantageously as compared to IDPs marooned in squatter settlements in outlying areas. (UK returnees who previously lived in Kabul would ordinarily have the additional advantage of knowing the city and having family and or social networks there.)

225. In addition (as already indicated in relation to Afghanistan as a whole), whilst the overall picture is of aid and humanitarian organisations struggling unequally to deal with the manifold problems of the urban poor and IDP population, and whilst we do not seek to minimise the significant incidence of physical and mental health problems and food insecurity, there is little evidence of significant numbers of such persons in Kabul suffering destitution or inability to survive at subsistence levels. These are cold words for those actually living in these conditions, but we reiterate our opening observation that our task in this case is a limited one of assessing country conditions by reference to established legal criteria, Article 15(c) in particular.

226. It is also significant in our judgement that the areas which Mr Vokes says are most likely to be those resorted to by returnees to Kabul – the poorest areas of the city or its environs – have been, and continue to be, much less affected by indiscriminate violence. As we have seen, whilst there are incidents of attacks throughout the city, the great majority have concentrated on areas where the government or international organisations have their offices or where their employees frequent.

Internal relocation

227. One of the issues we have to decide in revisiting the application of Article 15(c) in the context of present-day Afghanistan concerns internal relocation. Whilst confined to the Article 15(c) context, it is inevitable that what we say below will have implications for consideration of this issue in the context of Article 1A(2) of the Refugee Convention, Article 15(b) of the Qualification Directive and Article 3 ECHR; but it is not our task here to spell out what they are.

When analysing this issue, it is important to clarify that the respondent's position as expressed in submissions before us must clearly be read in the context of the concession that has been made in recent Home Office OGNs on Afghanistan, namely that whilst women with a male support network may be able to relocate internally "…it would be unreasonable to expect lone women and female heads of household to relocate internally" (February 2012 OGN, 3.10.8) and the Tribunal sees no basis for taking a different view. (Much the same position was taken by the ECtHR in the case of N v Sweden on the basis of a close consideration of major background sources.)

228. It is clear from the structure of Article 8 of the Qualification Directive that internal relocation is a necessary element which is relevant not just to establishing refugee eligibility (under Articles 2 and 9) but also to establishing subsidiary (humanitarian) protection eligibility under all three limbs of Article 15 – 15(a), (b) and 15(c). So far as concerns internal relocation being a necessary consideration for Article 15(c) purposes, it has been confirmed by the Court of Justice of the European Union (CJEU) ruling in Elgafaji that an Article 15(c) issue can arise not just in relation to the whole of a country but also part(s) of it: see para 43. If a civilian's home area or region is considered to be in a state of indiscriminate violence at above the Article 15(c) threshold, he will still not be able to establish eligibility for subsidiary (humanitarian) protection unless able to show *either* a continuing risk of serious harm (the Article 8(1) "safety" limb) *or* circumstances that would make it unreasonable for him to relocate to another area or region (the Article 8(1) "reasonableness" limb).

229. If the proposed place of relocation is one which is not significantly affected by armed conflict and/or indiscriminate violence, the established legal principles to be applied are clear.

230. If, however, the proposed place of relocation is beset by armed conflict/significant indiscriminate violence, then we must apply the principle set out in Elgafaji at para 36, namely that effect must be given in the assessment to the fact that this provision has its own additional scope or "field of application" as compared with that of Article 15(b)/Article 3 ECHR: see AMM, para 334.

231. The impact of the Elgafaji approach in relation to the first limb of the Article 8(1) inquiry, the "safety" limb, is easy to understand; ordinarily it will be to ask the same question about the level of indiscriminate violence in the area of relocation as was asked about the level in the civilian's home area. But we can see no principled basis for not applying the same approach to the second limb of Article 8(1) also, the "reasonableness" inquiry. Indeed, it might be said that considerations of general difficulties facing civilians would apply *a fortiori* when considering reasonableness. Thus, for example, in the most typical case that arises for an Afghan applicant (who is not from Kabul) who has been able to establish real risk of serious harm in his home area, it will be necessary in determining

reasonableness for decision-makers to factor in the evidence relating to levels of indiscriminate violence in Kabul.

232. It has also to be borne in mind that by analogy with the principles enunciated by the House of Lords in Januzi and AG (Sudan), just as an applicant seeking to establish refugee protection eligibility by pointing to factors making it unreasonable for him to relocate does not need to show the difficulties in the place of relocation reach the level of persecution (or Article 3 ECHR ill-treatment), so an applicant seeking to establish subsidiary protection eligibility does not need to show that difficulties in the place of relocation cross the Article 15(c) threshold of serious harm.

233. By the same token, this analogy only takes us so far, because, the "reasonableness" test remains, as noted by Baroness Hale in para 22 of AH (Sudan), a "stringent" one (see above para 114). In para 41 of the same decision Lord Brown, by reference to several opinions given in Januzi, described it as a "rigorous" test.

234. Before turning to apply this understanding to Kabul and other possible internal relocation alternatives for Afghan applicants in protection cases, it is necessary to address a separate strand of Mr Vokes' argument as to the law on internal relocation. His submissions were difficult to follow in places, but it is clear enough that he considered that we should find that whether one is talking about refugee protection, subsidiary protection or Article 3 ECHR protection, the approach to the reasonableness of internal relocation has to be a human rights approach. His fall back submission was that even if we took the view that for assessing reasonableness under the Refugee Convention, we were bound by Januzi and AH (Sudan) not to take a human rights approach, the sources for interpreting serious harm were expressly identified by recital 25 of the Qualification Directive as being human-rights based. This prompted us to raise with Mr Blundell whether the state of UK case law fully reflected the principles relating to internal relocation codified in Article 8 of the Qualification Directive.

235. The thrust of our inquiry was this. Even considered purely as cases concerned with internal relocation under the Refugee Convention, in relation to both Januzi and AH (Sudan), there are possible questions as to what their eventual position was regarding the extent to which human rights norms were to govern the assessment. It is clear from Article 9 of the Qualification Directive, read in conjunction with Article 8, that assessment of whether an applicant can find protection against persecution by moving to another part of the country must in the first instance be made in the context of an inquiry into the "safety" limb, namely whether relocation affords protection against persecution; and in deciding whether the latter is still a real threat in the place of relocation decision-makers are required by Article 9(1) to construe that in terms of whether there are "severe violations of basic human rights" or "an accumulation of various measures, including violation of human rights, that are sufficiently severe as to affect an individual in a similar manner".

So even confined to this limb of the Article 8(1) inquiry, a human rights approach would seem to be necessitated by Article 9.

236. Still confining matters to refugee eligibility, what happens when an applicant for international protection cannot succeed under the "safety" limb, so that his success turns on whether he can still succeed under the "reasonableness" limb? As just highlighted, we know from Januzi and AH (Sudan) that in order to show reasonableness under Article 8(1), it is unnecessary to show these violations are in themselves at the Article 9(1) level. So the question is - one made more acute by the seeming rejection in Januzi and AH (Sudan) of a human rights approach - what type of approach should continue to govern the less demanding "reasonableness inquiry".

237. For our part, it is difficult to see how the Article 8(1) inquiry, having begun (as it must) on a human rights basis under Article 8(1), can suddenly switch to a different type of approach having nothing to do with human rights. It would seem to make for more sense for the decision-maker to keep in mind the same human rights framework subject to recognising that even violations falling short of Article 9(1) levels may suffice to show unreasonableness.

238. Still maintaining focus on refugee protection, it is arguable therefore that Januzi and AH (Sudan) do not furnish a complete answer to the question of a human rights approach to internal relocation, notwithstanding the apparent rejection in Januzi of the human rights argument that was advanced by appellants' counsel in these cases.

239. All this has evident implications for assessing internal relocation in the different context of subsidiary (humanitarian) protection since, as already noted, the criteria set out in Article 8 govern both refugee and subsidiary (humanitarian) protection. It may be, if Januzi and AH (Sudan) are understood to negate a human rights approach, that Mr Vokes' fall back argument about recital 25 of the Qualification Directive giving the latter additional human rights bolstering, would then need to be considered in its own right.

240. In the event, we have decided not to seek to resolve this issue, save to note that it is difficult to conclude that the Law Lords in either Januzi or AH (Sudan) intended to reject all recourse to human rights norms. At para 22, Baroness Hale, for example, said that she found "very helpful" the UNHCR intervention submission which stated that this assessment is to be made in the context of the conditions in the place of relocation "including basic human rights…" and she went on to say that "I do not understand there to be any difference between this approach and that commended by Lord Bingham in paragraph 5 of his opinion".

241. Our reason for declining to try and resolve this issue is that we agree with Mr Blundell that the application or not of a human rights approach to internal relocation does not obviously impact on the issues of fact

identified in this appeal. For the avoidance of doubt, however, we can state that whether one applies the existing approach enjoined in Januzi and AH (Sudan) or an alternative human rights approach that takes serious or near serious violations of basic human rights as its basic framework, our conclusions on the facts of this case (both as concerns the general situation and the appellant's particular circumstances) would be the same.

242. We should explain how our above analysis affects the respondent's submission that we should endorse the position taken in GS at para 72 (and endorsed by the Tribunal in AMM at para 337) that the "life or person" criterion set out in Article 15(c) does not cover all forms of serious physical or psychological harm, and does not include flagrant breaches of qualified rights, such as freedom of thought, conscience and religion. That submission was made primarily in relation to Article 15(c) risk in a person's home area but has obvious implications for internal relocation. All we would say about it here is that we cannot agree with the respondent that the Tribunal in AMM directly endorsed the GS position; whilst the appellant's representatives in AMM did refer to GS, their basic submission was that the European Charter of Fundamental Rights required the notion of harm to be interpreted so as to guarantee "human dignity". That is all that the Tribunal in AMM sought to reject. Be that as it may, we cannot see that even if the GS position is right and that the "life or person" formulation restricts the material scope of Article 15(c), that it precludes a human rights approach to unpacking what "life or person" means. But in any event we do not think that we have heard anything that would justify us departing from existing case law on the meaning of this criterion.

Kabul

243. As regards Kabul city, we have already discussed the situation in that city and we cannot see that for the purposes of deciding either refugee eligibility or subsidiary protection eligibility (and we are only formally tasked with deciding the latter) that conditions in that city make relocation there *in general* unreasonable, whether considered under Article 15(c) or under 15(b) or 15(a). We emphasise the words "in general" because it is plain from Article 8 (2) and our domestic case law on internal relocation (see AH (Sudan) in particular) that in every case there needs to be an inquiry into the applicant's individual circumstances; and what those circumstances are will very often depend on the nature of specific findings made about the credibility of an appellant in respect of such matters as whether they have family ties in Kabul. But here our premise concerns an appellant with no specific risk characteristics and someone found to have an uncle in Kabul: see above paras 3,5,154, 186 and below, paras 250-254). To summarise our conclusion, whilst when assessing a claim in which the respondent asserts that Kabul city would be a viable internal relocation alternative, it is necessary to take into account (both in assessing "safety" and reasonableness") not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many IDPs living there, these considerations will not in general make

return to Kabul unsafe or unreasonable, although it will still always be necessary to examine an applicant's individual circumstances.

Ghazni

244. In relation to Ghazni, however, we note that it is accepted that there are significant numbers of districts in that province under Taliban control (although not the city itself) and we do not exclude that, for most civilians in such districts that is a factor that may make it unreasonable for them to relocate there, although that is not to say that a person with a history of family support for the Taliban, would have difficulties; much will depend on the particular circumstances of the case. Outside Taliban controlled districts, however, we do not find that internal relocation would in general be unreasonable.

Internal travel

245. Mr Blundell's skeleton argument notes that the appellant has not sought to suggest that any route of return within Afghanistan would place him at risk. "Where an appellant in any given case wishes to rely on risk on a route of return, it is for them to demonstrate on the evidence before the Tribunal that it would meet the high threshold required by Article 15(c): HH (Somalia) [2010] EWCA Civ 426 at paragraph 84. Having not done so, the Secretary of State proceeds on the basis that it is no part of the appellant's case that the route of return to his home area of Ghazni would create an Article 15(c) risk". We consider this to be an accurate statement both of the law and of the position as regards the appellant's case. Since we did not have full submissions on the issue of safety of different routes of return in Afghanistan, we do not seek to give guidance on it, although we are bound to say that nothing in the evidence before us indicates that the main routes of travel from Kabul to other major cities and towns experience violence at an intensity sufficient to engage Article 15(c) for the ordinary civilian. The position may be different when it comes to travel *from* the main cities and towns to villages: we note in this regard that Dr Giustozzi in his report at para 25 (see above para 15) said that "[m]ost indiscriminate violence occurs in the shape of pressure mines, which are indiscriminate by nature. The risk is mainly on the roads connecting the provincial and district cities to the villages." Routes of this kind may be under the control of the Taliban and/or other insurgents and hence will require a case-by-case approach. It is true that the FCO, among others, has issued travel guidance warning against travel to certain parts of Afghanistan (including Ghazni) but they have not done so seeking to apply legal criteria.

We make two final observations on the general situation, one concerns the past, the other the future.

Previous country guidance

246. It is necessary for us to specify the effects of our above assessment for relevant country guidance pertaining to Afghanistan. Given the limited scope of our inquiry – into the applicability of Article 15(c) for ordinary civilians in Afghanistan - it is not appropriate for us to review all current CG cases on Afghanistan, although our findings plainly have implications for some of the matters covered in them, in particular our findings on internal relocation. It will suffice to say first of all that whilst in general terms we have not been persuaded that the time has come to revise the position as regards Article 15(c) as set out in GS, nevertheless, the need for our guidance to be up-to-date, coupled with the need to ensure it is applied in the light of post-GS guidance on the law, leads us to conclude that GS is no longer to be considered as country guidance as to the present relevance of Article 15(c) to Afghanistan.

247. In the course of our deliberations we have not seen any reason or evidential basis to depart from the child-specific guidance given in AA.

The future situation

248. Whilst we have reached our assessment of country conditions in Afghanistan so far as they relate to Article 15(c) so as to make a forward-looking assessment of risk based on the present evidence, we cannot overlook the fact that the current overall trend is one of rising levels of violence now over several years, even if relatively gradual. Nor can we overlook that although we consider the planned departure of most of the NATO and international troops in 2014 is not reasonably likely to leave a security vacuum, this departure obviously gives rise to more unknowns about what is likely to happen than otherwise. Hence it seems to us that whilst the guidance we give will continue to have validity for the immediate future, we will need to keep the situation in the country under careful review over the next few years.

General conclusions

249. Drawing together the assessment given above, our principal conclusions are as follows:

A. Law etc:

(i) The Tribunal continues to regard as correct the summary of legal principles governing Article 15(c) of the Refugee Qualification Directive as set out in HM and others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC) and more recently in AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) and MK (documents - relocation) Iraq CG [2012] UKUT 126 (IAC).

(ii) The need, when dealing with asylum-related claims based wholly or significantly on risks arising from situations of armed conflict and indiscriminate violence, to assess whether Article 15(c) of the Qualification Directive is engaged, should not lead to judicial or other

decision-makers going straight to Article 15(c). The normal course should be to deal with the issue of refugee eligibility, subsidiary (humanitarian) protection eligibility and Article 3 ECHR in that order.

(iii) One relevant factor when deciding what weight to attach to a judgment of the European Court of Human Rights (ECtHR) that sets out findings on general country condition in asylum-related cases, will be the extent to which the Court had before it comprehensive COI (Country of Origin Information). However, even if there is a recent such ECtHR judgement based on comprehensive COI, the Tribunal is not bound to reach the same findings: see AMM, para 115.

(iv) There may be a useful role in country guidance cases for reports by COI (Country of Origin) analysts/consultants, subject to such reports adhering to certain basic standards. Such a role is distinct from that a country expert.

B. Country conditions

(i) This decision replaces GS (Article 15(c): indiscriminate violence) Afghanistan CG [2009] UKIAT 00044 as current country guidance on the applicability of Article 15(c) to the on-going armed conflict in Afghanistan. The country guidance given in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC), insofar as it relates to unattended children, remains unaffected by this decision.

(ii) Despite a rise in the number of civilian deaths and casualties and (particularly in the 2010-2011 period) an expansion of the geographical scope of the armed conflict in Afghanistan, the level of indiscriminate violence in that country taken as a whole is not at such a high level as to mean that, within the meaning of Article 15(c) of the Qualification Directive, a civilian, solely by being present in the country, faces a real risk which threatens his life or person.

(iii) Nor is the level of indiscriminate violence, even in the provinces worst affected by the violence (which may now be taken to include Ghazni but not to include Kabul), at such a level.

(iv) Whilst when assessing a claim in the context of Article 15(c) in which the respondent asserts that Kabul city would be a viable internal relocation alternative, it is necessary to take into account (both in assessing “safety” and reasonableness”) not only the level of violence in that city but also the difficulties experienced by that city’s poor and also the many Internally Displaced Persons (IDPs) living there, these considerations will not in general make return to Kabul unsafe or unreasonable.

(v) Nevertheless, this position is qualified (both in relation to Kabul and other potential places of internal relocation) for certain categories of women. The purport of the current Home Office OGN on Afghanistan is

that whilst women with a male support network may be able to relocate internally, "…it would be unreasonable to expect lone women and female heads of household to relocate internally" (February 2012 OGN, 3.10.8) and the Tribunal sees no basis for taking a different view.

(b) The Appellant

250. In the light of our general assessment, our treatment of the appellant's case can be brief. As already noted, he is someone whose asylum claim has been disbelieved and all that has been accepted about him is that he is an Afghan national, an able-bodied male, aged 22 (born on 1 January 1990) whose home area is Rozala village in Ghazni province where he and his family have a shop selling fruit and vegetables. His family also had a shop in Ghazni city. He has an uncle who lives in Kabul where he carries out a business in the clothing trade.

251. Mr Vokes has not sought to submit that the appellant would be at risk of Article 15(c) in Ghazny by virtue of being from one of the districts that is controlled by the Taliban. We have not been informed whether the appellant's village Rozala, which he said is close to the city, falls into that category; but since the appellant's evidence was that his family also had a base in Ghazni city, we do not consider that he would need to return to his village in order to live in safety in that province.

252. Insofar as the appellant puts his case on the basis that Ghazni is a province in a state of generalised violence at the Article 15(c) threshold, we reject it, subject to the caveat expressed earlier about the situation in Taliban-controlled areas of that province. Our reasons are effectively the same as those set out above at paras 217 and 222. The appellant, therefore, has failed to show that he faces a real risk of serious harm in his home area.

253. Even if it could be persuaded that the appellant would be at risk of persecution or serious harm in his home area (Ghazni province or Ghazni city), we would not find that he was lacking a viable internal relocation alternative in Kabul. We have taken full account of Dr Giustozzi's assessment that internal relocation for the appellant would be difficult if not altogether impossible (although, as explained earlier, we have not been helped by the fact that Dr Giustozzi's assessment was made on the mistaken basis that the appellant had given a credible account of his past experiences). Even considered as a single young male returning on his own without any family support, it is our finding that he would be able to live in Kabul in safety and without undue hardship. In particular, we do not think that rising prices for accommodation would prevent him finding shared accommodation and in this regard (as in regard to finding work) he would start from the advantageous position of being able to benefit from a returns package. But in point of fact he will not be returning as a single young adult male without family support, as he has an uncle in Kabul who has a business there and there is no valid reason to think this man would not help him with accommodation and finding a job.

254. For the above reasons:

The First-tier Tribunal materially erred in law in its decision on Article 15(c) and its decision as regards Article 15(c) has been set aside.

The decision we remake is to dismiss the appellant's appeal on Article 15(c) grounds (It has already been dismissed on asylum and human rights grounds).

Signed Date
Upper Tribunal Judge Storey

APPENDIX A: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber)
Re: AK (Appeal Number: AA/08956/2009)

Representation:

For the Appellant: Miss R Akther, Counsel, instructed by Malik & Malik
For the Respondent: Miss F Saunders, Home Office Presenting Officer

ERROR OF LAW DECISION AND FURTHER DIRECTIONS, 19 March 2010

1. The appellant is a national of Afghanistan. On 31 July 2009 the respondent made a decision to refuse leave to enter having refused to grant asylum. In a determination notified on 28 September 2009 Immigration Judge (IJ) Obhi allowed his appeal. The respondent's success in an application for reconsideration brought the matter before me, who must now decide it as a judge of the Immigration and Asylum Chamber.

2. Having heard submissions from both sides on 19 March 2009 I have decided that the IJ materially erred in law. There is no challenge to the IJ's principal findings of fact. These involved wholesale rejection of the appellant's claim that he and his family had been targeted by a powerful warlord and had attracted additional wrath in his local area by running away to Kabul with a young woman, Parveen. The only reason the IJ gave for allowing the appeal nevertheless was his belief that in both the appellant's home area (Ghazni) and in Kabul he would be at risk of serious harm in the form of indiscriminate violence, contrary to Article 15(c) of the Refugee Qualification Directive. Having cited the judgment of the European Court of Justice (ECJ) in Elgafaji C-465/07 [2009] 2 CMLR 45 and that of the Court of Appeal in QD (Iraq) [2009] EWCA Civ 620, the IJ concluded:

> "30. The appellant has said that the risk to him arises from the threat posed by Ghulam Mohammad and Jumma Khan. He has not described a situation of indiscriminate violence or a fear of being caught up in the general violence in the country. I note that his uncle lives in Kabul and that he appears to have carried on a business there even in the face of the conflict which has continued there. It is clear that there is a high level of indiscriminate violence and the COIR report for June 2009 describes an increasingly difficult situation in Kabul, with elements of the Taliban and criminal forces joining. Paragraph 8.17 of the report states that of the four doors leading out of Kabul, four are compromised by Taliban activity. The report goes on to describe a hostile and threatening situation for the security forces as well as the general civilians. I note also that in the case of QD and AD the Court confirmed that AIT was not necessary to establish whether the risk of serious violence came from, namely whether it arose out of the armed conflict or criminality and that often it would be difficult to distinguish. Whereas it is usually argued that it would be safe to return an individual to Kabul because of the presence of the international forces, based on the information contained in the COIR I am less inclined to accept that the appellant would be safe if returned there, even noting

that his uncle has resided there for some time and none of his evidence suggest a fear of the general situation in Afghanistan. However I note that the COIR report also suggests that Ghazni is assessed as being insecure. Most of the areas are described as being insecure. I am therefore satisfied that at the present time the appellant has shown that there is a real risk that the appellant's life or person would be threatened as a result of indiscriminate violence. I am not persuaded that there is an area to which he could relocate without facing a real risk."

3. There are two related reasons why I consider the IJ's reasoning to be legally erroneous. First he appeared to consider that the Elgafaji test of "a high level of indiscriminate violence" was met in respect of Kabul simply by virtue of the June 2009 COIR Report describing the situation there as "increasingly difficult", hostile and threatening for civilians and security forces as well and noting that gates leading out of Kabul were compromised by Taliban activity. That approach ignored the fact that the Elgafaji test as analysed in QD (Iraq) requires not just a "high level of individual violence" but "such a high level ... that substantive grounds exist for believing that an applicant ... would, solely by being present there, face a real risk which threatens his life or person". The IJ's approach also failed to explain why he considered the COIR report's analysis demonstrated such a high level. At the very least he should have examined what this report said about the available figures for deaths and injuries. Had he done this he would have had to engage with the fact that the latest figures for civilians killed in the conflict, around 2,100 during 2008 for the whole of Afghanistan, scarcely suggested the high level for indiscriminate violence envisaged in Elgafaji and QD.

4. The IJ also erred in wholly failing to explain why he was departing from Tribunal country guidance dealing with Afghanistan which included several cases reported since the Qualification Directive came into force on 10 October 2006, including PM and Others (Kabul – Hizb-I-Islam) Afghanistan CG [2007] UKAIT 00089 and MI (Hazara - Ismaili – associate of Nadiri family) Afghanistan CG [2009] UKIAT 00035. Whilst these cases did not deal expressly with Article 15(c), they made clear that they did not consider that the levels of insecurity and danger in Kabul and Afghanistan generally were sufficient to make returns unsafe for civilians generally. By virtue of AIT Practice Direction 18.2 an IJ was required to follow Tribunal CG unless there is fresh evidence justifying a departure. The IJ's attempt at para 30 to treat the coverage given in the COIR report for June 2009 as justifying an abandonment of existing Tribunal country guidance was plainly inadequate. He also failed to heed the warning given by the Tribunal in a number of reported cases, e.g. MK (AB & DM confirmed) DRC CG [2006] UKAIT 00001 at para 20 to the effect that the wider the risk category concerned (and here the effect of his reasoning was that no Afghan asylum seeker could be returned to that country) the greater the need for the IJ to have regard to a comprehensive body of evidence (as opposed to one or two items).

5. Although the more recent Tribunal country guidance case of GS (Article 15(c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044 had not been published at the time as the IJ determined the appeal of the appellant – and so it was not an error on his part to fail to follow it – the analysis of the evidence in this case highlighted the extent of the IJ's failure to address adequately the issue before him concerning the threshold of indiscriminate violence. Their conclusion (which also took into account the same COIR report of June 2009) was that the

current conflict “cannot be said to involve a high level of civilian causalities” (para 117).

6. Both parties were in agreement with me that were I to set aside the decision of the IJ for a material error of law the case would need to be adjourned for a further hearing. The present position is that the Tribunal will now consider whether this case should go forward as a potential country case intended to examine whether circumstances since the Tribunal CG case of GS [2009] UKAIT 00084 have changed so that a different view should be taken of Article 15(c) as applied to Kabul and other parts of Afghanistan. To that end, the next step will be to convene a CMR hearing.

UPPER TRIBUNAL JUDGE STOREY, 19 March 2010

APPENDIX B: LIST OF BACKGROUND COUNTRY OF ORIGIN INFORMATION (COI) DOCUMENTATION CONSIDERED

Item	Document	Date
1	BBC News, “Does deal mark new era in US-Afghan relations?”	3 May 2012
2	Theo Farrell and Olivier Schmitt / UN High Commissioner for Refugees, “The Causes, Character and Conduct of Armed Conflict, and the Effects on Civilian Populations, 1990-2010”	April 2012
3	Country of Origin Information Service – Casualty Figures in Afghanistan	Submitted March 2012
4	Country of Origin Information Service – Humanitarian Aid in Afghanistan	Submitted March 2012
5	Country responses to UKBA’s request for information concerning recent court cases about Article 15(c) –Belgium, Cyprus, Denmark, Finland, Germany, France, Hungary, Lithuania, Luxembourg, Slovenia, Sweden, Switzerland	Submitted March 2012
6	Population Figures in Afghanistan (various sources)	Submitted March 2012
7	UK Border Agency, “Assistance for Returnees to Afghanistan”	26 March 2012
8	United Nations Assistance Mission in Afghanistan (UNAMA) / Afghanistan Independent Human Rights Commission (AIHRC), “Afghanistan: Annual Report 2011: Protection of Civilians in Armed Conflict”	February 2012
9	UNHCR, “2011 UNHCR country operations profile – Afghanistan”	Undated (accessed 23 February 2012)
10	UK Border Agency, “Operational Guidance Note: Afghanistan”	20 February 2012
11	Central Intelligence Agency (CIA), “World Factbook: Afghanistan”	15 February 2012
12	Center for Strategic & International Studies, A. H. Cordesman and A. A. Burke, “Afghanistan: The Failed Metrics of Ten Years of War”	9 February 2012
13	Congressional Research Service (CRS), “Afghanistan: Post-Taliban Governance, Security and U.S. Policy”	6 February 2012
14	Afghanistan NGO Safety Office (ANSO), “ANSO Quarterly Data Report Q.4 2011”	January 2012
15	Human Rights Watch, “World Report 2012: Afghanistan”	22 January 2012
16	BBC News, “Afghanistan country profile”	12 January 2012
17	Afghanistan NGO Safety Office (ANSO), “The ANSO Report, Issue: 75, 1-15 June 2011”	2011
18	The World Bank, “World Development Report 2011: Conflict, Security, and Development. Chapter 2: Vulnerability to Violence”	2011
19	United Nations Development Programme, “Human Development Report 2011: Frequently Asked Questions (FAQs) about the Human Development Index (HDI)”	2011
20	United Nations Development Programme, “Human Development Report 2011: Human Development Index and its components”	2011
21	United Nations Development Programme, “Human Development Report 2011: Human Development Index trends, 1980 – 2011”	2011
22	United Nations Development Programme, “Human Development Report 2011: Technical notes”	2011
23	United Nations, “Report of the Secretary-General on the	13 December

APPENDIX C: INDEX OF FULL DOCUMENTS USED IN THE ARC REPORT (as furnished by ARC)

1	UN News Service, “Security Council condemns ‘heinous’ attacks on Afghan civilians”	7 December 2011
2	Foreign and Commonwealth Office, “Afghanistan Travel Advice, Afghanistan”	6 December 2011
3	Central Intelligence Agency (CIA), “World Factbook”	31 November 2011
4	“Afghanistan Protection Cluster: Protection Overview on the Eastern and South-Eastern Regions”	30 November 2011
5	BBC News, “Afghan president announces second troop transition”	27 November 2011
6	Khaama Press, “IED explosion injures at least 3 NATO troops near Kabul”	23 November 2011
7	Afghanistan Analysts Network, “Afghanistan’s Paramilitary Policing in Context: The Risk of Expediency”	22 November 2011
8	Congressional Research Service, “Afghanistan: Post-Taliban Governance, Security, and U.S. Policy”	22 November 2011
9	BBC News, “Afghan police killed during Nato night raid”	19 November 2011
10	Pajhwok, “Would-be suicide bomber detained in Kabul”	16 November 2011
11	Center for Strategic and International Studies, “The Afghanistan-Pakistan War at the end of 2011: Strategic Failure? Talk Without Hope? Tactical Success? Spend Not Build (And Then Stop Spending)?”	15 November 2011
12	Radio Free Europe / Radio Liberty, “FACTBOX-Security developments in Afghanistan”	11 November 2011
13	Integrated Regional Information Networks News (IRIN), “Numbers of returnees down”	9 November 2011
14	BBC News, “Afghanistan 'suicide attack' hits city of Herat”	3 November 2011
15	Afghanistan Research and Evaluation Unit, “Healing Complexes and Moving Forwards in Ghazni Province” (excerpt)	October 2011
16	Afghanistan Research and Evaluation Unit, “Wartime Suffering: Patterns of Violations in Afghanistan”	October 2011
17	U.S. Department of Defense, “Report on Progress Toward Security and Stability in Afghanistan” (excerpt)	October 2011
18	The Guardian (London), “Taliban car bomb attack kills US troops in Kabul: Deadliest insurgent blast in months leaves 13 dead”	30 October 2011
19	Agence France-Presse, “Kabul street children struggle to survive”	24 October 2011
20	Human Rights Watch, ““Just Don’t Call It A Militia”: Impunity, Militias and the ‘Afghan Local Police’”	September 2011

21	Reuters, “Security developments in Afghanistan”	27 September 2011
22	The New York Times, “Gunman Kills C.I.A. Employee At Embassy Annex in Kabul”	27 September 2011
23	The Guardian (London) - Final Edition, “Taliban tight-lipped over killing of former Afghan president: Afghanistan destabilised by assassination in Kabul Diplomatic tension grows amid alleged Pakistan link”	22 September 2011
24	Reuters – AlertNet, “FACTBOX-Security developments in Afghanistan”	21 September 2011
25	United Nations, “Report of the Secretary-General on the situation in Afghanistan and its implications for international peace and security”	21 September 2011
26	Norwegian Country of Origin Information Centre (LANDINFO), “Afghanistan: Security Report November 2010 – June 2011: Part 1”	20 September 2011
27	Norwegian Country of Origin Information Centre (LANDINFO), “Afghanistan: Security Report November 2010 – June 2011: Part 2”	20 September 2011
28	Reuters – AlertNet, “FACTBOX-Security developments in Afghanistan”	16 September 2011
29	Radio Free Europe / Radio Liberty, “Attack On Kabul Ends After 20 Hours”	14 September 2011
30	Norwegian Country of Origin Information Centre (LANDINFO), “Afghanistan: Human Rights and Security Situation: Report by Dr. Antonio Giustozzi”	9 September 2011
31	The Brookings Institution, “Afghanistan Ten Years after 9/11: Counterterrorism Accomplishments while a Civil War Is Lurking?”	6 September 2011
32	Danish Refugee Council, “Danish Refugee Council upscale reintegration efforts in Afghanistan”	8 September 2011
33	US Department of Defense, “Report on Progress Toward Security and Stability in Afghanistan” (excerpt)	23 November 2010
34	BBC Monitoring South Asia – Political Supplied by BBC Worldwide Monitoring, “Taleban attack district centre in Afghan east”	30 August 2010
35	Institute for War and Peace Reporting, “Troop Pullout Bad for Afghan Economy”	22 August 2011
36	Reuters, “FACTBOX-Security developments in Afghanistan”	20 August 2011
37	Agence France-Presse, “Suicide blasts target British Council in Kabul”	19 August 2011
38	US Department of State, “Country Report on Terrorism 2010 – Afghanistan”	18 August 2011
39	Radio Free Europe / Radio Liberty, “Afghan Policeman Killed In Attack On Governor's Office”	15 August 2011
40	Daily Outlook Afghanistan, “The Future of Afghanistan, an	9 August 2011

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41	Institute for War and Peace Reporting, “Deadly Mines Still Take Toll in Afghanistan”	28 July 2011
42	Integrated Regional Information Networks, “Kabul: Afghanistan's water crisis”	6 July 2011
43	International Crisis Group, “The Growing Danger in Kabul”	29 June 2011
44	Radio Free Europe / Radio Liberty, “Taliban Attack On Landmark Kabul Hotel Kills 12, Injures 18”	29 June 2011
45	Refugees International, “U.S. Congress must halt payments to Afghan local police due to human rights abuses”	28 June 2011
46	International Crisis Group, “The Insurgency in Afghanistan’s Heartland” (excerpt)	27 June 2011
47	International Crisis Group, “The Insurgency in Afghanistan’s Heartland: Executive Summary and Recommendations”	27 June 2011
48	BBC News, “Afghan policemen die in attack in Ghazni province”	22 June 2011
49	The Fund for Peace, “The Failed States Index 2011”	20 June 2011
50	Business Recorder, “Taliban kill nine in Kabul police station attack”	19 June 2011
51	Reuters, “FACTBOX-Security developments in Afghanistan, June 18”	18 June 2011
52	UNESCO, “Arming the Afghan Police with literacy”	14 June 2011
53	Centre for Strategic and International Studies, “Can Afghan Forces Be Effective By Transition?”	13 June 2011
54	UN High Commissioner for Refugees, “World Bank, Study Reveals Vulnerability of IDPs Living in Afghan Cities and Urges a Comprehensive Approach to Support Durable Solutions”	1 June 2011
55	Amnesty International, “Annual Report 2011: Afghanistan”	May 2011
56	Associated Press Online, “Afghan police: Kabul market blast kills civilian”	31 May 2011
57	The Evening Standard (London), “Restoration work is symbol of a country not yet ready”	25 May 2011
58	Al Arabiya, “Taliban suicide bomber kills 6 medical students at Kabul military hospital”	21 May 2011
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60	Reuters, “FACTBOX-Security developments in Afghanistan, May 14”	14 May 2011
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62	Oxfam, “No Time to Lose: Promoting the Accountability of the Afghan National Security Forces”	10 May 2011
63	BBC News, “Fresh violence in Afghanistan after Kandahar attack”	9 May 2011
64	Reuters, “FACTBOX-Security developments in Afghanistan, May 1”	1 May 2011
65	BBC News, “Afghan pilot kills eight US troops at Kabul airport”	27 April 2011
66	Reuters, “Security developments in Afghanistan, April 23”	23 April 2011
67	International Business Times News, “Suicide bombing in Kabul	18 April 2011

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68	Reuters, "FACTBOX-Security developments in Afghanistan, April 18"	18 April 2011
69	Pajhwok Afghan News, "Suicide blast hits army vehicle in Kabul; 7 injured by Khwaja Basir Ahmad"	10 April 2011
70	US Department of State, "2010 Country Reports on Human Rights Practices: Afghanistan"	8 April 2011
71	Pajhwok Afghan News, "4 bombers killed, 3 ISAF soldiers injured in Kabul attack by Khwaja Basir Ahmad"	2 April 2011
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73	Internal Displacement Monitoring Centre, "Afghanistan Profile"	13 March 2011
74	United Nations Assistance Mission in Afghanistan (UNAMA) / Afghanistan Independent Human Rights Commission (AIHRC), "Afghanistan: Annual Report 2010: Protection of Civilians in Armed Conflict"	9 March 2011
75	Danish Refugee Council, "Reaching out to poor Afghans in urban tent settlements"	16 February 2011
76	Agency for Technical Cooperation and Development, "Afghanistan: Over 3,000 shelters provided and improved access to infrastructure and livelihoods for thousands of vulnerable individuals in Kabul"	15 February 2011
77	Voice of America News, "Taliban Claims Responsibility for Kabul Blast"	14 February 2011
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79	Radio Free Europe / Radio Liberty, "Kabul Housing Shortage Leaves The Middle Class Behind"	31 January 2011
80	Institute for War and Peace Reporting (IWPR), "Afghans Complain of Police Harassment"	28 January 2011
81	Radio Free Europe / Radio Liberty, "Suicide Attack Kills Eight In Kabul Supermarket"	28 January 2011
82	Office of the United Nations High Commissioner for Human Rights (OHCHR), "Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights"	19 January 2011
83	Pajhwok Afghan News English, "Giro residents facing starvation by Mirwais Himmat"	13 January 2011
84	Agence France-Presse (AFP), "Four killed, 29 wounded in Kabul suicide attack"	12 January 2011
85	Integrated Regional Information Networks News (IRIN), "Afghanistan: Call for help for IDPs, deportees in Helmand"	10 January 2011
86	Radio Free Europe / Radio Liberty, "Explosion In Kabul Kills One, Wounds Three Others"	4 January 2011

87	BBC News, “Afghanistan attacks target army bases, killing 13”	19 December 2010
88	United Nations High Commissioner for Refugees (UNHCR), “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan”	17 December 2010
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90	Associated Press Online, “9 Afghan guards kidnapped in Kabul province”	30 November 2010
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92	The Washington Post, “Afghanistan's disheartened”	22 November 2010
93	Oxfam, “Nowhere to Turn: The Failure to Protect Civilians in Afghanistan”	19 November 2010
94	BBC Monitoring South Asia – political supplied by BBC Worldwide Monitoring, “Police numbers in Afghan capital need to double - Kabul police chief”	18 November 2010
95	Integrated Regional Information Networks News (IRIN), “Afghanistan: Winter misery as food prices rise”	15 November 2010
96	Associated Press Online, “Afghan officials: Kabul attack kills 1, wounds 2”	12 November 2011
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98	United States Institute of Peace, “Dangerous Liaisons with the Afghan Taliban: The Feasibility and Risks of Negotiations”	October 2010
99	The Times of Central Asia, “New project to clear mines from Ghazni city begins”	27 October 2010
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106	The Independent (London), “Kabul blast kills three ahead of Afghan state-building conference; As international delegates start to arrive, militants declare their intent”	19 July 2010
107	Eurasianet.com, “Corruption Expanding at Alarming Rate in Afghanistan – Survey”	13 July 2010
108	UN News Centre, “Attack on UN vehicle in Afghan capital leaves	29 June 2010

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110	Pajhwok Afghan News English, “Nawa residents face numerous problems”	3 May 2010
112	Internal Displacement Monitoring Centre (Norwegian Refugee Council), “Afghanistan: Armed conflict forces increasing numbers of Afghans to flee their homes”	15 April 2010
113	The International Council on Security and Development, “Operation Moshtarak: Lessons Learned”	March 2010
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119	BBC Monitoring South Asia, “Afghan TV debates impact of Helmand operations”	10 July 2009
120	Immigration and Refugee Board of Canada, “Afghanistan: Recruitment by illegal armed groups and other non-state actors for voluntary or forced service and labour”	23 February 2007