

KH
Heard at: Field House
On: 16 March 2004

IB and TK (Sikhs - Risk on
return - Objective evidence)
Afghanistan [2004] UKIAT
00150

IMMIGRATION APPEAL TRIBUNAL

notified: Date Determination

Decision reserved 20 May 2004

Before

:

**Mr J Barnes (Vice President)
Mr J Perkins**

Between

FIRST APPELLANT

and

SECOND APPELLANT

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT
RESPONDENT**

Representation:

For the First and Second appellants: Miss A Jones of Counsel
instructed by Bhogal Lal,
solicitors.

For the respondent: Miss C Hanrahan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first appellant, whom we shall hereafter refer to as B, is a citizen of Afghanistan and a Sikh born on 25 December 1965 whose home in Afghanistan was in Jalalabad. The second appellant, whom we shall hereafter refer to as K, is also a citizen of Afghanistan and a Sikh born on 1 January 1964 whose former home was in Kabul.

2. B arrived in the United Kingdom on 13 December 2000 accompanied by his wife and three children who are his dependants. He applied for asylum and following submission of a statement of evidence form and an interview that application was refused by the Secretary of State for the reasons set out in a letter dated 24 September 2002. On 24 September 2002 the Secretary of State issued directions for his removal to Afghanistan as an illegal entrant after refusal of his asylum application.
3. K arrived in the United Kingdom clandestinely on 24 April 2001 accompanied by his wife and two children and claimed asylum on arrival with them also as his dependants. He also submitted a self evidence form and was interviewed by the Secretary of State who then refused his application for the reasons set out in a letter dated 27 September 2002. On 11 October 2002 the Secretary of State issued directions for his removal to Afghanistan following refusal of leave to enter after refusal of his asylum application.
4. Both appellants appealed against those decisions on asylum and human rights grounds.
5. B's appeal was heard on 14 March 2003 by Mr D C Clapham, an Adjudicator, who found him credible in his factual history. This is sufficiently set out in the refusal letter at paragraphs 2 and 3 as follows:
 - "2. You state that you have been persecuted both by the Taliban and the Mujahideen in Afghanistan. You state that you were physically and verbally abused by the Taleban because you are a Sikh, and prevented on many occasions from attending the Gurudwara. You state that you were also put under pressure to convert to Islam. You state that your father was killed by the Taleban in September 2000 when he was trying to protect you from being beaten by them. You also state that in October 2000 you were kidnapped by the Taleban and held for 4-5 days and that you were released after a friend of yours paid them. You also state that you were beaten by them whilst they detained you.
 3. You also state that prior to the arrival of the Taleban, you were persecuted by the Mujahideen. You state that you were taken to the police station and asked by them to convert to Islam in 1994. You state however that you escaped during an explosion at the police station. You also state that the Mujahideen used to come to your house and beat you and demand money from you and [you] also state that you were asked to convert to Islam on a number of occasions."

6. The Adjudicator accepted on the facts that he had been persecuted in the past by reason of his religion and race but concluded that the situation in Afghanistan had now changed to the extent that there would be no reasonable likelihood that B would be either persecuted or treated in breach of his protected human rights under Article 3 of the European Convention if now returned to his own country.
7. K's appeal was heard on 4 April 2003 before Mr H Macleman, another Adjudicator. His claims are recorded by the Adjudicator at paragraph 3 of the determination as follows:
 - "3. In a statement lodged with the Home Office on 29 April 2001 the appellant said that he ran a shop in Kabul. Problems started when the Mujahideen took control, but more particularly after the Taliban came to power. They took away the appellant's brother in July 2000. They demanded \$4,000 for his release, but when the appellant made further enquiries, his brother had disappeared. On 23 January 2001 the Taliban detained and tortured the appellant over a period of twenty days until a friend paid a bribe for his release. On 14 March 2001 an unknown person offered to arrange the family's travel abroad for US\$22,000. He took this opportunity. At interview the appellant added a few details. Under the Taliban he was not allowed to pray, was ordered to shave his beard and was insulted and abused in public."
8. Although the second Adjudicator dismissed the appeal also on the basis of it being safe for Sikhs now to return to Afghanistan, he added that he had not found K a credible witness in significant respects which he details as follows:

"There was no adequate explanation for giving a quite different account of detention at interview as compared with the statement or for failing to state he was released on payment of a bribe. The obvious conclusion is that he could not remember the statement invented by him or on his behalf. The appellant in cross-examination made it clear that it was because of his lack of resources and the general situation in Afghanistan that he did not wish to return, not because of any particular risk to him."
9. Both Adjudicators relied on the Tribunal decision in Gulati [2002] UKIAT 02130 as authority for the proposition that there was no background evidence on which either appellant could on the basis simply of being a Sikh establish a well-founded fear of persecution or risk of ill-treatment contrary to his human rights if returned to Afghanistan.

10. The main thrust of the grounds of appeal in each case was that the Adjudicator had erred in placing undue weight on the views of the Tribunal as expressed in Gulati because he had failed to take into account and make any findings on objective material before him which post-dated that decision and which, it was said, pointed to the existence of a risk to Sikhs in Afghanistan. Reliance was placed on an expert report made by Dr Martin Lau to which we shall refer further in due course. It is sufficient to note at this point we are satisfied from what Miss Jones said to us that Dr Lau had authorised the use of that report for the purposes of these appeals.
11. In the substantial background material which was placed before us for the appellants, there were also statements by a Tara Singh Wadwa and Mr Gajinder Singh Safri, both whom had attended before us for the purpose of giving evidence if so required. For the Secretary of State Miss Hanrahan informed us that she did not wish to challenge anything contained in their respective statements. We also noted that in paragraph 8 of the skeleton argument for B it was said:

"The appellant is from Jalalabad. He could not be returned there; it is common ground that Kabul is the only place in Afghanistan where the rule of law operates. The appellant would be returned to a city where he has no roots or connections."

We asked Miss Hanrahan if what was asserted there was, indeed, common ground between the parties and she conceded that it was and B would be at real risk of persecution in Jalalabad.
12. It follows, therefore, that this determination must be read on the basis that clear concessions were made on behalf of the Secretary of State in relation to these matters.
13. Finally, we note at this point that our attention was drawn also to the Tribunal determination [2003] UKIAT 00057 K (Afghanistan) heard on 25 July 2003 in which on an appeal by the Secretary of State the Tribunal had considered at considerable length the background material produced before it in relation to the position of Sikhs in Kabul and had concluded that there was, in general terms, a sufficiency of protection for Sikhs in Kabul.
13. Miss Jones made it clear at the outset of her submissions that it was not her case that Sikh ethnicity of itself meant that there would be a well-founded fear of persecution in Kabul but that in the circumstances of these appellants that would be the case and they would not have a sufficiency of protection there. In the case of B, the Secretary of State had accepted that he would be at risk in Jalalabad, his home area, so that if

Kabul was considered to be safe for him for the purposes of relocation, there would be the additional issue of whether or not it would be unduly harsh to expect him to return and live there. These were issues which in her submission could be determined by the Tribunal. So far as K was concerned, however, it was her submission that the adverse credibility findings made by Mr Macleman were unsafe and unsustainable and that the proper course in his case was for the evidence to be reheard by another Adjudicator following remittal.

15. In the course of submissions we were referred to the following specific sources of background evidence: the report of Dr Lau and the statements of Mr Wadwa and Mr Safri; the UNHCR letter of 18 July 2003 concerning protection concerns for individuals of Sikh faith in Afghanistan; a report of 22 May 2003 by the Afghan Professional Alliance for Minority Rights (APAMR) on the Hindu/Sikh community in Afghanistan; Amnesty International Report of 23 June 2003 "Out of Sight, Out of Mind: the Fate of the Afghan Returnees"; the CIPU Afghanistan Country Report of October 2003 (contrasted with what was said in the October 2002 Assessment); a letter of 3 December 2003 from Mr Ravinder Singh, a member of the Emergency Loya Jirga; the Human Rights Watch Report of 2004 entitled "Losing the Peace in Afghanistan"; and current Foreign and Commonwealth Office travel advice.
16. We have made a full record of the helpful submissions made by both advocates to us and will refer as appropriate in this determination to the substance of those submissions.
17. Miss Jones' primary submission was that Gulati and K were based on out-of-date material and that the views expressed there required to be revisited in the light of the current country material.
18. In Gulati the Tribunal considered what was said by the UNHCR office in London in a letter of 21 May 2002. The Tribunal considered that, from its wording, this letter was intended to refer to those who were not refugees under the Convention but was rather dealing with the situation of unsuccessful asylum applicants and expressing a view that in the light of the uncertainty as to the situation in Afghanistan at that time UNHCR was of the view that no enforced returns should then be made. As the Tribunal noted, that did not assist with the issue before them of whether Mr Gulati had a well-founded fear of persecution for a Convention reason in Afghanistan then. The Tribunal then considered certain reports in newspapers in December 2001 and February 2002 all of which suggested at that time the return of Sikhs to Afghanistan would be facilitated by the Afghanistan authorities.

19. In K the Tribunal considered whether a Sikh woman from Kabul with two infant relatives and a widowed mother-in-law would be at risk of persecution if returned there. The Tribunal considered substantive background material as to the general position in Kabul, the majority of which dated from 2002, and concluded that in general terms the security situation in Kabul was good. The Tribunal then considered the situation of Sikhs in Kabul and said this at paragraphs 14.5 and 14.6 of its determination:

“14.5. We were referred to pages A62 and A 63 of the Claimant’s bundle. However, in the main, this document relates to the problems of Sikhs in a place called Khost in Afghanistan. There is reference, on page A63, to the Sikh community leader in Kabul (Autur Singh) saying that “in terms of freedom” their lives were much better now and that they had good relations with the officials in Kabul. Although it is true that he is quoted as lamenting the lack of financial support for the Sikh community, as compared to other communities, there is nothing which suggests that Sikhs are a persecuted ethnic group in Kabul. Indeed, we note that, according to the last sentence of paragraph 6.42 of the CIPU report, four Hindu and Sikh delegates who attended the Loya Jirga in June 2002 reported that they were no longer repressed and felt free to practise their religions. Further, in September 2002, the UNHCR-Kabul and Co-operation Centre for Afghanistan confirmed that the situation for Hindus and Sikhs was generally good; there is religious tolerance of these groups and they have the right to practise their religions. The source for this information (according to footnote 8c to paragraph 6.43) is the Danish fact-finding report from September to October 2002. The Amnesty International Report dated 23rd June 2003 in the Claimant’s bundle (which starts at page E17) refers (on page E25) to three Sikh asylum seekers who were forcibly returned by the United Kingdom and who were forced to seek shelter in a Sikh temple in Kabul as they had nowhere else to go. They reported that they were “singled out for abuse” in a market place in Kabul three days after their return. Whilst we have noted this, this does not amount to evidence of treatment which is sufficiently severe as to amount to persecution or treatment in breach of Article 3.

14.6 Although we agree with Mr Patel that paragraphs 6.38 and 6.39 of the CIPU report are, in general terms, based on out-of-date sources, we have come to the conclusion, by considering the objective evidence relating to the current situation which is before us, that Sikhs are not a persecuted ethnic group in Kabul. We have concluded, on the evidence before us, that there is

no real risk that the Claimant would face treatment amounting to persecution or breach of her Article 3 rights, simply on account of being a Sikh.

20. It is clear that the position of the UNHCR United Kingdom office has changed since Gulati and the letter from which we quote was not apparently before the Tribunal in K which was heard on 25 July 2003. Their letter of 18 July 2003 relates to the question of a reasonable likelihood of persecution and states unequivocally:

"We propose ... to highlight the protection and security situation facing Sikhs within the broader context of the current situation in Afghanistan. We also articulate UNHCR's considered opinion that as non-Muslim religious minorities in Afghanistan, Sikhs and Hindus are particularly susceptible to persecution in the sense of the 1951 Convention.

... In some instances, UNHCR's view of the current situation may furnish the elements for establishing a well-founded fear of persecution under Article 1A(2) of the 1951 Convention. In other instances involving the indiscriminate effects of widespread violence and disorder, UNHCR's views could contribute to a decision to recognise protection needs under Human Rights instruments, even if protection under the 1951 Convention is deemed not proven. The UNHCR's comments are set out in general terms. It is for the applicant's legal representatives to draw on UNHCR and other sources in order to establish how the merits of the individual case correspond with the relevant protection criteria."

21. Dealing with the security protection situation in Afghanistan generally, the letter says this:

"The general human rights situation remains a source of great concern. The lack of adequate national security and law enforcement capacity and the weakness of the justice system exacerbate human rights violations. Abuses are reported in all parts of the country, most often by forces under the control of regional factions or local commanders. The main features of the prevailing security situation are the ongoing military activity against Taliban forces, the continuing 'war on terrorism' by the coalition forces, and the continued factional clashes and warfare by local warlords. There is concern about re-grouping of Taliban forces in the south east and targeted killings of aid workers. Factional and tribal clashes have led to the internal displacement of civilians and the forcible recruitment of young men from villages

in direct contravention of decrees issued by central government. The military or militia control [in] certain areas is also linked to extortion of money, looting, the abduction of women, kidnapping and ransoms and unlawful occupation of land and unlawful control of water.

All of this makes for a precarious security and protection environment in which a number of individuals and groups are at risk of human rights abuses and persecution. The rule of law is a long way from enjoying full respect and implementation and this has a bearing on the question as to whether effective national protection is available in Afghanistan. In this regard, Afghanistan's legal institutions suffer from a lack of resources while the record of laws and regulations has been destroyed and much has disappeared during the years of conflict, leaving practitioners unclear as to the substance of the country's law. Although court systems exist from district to national levels, the influence of commanders and powerful figures often renders it impossible for fair and just decisions to be reached over land disputes."

22. The letter then considers the position of Sikhs specifically as follows:

"The UNHCR's information is that there are some 3,500 Sikh and Hindu families in Afghanistan, mainly living in Kabul, Ghazni, Kandahar, Helmand and Nangarhar provinces. Until 1992, they had not suffered from discrimination and could exercise their religion freely in the urban centres where they predominantly lived. During the civil war and Taliban rule, many of their temples were destroyed or used as military bases. The community still suffers from the consequences of a more rigorous and less tolerant application of Islamic values by the state and the various factions in power during the last fourteen years. As a result, the community still faces various forms of intimidation in public places and children cannot attend their existing Sikh/Hindu schools.

Against this backdrop, and after giving careful consideration to the current circumstances, UNHCR's opinion is that Sikhs and Hindus from present day Afghanistan are among those who qualify for protection under the 1951 Convention."

23. It is right to add that a further passage in the letter makes it clear that the views there expressed are a primary source as they are based on first hand reports from UNHCR's extensive field presence throughout Afghanistan. They are articulated

primarily in UNHCR's "Update of the Situation in Afghanistan and Internal Protection Considerations" (July 2002 and July 2003) and they also rely on their own internal reports and confidential briefing provided to governments at their request.

24. Following the defeat of the Taliban by international and coalition forces in December 2001 and the subsequent military technical agreement signed by the Afghan Interim Administration on 4 January 2002 on the deployment of an International Security Assistance Force (ISAF) it had been considered that the position of Sikhs and Hindus had improved substantially to the point where four Hindu and Sikh delegates to the Loya Jirga in June 2002 reported that they were no longer repressed and felt free to practice their religions (see extract from K above). Nevertheless it remained the case that of the total Hindu and Sikh population, which at its highest amounted only to some 50,000, the vast majority had either emigrated or taken refuge abroad from 1992 onwards. The position appeared to have eased somewhat for the small Sikh minority remaining after the Taliban took control in 1996 although later in their period of dominance the position became more difficult and in some cases clearly persecutory for those remaining. By June 2002 the numbers remaining in Afghanistan were variously estimated at as few as 1,000, of whom half were concentrated in Jalalabad, although it seems to us that, given its network within Afghanistan, the UNHCR's estimate of some 3,500 remaining Sikh and Hindu families is probably to be preferred. On any view, however, Afghani Sikhs now represent a small minority in the country who were, as in the case of these appellants, largely drawn from the merchant class and who are, of course, distinctive by their dress.

25. We must deal next with the expert opinion of Dr Lau whose report is dated 6 June 1993. He is a Barrister and Head of the Law Department of the School of Oriental and African Studies at the University of London and has other relevant academic qualifications. He says that his work involves intensive research on modern Afghan and Pakistani law and that he visited Afghanistan twice in 2002 carrying out fieldwork on behalf of the International Commission of Jurists, Geneva, and again for a week in May 2003 to advise the interim government on the rebuilding of the legal system and the training of lawyers and judges. He accepts that the security situation in Kabul has improved and that the presence of ISAF troops and Afghan security forces has restored relative calm in the city, taking into account the coalition forces stationed at Bagram Airbase, 40 km away. He says, however, that he would not describe Kabul as a perfectly safe place. He considers that Sikhs would find their position more difficult because Islamic Welfare funds and community support would not be readily available to them, and there is in his view a very real likelihood that they could face harassment and

intimidation from the authorities since many of its holders of office must be regarded as being rather conservative Muslims. A Hindu or Sikh without any close family in Kabul belonging to a non-Muslim minority religion which itself has all but disappeared from Afghanistan would in his view face a very real danger that their human rights would be violated by some members of the authorities, or at the very least that the authorities would be unable to guarantee their human rights. He made the point that there is in general a lack of information on Afghanistan's human rights situation - although having regard to the material to which we have been referred we do not accept this as at the present time - and he mentions that a "seemingly reliable source of information on the human rights and political/legal situation" is the periodic report submitted by the EU Special Representative to Afghanistan to the European Union. He says that he understands those reports are made available to the UK Government but that the Special Representative was not at liberty to share them with Dr Lau although they were consistently "most critical of human rights developments in Afghanistan". Beyond this he referred to the uncertainty currently as to the final form of the new constitution and what provision it would make in relation to religious minorities. So far as the question of the EU report is concerned, Miss Hanrahan informed us that she had enquired the position with the Central Information and Policy Unit who stated that any relevant material from them would be included in their reports and that there was none in the current report. Whilst we note what Dr Lau says, his views are, of course, broadly put and relevant to the country as a whole. The reports were not prepared in relation to either of the appellants before us although they do represent the impression of an independent foreign observer as at June 1993. In broad terms they are not out of line with the other background evidence before us and, if anything, perhaps reflect some of the optimism of earlier reports. In view of the fact that Dr Lau's report was made as long ago as June 1993, we find it surprising that the respondent has not thought it appropriate to disclose any of the EU reports referred to, particularly since these appeals were previously adjourned to enable him to do so, but the other material before us makes it hardly surprising that they are reported to be critical of the current human rights situation.

26. The current October 2003 CIPU report confirms at paragraph 6.6 that the UNHCR regards non-Muslim religious minorities, amongst others, as potentially being at particular risk of violence, harassment or discrimination and deals jointly with Sikhs and Hindus in more detail at paragraphs 6.45 to 6.54 of the report. Much of the earlier material in these paragraphs is simply repeated (it was before the Tribunal in K) and what has been adverted to above from the UNHCR letter is largely repeated at the new paragraph 6.54. The preceding paragraph

6.53, which is also new, sheds some light on the position of those returning to Afghanistan. It reads as follows:

"A report by [APAMR] on 22 May 2003 stated that, in 2002, some fifty Hindu and Sikh families returned to Afghanistan, some of whom found their houses, temples, lands and shops being occupied by commanders, tribal leaders and armed groups. Some are too afraid to repossess their properties for fear of reprisals from the present occupants. Problems of this nature were reported in Kandahar, Nangahar, Helman and Khost provinces. The Hindus and Sikhs who have returned to Afghanistan are reported to be mostly living in temples (Daramsals) in Kabul and other provinces, as they do not have a house or job to support themselves. Representatives of the Hindu and Sikh communities told APAMR that they had not been consulted about the selection of a member for the Constitution Commission to represent their community and they have not been consulted them [sic] about the difficulties and problems their community faced. It is estimated that 1200 Hindu and Sikh families are now living in Afghanistan including 350 families in Kabul."

Further, at paragraph 6.54, drawing once more on APAMR, it is said that Sikhs and Hindus are unwilling to send their children to Afghan schools (as opposed to the limited provision still remaining in Sikh/Hindu schools) "for fear of mistreatment". What is clear is that the CIPU Report does not seek to make any critical evaluation of the current position of the Sikh and Hindu minorities. It is really a sequential history from various sources which as it has now been expanded makes it clear that the relatively optimistic picture painted following the overthrow of the Taliban needs to be revised in light of what are clearly pessimistic reports which justify the comparison made with the separation of the two communities in India with the fact that in Afghanistan they "have become united in adversity" (paragraph 6.51).

27. It seems to us from the passages to which we have referred above and from our general consideration of the background material to which we have been referred, that it is important to bear in mind in considering the present situation of Sikhs that it can only be understood against the historical background. In the period of the war and subsequent Mujahideen control from 1992 to 1996, there is evidence of past persecution of some and general insecurity of the majority of Sikhs which led to a substantial exodus from Afghanistan. Both Mr Wadwa and Mr Safri, to whose evidence we shall make further reference below, fall into this category. During the period of Taliban predominance, it would appear that most of those who remained were generally treated with tolerance so far as their

expression of their religion was concerned but that their circumstances as a comparatively wealthy merchant class were much reduced. In the later period of Taliban dominance, the discrimination which that attracted became more serious resulting in some cases in the sort of treatment suffered by B and his family. After the overthrow of the Taliban these pressures certainly eased initially but the position of the Sikhs remained potentially one of difficulty insofar as former leaders of the Mujahideen regained control in substantial areas of Afghanistan, including Kabul on the evidence before us. That is no doubt why the respondent has formally conceded that B would be at risk in his home area of Jalalabad.

28. It was common to the statements of Mr Wadwa and Mr Safri, both of whom formerly held prominent positions in Afghanistan society – the former as a doctor and one time representative in the Loya Jirga before the Russian occupation, and the latter as a merchant involved also in social work for the Sikh and Hindu community in Kabul, a former Member of Parliament from 1988 to 1992 and a Sikh and Hindu representative for the Loya Jirga from 1987 – that it was fear of the Mujahideen which had led to their flight from Afghanistan. It was the view of both of them that those in power in the Northern Alliance were former Mujahideen and in some cases even former Taliban supporters. Both referred to the fact that Rabbani had been President during the Mujahideen period and that Generals Fahim, Dostum and Ismail Khan, all of whom had targeted the Sikh and Hindu communities during the Mujahideen period, were now back in power. Although they had not been personally in Afghanistan from the mid-1990s, both expressed serious concern for the safety of members of the Sikh community on the basis of their accepted past experiences.
29. Their views are largely supported in the letter of 3 December 2003 from Mr Ravinder Singh who describes himself as a member of the emergency Loya Jirga in 2002 and a representative of the Hindu and Sikh communities based in Kabul, who had attended Afghani Government meetings in order to advise them as to the situation faced by these religious minorities. He says that he has given interviews to many organisations including the APAMR. He claims that Kabul remains unsafe and that his community is not being supported by international committees or organisations there and has not been given any aid to sustain the community. The Hindu and Sikh families living in Afghanistan have decreased to around three hundred families in Kabul, since most fled during the time of the Mujahideen. He also observes that the same Mujahideen leaders are prominent in the interim administration. He states that he advises those who wish to return from India not to return to Kabul because the houses and temples of the local community have been totally destroyed and many of the surviving shops, houses and land

are being occupied by some powerful commanders and armed groups. The interim administration offers no assistance to the remaining Sikh community either in rebuilding destroyed buildings or in recovery of land and property. Many of the police and those controlling them are former Mujahideen who are extorting money from the minority community and there are now unfounded allegations by some Afghans that the Sikh and Hindu communities were supporters of the Taliban. He sums up the situation in these words:

"We cannot walk on the streets without suffering harassment. We are easily identifiable because of the way that we dress and, as a result of this, are singled out by the Muslim people for abuse and persecution. We cannot approach the police for protection because they are not interested in our safety, dignity or well-being; they are interested only in asking for bribes. The police claim that we supported the Taliban and use this to justify ignoring us as a community. We are told that we are not welcome in Afghanistan and that we should go to India."

30. He adds that the current Hindu and Sikh representatives to the new administration do not consult with their community about these grievances and have lost the trust of the communities. He says that he has witnessed beatings of people in his own community and also himself been subject to demands by way of bribery. It is his position that these communities have been persecuted by the local population.
31. We have also considered the APAMR Report of 22 May 2003. We are informed that this organisation is an Afghan NGO established in Pakistan in 2001 by Afghan professionals living in different parts of the world, is registered with the transitional administration and is a member of the Coalition for the International Criminal Court (CICC), an Asian network for International Criminal Court (ICC) as well as having very close relationships with the United Nations and many other international and national human rights agencies. That it is afforded some recognition as an NGO is clear from the fact that it is quoted as a source in the current CIPU Report. It is not concerned solely with the situation of Sikhs and Hindus in Afghanistan but is concerned with the rights of all minorities and has provided reports based on direct interviews and observations and first hand evidence.
32. Whilst it is clear that Mr Ravinder Singh has provided substantial information to APAMR it is also clear from the report that their information is not confined to him as a single source but is far more generalised. It is concerned particularly with the situation of those returning and confirms by reference to a variety of individual interviews their inability to recover

their property which was in most cases initially occupied by the Taliban and has now been taken over by those active in the present transitional government, including Mr Rabbani, the former President, and Northern Alliance commanders. These examples relate to land and property in Kabul. Attempts to seek the assistance of the Kabul security forces are said to be ineffective. Many of the Sikh temples were looted and destroyed in Kabul and other parts of the country by different armed groups and only three have been reconstructed since the transitional administration commenced. They say that the Hindu and Sikh community in Afghanistan, including the returnees, are suffering badly. By example they refer to Panchowk, an area in the west of Kabul where some one hundred Hindu and Sikh families used to live, as being entirely razed during the 1990s and that many of the temples were looted and have never been restored to use. They repeat the extreme difficulties in the provision of education for Hindu and Sikh children. The only school now functioning has only four classrooms which are insufficient for the present one hundred students and the four present teachers are young girls aged between ten and thirteen. The Headmaster says that the situation in the provinces is much more difficult and appeals for help to the President and other members of the interim administration had resulted in no practical assistance. Most returnees have neither shelter nor the capability of renting property and are living in temples, unable to obtain a job to support their families. They are provided with no support by the interim administration or any other organisation in Afghanistan.

33. We have taken into account that the testimony of members of the Sikh community here and the statement of Mr Ravinder Singh cannot be regarded as disinterested sources of evidence but the detailed evidence which they, like APAMR, provide is not generally inconsistent with the thrust of the international reports which we have considered. It is in our view appropriate to consider it as fleshing out the more generalised information in the latter reports. There can be little doubt that in terms of the hardship faced by the remaining members of this minority community, and in particular those now returning from abroad, that there are real and practical difficulties of subsistence and deprivation of primary civic, economic and educational rights as set out in the report of APAMR. Serious humanitarian considerations are raised.
34. In reaching that conclusion we have borne in mind the Amnesty International Report in relation to Afghan returnees generally. Much of that lengthy report is concerned with issues relating to the poor living conditions which exist but, on the evidence before us, those are not matters which in our judgment would give rise to destitution to such an extent as to engage Article 3 or, more obviously, to amount to persecution

for Refugee Convention purposes. We do, however, note the passage at paragraph 7.2.4 of the Report dealing with the situation of ISAF where it is pointed out that it is not a peacekeeping force and has no mandate to intervene in relation to human rights violations without a request from the government. Faced with evidence of lack of action in relevant situations by the Afghan authorities themselves, we are satisfied that ISAF cannot be regarded as of itself being able to provide a sufficiency of security to individuals in the Sikh community notwithstanding that its presence may have a generally calming effect in Kabul (but see also paragraph 36 below as to the current security situation in Kabul generally).

35. The latest report before us is the Human Rights Watch Report for 2004 entitled "Losing the Peace in Afghanistan". This emphasises the importance of international support for rebuilding Afghanistan and underlines that international assistance is running at a fraction of that previously applied in Rwanda, East Timor, Kosovo and Bosnia. It quotes the Henry L Stimson Center, a Washington DC based think tank, as pointing out that the international community spent twenty five times more in Kosovo on a per capita basis than it has pledged in Afghanistan and that where Iraq received US\$26,000,000 in reconstruction aid in 2003, Afghanistan received less than US\$1,000,000. It makes a powerful plea for additional assistance from the international community if the progress made is to be consolidated and go forward, citing problems such as the reappearance of elements of the Taliban in southern Afghanistan, increasingly powerful regional warlords, growth of the poppy trade and other criminal activity, and a continuing threat of meddling regional powers as representing four different but interlinked challenges to the goal of creating a stable civilian government there. The relevance of the report is, to our mind, that it points to important disruptive challenges which do exist and which may arguably in the case of the Sikh minority exacerbate the difficulties which they are currently recorded as facing not only in the areas in Afghanistan where they have formerly lived but also in Kabul, their likely destination if now returned if they did not formerly live there.

36. Finally, as to the present position in Kabul we were referred to the current Foreign and Commonwealth Office advice against all non-essential travel to Kabul and against all travel to other parts of Afghanistan. Whilst this is intended for British nationals, this advice, current at 28 January 2004, says this of the position in Kabul:

"There are regular rocket and bomb attacks in Kabul, and there have been a number of attacks against westerners and suicide bomb attacks against civilians,

including one in a crowded shopping street. On 28 December 2003, six people died in a probable suicide car bomb near Kabul Airport. On 25 December 2003, a bomb destroyed a wall on the UN compound in Kabul. Several rockets were fired into residential areas of Kabul whilst the Constitutional Loya Jirga (CLJ) was meeting from 14 December 2003 to 4 January 2004, although none are believed to have been aimed at the CLJ itself. On 22 November 2003, a small bomb exploded near the Intercontinental Hotel, although no one was injured. The Intercontinental Hotel, and other hotels where foreigners might stay, will continue to be possible targets for such attacks. On 5 November 2003, a bomb exploded near the Kabul offices of Oxfam and Save the Children but there were no casualties and on 7 November 2003, an Indian national, working for an Indian construction company, was shot dead by unknown attackers. There have been a number of attacks against Kabul International Airport and further attacks cannot be ruled out. On 7 June 2003, a suicide bomb was detonated alongside a bus carrying German troops from the International Security Assistance Force, killing several and injuring many others."

37. It was submitted by Miss Jones that this evidence made plain that the combination of corruption, prejudice against Sikhs, breakdown following tyranny and then war, and inadequate funding means that the authorities either will not or cannot provide a sufficiency of state protection to the appellants. If true, that of course presupposes that there will be a real risk of persecution under the Refugee Convention by reason of their race or religion or of breach of their protected human rights under Article 3 of the European Convention against which such protection is necessary.
38. Before we consider the situation of each appellant, it is appropriate to give our views in respect of the situation of the Sikh community in Afghanistan generally. The evidence which we have considered above certainly points to a situation of general societal discrimination and of interference with economic and educational rights in respect of which the state does not appear to offer adequate protection or provision. Because of the concession made by the respondent in the case of B, we have not had to consider the evidence other than in relation to Kabul but there is no reason to believe from the evidence that the situation of Sikhs elsewhere in Afghanistan, in the limited areas in which they reside, is any better than in Kabul. It may be worse. In Kabul, SIAF might have the ability to provide a sufficiency of protection as KFOR does in Kosovo but it will not intervene unless asked to do so by the interim administration and there is nothing we can find in the evidence before us to demonstrate that the administration does make

such requests in relation to the protection of members of the Sikh community. Indeed such evidence as we have been referred to would seem to be to the contrary. Nonetheless, we accept that the mere presence of SIAF is likely to have a practical restraining effect on overt public excess. Considering the high threshold to be reached before the Conventions are engaged, it does not seem to us that these matters, however hard and difficult it might make the lives of the Sikh community, will be sufficient to say that there is a general risk of persecution or breach of Article 3 rights simply by being an Afghan Sikh. To that extent, we agree with Miss Jones' submission that it is the individual circumstances of each appellant which require consideration and that, as UNHCR accepts, it is not the case that Sikhs as such are entitled to recognition as refugees but rather that they form a class of whom individual members may, on the basis of their particular situation, properly qualify for international protection.

39. To that extent, the material before us does supersede that before the Tribunal in Gulati and suggests that K also may be unsafe insofar as it considers on the evidence there reviewed that there is a sufficiency of protection in Kabul for those whose previous history points to past persecution or adverse interest by members or factions of the Mujahideen who retain a position of influence in Kabul. They may now have directly conflicting interests with those of returnees seeking to recover their property. Evidence of a past personal animus against a specific asylum applicant will also be of potential relevance.
40. We do not suggest that this picture of the current situation means there is a real possibility of or a reasonable likelihood of persecution in Kabul for all Sikhs but it is part of the background picture to be taken into account in considering the position of those to be returned to Kabul.
41. We turn now to consider the position of B. It was conceded that he had a well-founded fear of persecution in his home area of Jalalabad but for the reasons which we have set out above, we do not find on the totality of the evidence that such a fear would extend to Kabul to which he is intended to be returned. Nevertheless if he cannot reasonably be expected to relocate there, he will be entitled to be recognised as someone enjoying the protection of the Refugee Convention. The issue for our consideration is therefore whether it would be unreasonable – that is to say unduly harsh – to expect him to relocate in Kabul with his wife and children.
42. The leading case on the issue of reasonableness of relocation is still **R v SSHD ex parte Robinson** [1997] INLR 182. Lord Woolf, then Master of the Rolls, said this at p.189:

“It follows that if the home State can afford what has variously been described as ‘a safe haven’, ‘relocation’, ‘internal protection’, or ‘an internal flight alternative’ where the claimant would not have a well-founded fear of persecution for a Convention reason, then internal protection is not necessary. But it must be reasonable for him to go and stay in that safe haven. As the majority of the Federal Court of Australia observed in *Randhawa* (above) ... :

‘If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from where he or she has fled to relocate to another part of the country of nationality, it may be said that, in the relevant sense, the person’s fear of persecution in relation to the country as a whole is well-founded.’

In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backdrop that the issue is whether the claimant is entitled to the status of a refugee. Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the ‘safe’ part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet the basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental rights and freedoms without discrimination. In *Thiruvuvukkarasu*, Linden JA, giving the judgment of the Federal Court of Canada said at 687:

‘Stated another way for clarity, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?’”

43. In considering whether B could reasonably relocate to Kabul, we must consider the facts that are personal to him. First, our consideration must be on the basis that he will have to live there with his wife and three infant children so that it is the reasonableness of the relocation of the family unit with which we are concerned and not simply the Appellant considered in

isolation. The evidence identifies the further factors relevant to B and his family: (a) he has no connection in Kabul from the past; (b) no government assistance, either financial or practical, will be available to him; (c) there is no reasonable prospect that he could find gainful employment in Kabul; (d) in consequence of the two preceding factors, he would be wholly dependent for survival upon the support of the small remaining Sikh community in Kabul; (e) as even some of those originating from Kabul are forced to live in temples, that is reasonably likely to be his position indefinitely; (f) there is no reasonable prospect of educational facilities being available for his children because of the level of discrimination in Afghani schools and the inadequacy of facilities within the Sikh community; (g) additionally, and in our view crucially, as a member of a religious and ethnic minority, he and his family would be reasonably likely to be the subject of general discrimination on the part of the Muslim majority with no real prospect of being provided with protection against such discrimination by the authorities or any other body.

44. We would stress that the above factors are all specific to this appellant and are not to be considered as a 'shopping list' of relevant factors. Such factors will in each Sikh Afghan case require individual consideration on the basis of the specific history and circumstances of each appellant where internal relocation falls to be considered.
45. On the basis of the factors identified as relevant to B, it does not seem to us that the State will provide him with a 'safe haven' or 'internal protection' in Kabul. We are satisfied that the quality of the internal protection fails to meet 'the basic norms of civil, political and socio-economic rights'. In reaching this view we have carefully considered the judgments in **AE and FE v SSHD** [2003] EWCA Civ 1032. At paragraph 64, Lord Philips, MR, said:

"So far as refugee status is concerned, a comparison must be made between the asylum-seeker's conditions and circumstances in the place where he has reason to fear persecution and those that he would be faced with in the suggested place of internal location. If that comparison suggests that it would be unreasonable or unduly harsh to expect him to relocate in order to escape the risk of persecution, his refugee status is established."

We have therefore considered this issue on the basis of a comparison between the situation of the Appellant in his former home area of Jalalabad and in Kabul. For the reasons which we have enumerated above in paragraph 43, with the consideration under (g) playing a decisive role in our finding by reason of its discriminatory nature, we find that the cumulative

effect of these factors is that it would be unreasonable or unduly harsh to require this particular Appellant to relocate with his family to Kabul and that he is accordingly entitled to the protection of the Refugee Convention. We have not considered whether there are other areas of Afghanistan to which B might reasonably be expected to relocate because it is our understanding of the concession made Ms Hanrahan that the only place of relocation in Afghanistan considered appropriate by the Respondent for consideration in B's case was Kabul. As each appeal must be decided on its own specific facts, this does not mean that other areas for relocation may not be appropriate in other cases.

46. So far as K is concerned, he is a native of Kabul and it is to there that the Secretary of State proposes to remove him. The issues relevant to B as a non-native of Kabul do not therefore have any application in K's case. The issue is simply whether K has a well-founded fear of persecution for a Refugee Convention reason or of breach of his protected human rights under Article 3 of the European Convention in Kabul. Miss Jones urged upon us that the Adjudicator's adverse credibility findings, which formed the secondary basis of dismissal of his appeal, are insufficiently reasoned and unsafe. We do not agree. There was a contradiction as to whether the appellant was arrested once or twice but even if the appellant was credible in respect of both occasions, these were actions on the part of the Taliban and not the Mujahideen. The appellant said of his experiences during the Mujahideen period that "they started harassing and intimidating us on several occasions and demanded money from us but they gave us freedom of religion, freedom of speech, freedom to do our business the way we want and freedom to travel all over the country". He contrasted the situation then with that which arose when the Taliban came to power in 1996. Although even then it is clear that he retained his house and his shop throughout the period until he left Afghanistan. Whilst we remain of the view that the Adjudicator was entitled to reject credibility in the way which he did, it makes no difference to the outcome of K's appeal in any event. The only problems which could on his own account reach the high threshold where they could be regarded as persecutory in nature arose under the Taliban regime which no longer exists in Kabul. We therefore find that, taking his account at its highest, there is no arguable basis for saying that K is currently able to make out a well-founded fear of persecution for a Refugee Convention reason or of treatment in breach of his protected human rights under Article 3. The situation which he will face will no doubt be unpleasant and difficult but he is from Kabul and it is to there that he will be returned. There is in any event no evidence that his family house and shop in Kabul do not remain available to him there. He says in his statement that he funded the cost of leaving Afghanistan from the

proceeds of sale of a shop in another part of Afghanistan. But even if they were not available this would in our view go in his case to general humanitarian issues only and would be for the consideration of the Secretary of State outside the provisions of the European Convention (see the distinction drawn in **AE and FE** referred to above). It follows that he cannot succeed before us and his appeal is accordingly dismissed.

47. In summary, so far as the refugee claims are concerned, B's appeal succeeds. He has shown a well founded fear of persecution in his home area and has shown he cannot reasonably be expected to live elsewhere in Afghanistan. K's appeal fails. He has shown no well founded fear at home, and of course in those circumstances cannot succeed by showing that he might have had a claim had his home been elsewhere (see **Dyli** [00/TH/02186*]). So far as the Article 3 claims are concerned, both fail. Neither appellant is at real risk of receiving treatment contrary to Article 3 in the part of the country where he will in reality be. We were not concerned with any claim that return would be in breach of Article 8 rights, no doubt because there is no arguable basis on which such a claim could be made following **Ullah & Do v SSHD** [2003] EWCA Civ. 1856.

J Barnes
Vice President