Case No: C2/2015/2582

Neutral Citation Number: [2016] EWCA Civ 123
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION & ASYLUM CHAMBER)
Mr Justice McCloskey and Upper Tribunal Judge Allen
UTIJR 6 JR/2772, 2793, 2813, 2778 & 2781/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2016

Before :

LORD JUSTICE LAWS
LORD JUSTICE McCOMBE
and
LORD JUSTICE FLOYD

- -

Between :

R (on the application of HN and SA) (AFGHANISTAN) (Lead Cases associated Non-Lead Cases)	**Appellants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Martin Westgate QC, Sonali Naik, Louise Hooper, Bryony Poynor and Ali Bandegani (instructed by Duncan Lewis) for the Appellants
David Blundell, Mary Glass and Nicholas Ostrowski (instructed by the Government Legal Department) for the Respondent

Hearing dates: 13 and 14 January 2016
- -

Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal from the Upper Tribunal (Immigration and Asylum Chamber) (McCloskey J and Upper Tribunal Judge Allen) brought by two Afghan nationals known in these proceedings as HN and SA. The appeal is against the dismissal by the Tribunal of a claim for judicial review brought by the appellants against the respondent Secretary of State in respect of decisions by her, under rule 353 of the Immigration Rules, not to admit as fresh claims for asylum representations made on their behalf by solicitors in March 2015. The decisions on those representations as challenged by the appellants were dated 1 April 2015 (in HN's case) and 23 and 31 March 2015 (in the case of SA). Permission to appeal from the Tribunal to this court was granted by Christopher Clarke LJ by order dated 19 August 2015.

2. Earlier asylum claims had been made by each appellant which had been rejected by the respondent and on appeal to the First-tier Tribunal in decisions dated (in HN's case) 30 September 2013 and (in SA's case) on 17 September 2014. Permission to appeal to the Upper Tribunal from the First-tier had in each case been refused.

3. Both HN and SA, and a number of other Afghan nationals whose claims to remain in the United Kingdom had been rejected by the respondent, were given directions for their compulsory removal to Afghanistan on a flight departing on 10 March 2015. Those directions prompted a number of claims for judicial review and for urgent interim relief staying removal, including the claims by these appellants. Stays of removal were granted.

4. At an early stage of the proceedings, pursuant to the President's directions by order of 10 April 2015, five "lead cases", including those of the present appellants, were selected for initial determination. The remaining non-lead cases were at that stage, it seems, to be considered after the Tribunal's decision in the lead cases. The procedural steps assumed some complexity. It is not, however, necessary to dwell upon them at any length as they are set out in the Tribunal's judgment at paragraphs 10 to 22. As a result, all the cases came before the Tribunal for "rolled up" hearing on 11 and 12 May 2015, i.e. for hearing of the oral permission applications with substantive applications for judicial review to be heard immediately if permission to apply were granted. In other words, the permission and substantive stages were "rolled up" into one single hearing and the matters were heard on the merits. The non-lead cases, notwithstanding their non-lead status, were formally before the Tribunal, as is clear from the fact the Tribunal dealt with them in the judgment.

5. By its judgment of 21 July 2015, the Tribunal granted permission to apply for judicial review in all the lead cases but dismissed the claims. In respect of the non-lead cases, the Tribunal refused permission to apply. By his permission order of 19 August 2015, Lord Justice Christopher Clarke gave permission to appeal, to the lead and non-lead claimants alike, against those orders.

6. For reasons extraneous to the points arising on the appeals, the claims of three of the lead claimants and those of certain of the non-lead claimants have become academic and they have dropped out of the appeals to this court.

7. The essence of the claims before us centres upon what was accepted to be a worsening security position in Afghanistan at the relevant time, following the withdrawal of the International Military Forces ("IMF"). The case of the appellants is that their claims for asylum/international protection, previously dismissed, should be reviewed and that they have genuine "fresh claims" standing a "realistic prospect of success" within rule 353. The new position in Afghanistan is such, they contend, that they are entitled to "subsidiary protection" within the meaning of the EU Qualification Directive 2004/83/EC in the light of the risk of "serious harm" to them consisting of

> "…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 15(c) of the Directive).

Subsidiary protection would comprise the various benefits referred to in the relevant parts of Chapter VII of the Directive which include Article 24.2. That Article provides:

> "As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year, unless compelling reasons of national security or public order otherwise require."

In implementation of this obligation in this country the respondent has issued a policy on Humanitarian Protection and the Immigration Rules make provision for the grant of the necessary residence permits as soon as possible, which may be valid for five years and are renewable and with a facility to apply for indefinite leave to remain (subject to various criteria) after five years: Immigration Rules 339Q(ii), 339R and 339S.

8. A second issue arising in the proceedings was that the appellants contended before the Tribunal that the respondent acted in breach of an established "policy", arising under a tri-partite Memorandum of Understanding ("MoU") between Her Majesty's Government, the Government of Afghanistan and United Nations High Commissioner for Refugees ("UNHCR"), under which certain persons "identified as vulnerable" should not be returned to Afghanistan. For reasons amplified below, the argument was modified to argue that the relevant policy was to be found, not in the MoU (an international instrument) but in a Home Office Operational Guidance Note.

(B) Background Facts relating to the Appellants

9. The individual circumstances of the appellants were set out in agreed terms in the Tribunal's judgment at [55] and [56] as follows:

> "[HN], is aged 22 years. He entered the United Kingdom as a minor, in 2007, aged 14. He is from Laghman province. He has resided here for almost eight years. The last judicial decision in his case was on 30 September 2013, when the FtT decided that the Applicant was not credible and rejected his evidence since his last appeal in 2011. The Judge found he had a deep rooted

resistance to being returned to Afghanistan, and rejected any risk on return. The FtT found that the Applicant had support in Afghanistan (the Applicant's own account was of his cousin's family in Kabul and he claimed he had previously resided in Kabul with a neighbour's relative for a year before his departure from Afghanistan). The Judge also dismissed the Article 8 appeal. Mental health was not in issue in this appeal. On 20 November 2013 the Upper Tribunal refused permission to appeal. This Applicant's challenge asserts a *prima facie* risk of Article 15(c) treatment in his home province. It further involves the contention that, in his present condition, he cannot safely or reasonably relocate to Kabul. This contention is based on certain medical evidence which records a history of recent suicide attempts, self-harming and hunger strike. The medical expert describes this Applicant as manifesting severe mental health problems, describing his condition as "*unstable"*. He too invokes paragraph 276 ADE of the Immigration Rules, highlighting his age, length of residence, health and the lack of meaningful healthcare in Kabul and linking this with his private life rights under Article 8 ECHR. He further contends that he qualifies to be considered a vulnerable person within the terms of the OGN of February 2015 and that the Secretary of State should now give consideration to granting him leave to remain exceptionally under paragraph 353B of the rules.

…

[SA], celebrated his 18th birthday on his deemed date of birth of 01 January 1997. He originates from Baghlan province. On 01 October 2014 the FtT held that while he would be at real risk of persecution in his home area, he could safely and reasonably relocate to Kabul. The first element of his case is based on Article 15(c) of the Qualification Directive. The second involves the contention that he cannot safely relocate internally in Afghanistan. The third, invoking paragraph 276ADE(vi) of the Immigration Rules, is based on the contention that in light of his age, recent separation from Afghanistan and absence of family support in Kabul, there are clearly serious obstacles to his reintegration there. The fourth element of his challenge is, invoking JS (Former unaccompanied child – durable solution) Afghanistan [2013] UKUT 00568 (IAC) that he is a former looked after child he requires a "*durable solution*" to any proposed resettlement and, given the absence thereof, his removal to Afghanistan will breach his right to respect for private life under Article 8 ECHR."

(C) The Representations made to the Respondent and the Decisions

HN

10. In the face of the proposed removal of HN from the UK to Afghanistan, on 7 March 2015, HN's solicitors sent a pre-action protocol letter to the respondent requesting a stay of removal. The letter was based upon reported statements of the Afghan Minister for Integration and Refugees and by the country's ambassador in the United Kingdom that removal of Afghan citizens from EU member states should be suspended in view of the deterioration in conditions in Afghanistan. The solicitors also relied upon HN's mental health. On 27 March 2015 the solicitors supplemented the arguments with reports from two experts, Professor Susan Clayton and Dr Liza Schuster. The contents of these representations were summarised in the Amended Grounds of Claim as follows.

11. Dr Schuster's report referred to a number of features:

a. She said that the reception centre of the International Office of Migration in Afghanistan could only provide limited assistance and required those given initial accommodation to leave after two weeks. This, she said, often required those returned to the country to depart for unsafe provinces;

b. She referred to the deteriorating infrastructure which was under pressure from population increase;

c. Her view was that in the absence of support those returned "will find it difficult, perhaps impossible to find livelihood opportunities";

d. Those returned from the UK tended to be regarded as contaminated or "westernised" and some were vulnerable to recruitment by armed groups;

e. Reintegration packages were said to be inadequate and on failure of new businesses started by them risked being forced to choose between destitution in Kabul or risks of returning to unsafe provinces on unsafe roads.

12. Professor Clayton's report centred upon separated child asylum seekers. She had tracked 70 of those returned from the UK and found that they rarely had family in Kabul to look to for support or, if they did, they tended to be shunned because of the fact of their return from abroad. She referred to the 680,000 internally displaced persons and a figure of 1 million persons to be regarded as a "population of concern" according to UNHCR 2014 figures. Such figures showed that it was difficult even for able-bodied young men to settle into life in the country. Further, returned migrants with western styles and dress, and with knowledge of English, were seen as "westernised" and for that reason potentially wealthy, rendering them vulnerable to attacks by the Taliban and other random kidnappings.

13. Reference was also made to a statement of the United Nations Assistance Mission in Afghanistan, as summarised in the Amended Grounds as follows:

> "<u>UNAMA</u>
>
> In 2014, UNAMA documented 10,548 civilian casualties (3,699 deaths and 6,849 injured): "The intensification of conflict-related violence in Afghanistan took an extreme toll on civilians in 2014, with civilian loss of life and injury reaching

> unprecedented levels. UNAMA documented 10,548 civilian casualties (3,699 deaths and 6,849 injured), marking a 25 per cent increase in civilian deaths, a 21 per cent increase in injuries for an overall increase of 22 per cent civilian casualties compared to 2013. In 2014, UNAMA documented the highest number of civilian deaths and injuries in a single year since it began systematically recording civilian casualties in 2009."

14. The respondent's decision on these representations was contained in her official's letter of 1 April 2015. That is the letter that has been studied in the course of arguments on this appeal. (I would note, however, that this letter itself actually acknowledges letters of 3 and 5 March 2015 – to which our attention was not directed - rather than referring to representations of 7 and 27 March, as mentioned in the Amended Grounds of Claim.)

15. The decision letter is long, running to 15 pages. It has been necessary to consider it closely to address the arguments on the appeals but I shall endeavour to summarise it shortly, for the purposes of exposition, in this judgment.

16. Importantly, it is accepted by counsel for the appellants that the letter correctly states the test to be applied where material presented to the respondent is said to give rise to a "fresh claim" under rule 353. This is the test as set out in the judgment of Buxton LJ in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 at paragraphs 6 and 7 and is quoted in the letter as follows:

> "Buxton LJ explained the nature of the Secretary of State's task under paragraph 353:
>
> ... [She] has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of Sate has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the

> applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.
>
> The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition (see per Lord Bridge of Harwich in Bugdaycay v SSHD [1987] AC 514 at p531F)".

The letter also refers to paragraphs 22 and 23 of the judgment of Toulson LJ in *AK (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 535, identifying the mischief of repeated claims seeking to re-open cases without sufficient new cause and stating:

> "Precisely because there is no appeal from an adverse decision under rule 353, the decision maker has to decide whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim, on considering the new material together with the material previously considered. Only if the Home Secretary is able to exclude that as a realistic possibility can it safely be said that there is no mischief which will result from the denial of the opportunity of an independent tribunal to consider the material."

17. After these citations the letter, as acknowledged by the appellants, again correctly summarises this test in law as follows:

> "Thus the approach in respect of Paragraph 353 of the Immigration Rules as contemplated by those passages requires us to establish whether the new material has previously been considered and, if not, whether on all the evidence there would be a realistic prospect of success in an appeal to the First Tier Immigration Tribunal, bearing in mind as well the requisite standard of proof and the requirement for anxious scrutiny."

18. The letter identifies the materials considered, including the two experts' reports, the UNHCR Eligibility Guidelines for Assessing International Protection Needs of Afghan Asylum Seekers (2103), UNAMA's annual report for 2014 (dated February 2015), a study by the Institute for the Study of War of March 2015 and the Home Office's own Country Information and Guidance of February 2015.

19. The statements of the Afghan Minister, relied upon by the appellants, were considered but were said not to represent the views of the Afghan government as a whole. Reference was made to evidence provided by the Chargé d'Affaires at the UK embassy in Kabul (Mr R Chatterton Dickson) as to the continued successful return of people to Afghanistan from the UK in 2014. The writer referred to the Upper Tribunal "Country Guidance" case of *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 163 (IAC) and made lengthy citation from the Home Office Guidance of August 2014, noting the fluctuating security situation since the decision in the *AK* case stating that the proportion of civilians directly affected by violence as being low. In the first six months of 2014, the report stated, 0.02% of the population were so affected, as compared with 0.03% in the whole of 2013. The official writing the letter repeated this statistic for the first six months of 2014. It was recognised that the security situation had worsened, but it was said that this situation did not demonstrate that HN would face a real risk of harm if returned to Afghanistan.

20. The letter referred to HN's solicitors' reliance upon the MoU between the UK and Afghan governments and the UNHCR (to which I shall return, on the appellants' second point, in more detail later) which was claimed to prohibit the return of vulnerable persons, a group to which it had been said HN belonged because of the issues relating to his mental health. The letter then noted that under the MoU the parties were required to afford protection to vulnerable groups on repatriation and to provide medical examination before return. It was said that any physical or psychological illness would be taken into account with regard to the person's rights under Article 3 and 8 of the European Convention on Human Rights. However, it was said that the MoU did not prohibit the return of individuals with health issues.

21. Reference is then made to the reports from UNAMA and the Institute for the Study of War (mentioned above and post-dating the Home Office document) pointing to the worsening situation in the country. It was said in the letter that this deterioration was accepted but it was not accepted that this added to HN's claim other than background to the general country risk.

22. The writer then turned to the reports from Professor Clayton and Dr Schuster.

23. In respect of the former, the letter made the points that the sample taken was small and unrepresentative of the broader country material; the methodology was not explained and she made comparison between Kabul and a western city which was not a material comparison.

24. So far as Dr Schuster's report was concerned, the letter criticised it on the basis that her reported meeting with the Afghan Minister and his statements did not properly reflect the position of the Afghan government; there were failings in her assessment of the various Afghan provinces and her evidence from the individuals interviewed. In general, the report was thought not sufficiently comprehensive to warrant departure from the assessment made in the *AK* case. She is also criticised for not stating whether the situation met the threshold required under Article 15(c) of the Directive. Again the methodology and smallness of the sample of subjects was relied upon in rejecting the claims made.

25. The conclusion on the country situation, which had been relied upon by Dr Schuster in her report, was:

> "It is not accepted that Dr Schuster's report together with all the other material relied upon, justifies a departure from the findings in AK as to the risk posed to an individual returning to Afghanistan, to the reasonableness and safety of relocating to Kabul, and whether the internal armed conflict in Afghanistan reaches the threshold necessary to engage the UK's obligations under Article 15(c)."

26. The letter then turned to the medical issue. On this reliance had been placed on a report from a doctor, who had not seen HN in person at all but had expressed an opinion upon his "fitness to fly" (as it was put in the Grounds for Interim relief filed on his behalf). The doctor's report was based upon HN's medical records and drew the following conclusion:

> "From this I conclude that Mr [N] is a disturbed man suffering from mental illness, who in recent weeks has made attempts on his life. He has serious illness which is continuing, in spite of medication. This mental state is currently unstable. It is understood Mr [N] does not want to be removed, and the added stress of a forced removal would be expected to provoke a further deterioration in his mental illness, especially in the light of what his voices are said to have been telling him. Being on a charter flight with others also being forcibly removed could be particularly disturbing for Mr [N], with the risk of group behaviour compounding his anxiety.
>
> The standard IATA guidelines indicate that 'medical clearance is required by the airline's medical department if the passenger…….(b) because of the ….behavioural condition, is likely to be a hazard or cause discomfort to other passengers'. Specifically in relation to chronic psychiatric disorders, acceptance is only for those who are 'properly controlled by medication and stable (eg living out in the community taking care of all own needs including medication)'.
>
> My professional judgment is that on the evidence available to me it would be wise to assume Mr [N] is not fit to fly because of his mental instability. However, there could be scope for flying with a medical escort, if this were advised by an expert in aviation medicine, as advised by a psychiatrist."

The respondent's answer to this was this:

> "Your client's claimed mental health is not considered to be life threatening. As stated earlier in this letter there is adequate support and treatment should your client need assistance upon his return to Afghanistan. Mental illness is not a barrier to removal and that there is no question of removing anyone who, following assessment from the relevant and appropriate medical authorities is deemed not fit to fly.

> We have had regard to Dr Pickles' report, note that he makes his observations without having seen or met Mr Naziri and we will make our decision on Mr Naziri's fitness to fly based on an up to date assessment from a medical practitioner who has had the benefit of making an in-person assessment"

27. The letter then addressed the claims made in respect of HN's private life and Article 8 of the ECHR. As this issue has not featured with any prominence in the arguments before us, I say no more about it.

28. The respondent's letter concluded with a final paragraph which again, as is accepted, applied the correct test that the respondent was required to apply in dealing with the new representations. The paragraph reads as follows:

> "Your submissions have been considered, both individually and together, along with your client's previously submitted material, to determine whether there is a realistic prospect of success before an immigration judge. For the reasons already given in our previous letter of 26 January 2015 and for the reasons above it is considered that your submissions on behalf of your client, when taken together with the material previously considered, do not create a realistic prospect of success before an immigration judge. Therefore it is not considered that your submissions on behalf of your client amount to a fresh claim"

SA

29. In the case of SA, his "Judicial Review Grounds" (so identified in the index to the Core Bundle before us) appear to have been contained in a document headed "Grounds for Interim Relief" dated 9 March 2015. This document relied upon statements of the same Afghan Minister as those relied upon by HN and a letter from Dr Schuster recording her interview with the Minister on 28 February 2015. Also, as in HN's case, similar references were made to the respondent's "Country Information and Guidance" of August 2014 which recorded that the security position in Afghanistan had deteriorated. Reliance was placed on a further short reference to a document from the EU "European Asylum Support Office" (EASO) reporting 246 "reported security incidents" in the district of Kabul between January and 31 October 2014. The submission was then made that in the light of this new material the situation of each applicant had to be re-considered to determine whether he can "properly or lawfully" be removed to Kabul in the light of facts as previously found and the previous conclusions as to the risk of breach of Article 3 of the ECHR, whether there was a well-founded fear of persecution in the home area and whether safe relocation to Kabul was possible and whether there were serious obstacles to re-integration, together with a re-assessment of the position under Article 8 of the ECHR.

30. In SA's case the respondent's answers to these representations were given in letters of 23 and 31 March 2015. In the first letter, the immigration history was set out and the results of earlier appeals. It was noted that his appeal rights had become exhausted as recently as 2 March 2015 and reference was made to the new representations from solicitors of 18 March 2015.

31. The respondent's lengthy letter of 23 March 2015 (as with the letter of 1 April 2015 in HN's case) referred to the correct legal test to be applied by the Secretary of State in "fresh claim" cases. Again, I summarise some of the principal points raised.

32. It was noted that previous findings by the Tribunal in SA's case included adverse findings as to his credibility. The letter referred to the Afghan Minister's statements but again stated that those statements should be seen "in the context of developments since that time, including ongoing discussion which has resulted in an agreement to continue with the charter [flight] programme" pending the opening of new negotiations about the MoU. It was noted that successful returns to Afghanistan had been achieved in 2014. Reliance was placed upon the decision in *AK* (supra). It was stated that more recent materials did not demonstrate that SA faced real risk of harm if returned to Afghanistan.

33. The writer of the 23 March letter also referred to Dr Schuster's report of 3 March 2015. In so far as the statements of the Afghan Minister were relied upon, the answer was again that matters had moved on.

34. Dr Schuster had further referred to the return to Norway of certain individuals removed from that country to Afghanistan; it was said by the respondent in answer that more recent returns of single men had continued to be successful. Dr Schuster's suggestion that absence of protection noted in some instances was not considered sufficient to risk a breach of Article 3 of the ECHR. With regard to Dr Schuster's opinion that Kabul might be less unsafe as a return location than others but could not be regarded as secure, the writer indicated that it was not suggested by Dr Schuster that the decision in *AK* on this issue had become "unreliable".

35. On SA's behalf issues as to his mental health and perceived vulnerability had been raised as an obstacle to his return. The respondent referred to the obligations on the parties under the MoU to take precautions in respect of vulnerable returnees. Health checks would be undertaken and fitness to fly would be taken properly into account. So far as SA's own mental health was concerned, the respondent noted certain underlying adverse credibility findings made by Immigration Judge Wellesley-Cole in a decision in October 2010. It was asserted that access to medical treatment was possible on a subject's return to Afghanistan. The letter concluded in paragraph 49 as follows:

> "Conclusion
>
> Your asylum and/or Human Rights claim has been reconsidered on all evidence available, including the further submissions of 18 March 2015 but it has been decided that the decision of 02 August 2014 should not be reversed. The further submissions submitted are hereby rejected. Accordingly it is not appropriate to grant you leave in the UK for the reasons outlined in earlier letters and also above. Furthermore it has been decided that your submissions do not amount to a fresh claim. The new submissions taken together with the previous considered material do not create a realistic prospect of success."

36. The respondent supplemented her answer to SA's assertion of a "fresh claim" in the second letter to SA's solicitors of 31 March 2015. This letter addressed additional objective material and the reports of Dr Schuster and Professor Clayton that had also been advanced in support of HN's claims. As is again non-contentious, the letter set out the correct legal tests to be applied and quoted a similar extract from the *WM* case as that was to be recited in the letter of 1 April to the same solicitors in response to HN's claims. The substantive responses to the additional material presented were full and in essentially the same terms as given the following day in the reply to HN which I have already summarised above. It is not necessary to say more about them here.

37. In these circumstances, the respondent rejected the contentions of HN and SA that the further representations made on their behalf amounted to proper "fresh claims" within the meaning of rule 353.

(D) The Tribunal's Decision

38. The Upper Tribunal was much concerned as to the proper ambit of the proceedings that it had to decide and the range of evidence that it had properly to consider. It was also concerned (as Chapters IV and V of its judgment graphically indicate) that many of the claims before it were likely in any event to call for further consideration by the respondent in the light of new materials. (This last feature of the case is a matter that made this court question whether it was a sensible use of resources to hear the appeals. However, we did so and I move on.) The Tribunal gave consideration to all the evidence produced to it, whether available at the time of the challenged decisions or not: see paragraphs 73 and following of the judgment.

39. The Tribunal saw the appellants primary case as being based upon the statements of Minister Balkhi and the MoU ("two of the cornerstones of the Applicants' challenge" and said that "the other elements of challenge" were: "the expert evidence, the UNHCR Guidelines, the various reports of international agencies, the Home Office 2015 Country Information and Guidance publications and sundry witness statements generated on both sides": see paragraph 94 of the judgment.

40. With regard to the statements of the Minister, the Tribunal reached the conclusion, on the evidence before it, that these represented the Minister's personal views and did not reflect the attitude of the Afghan government as a whole. At paragraphs 78 and 79 of the judgment, the Tribunal said:

> "78. We consider it likely that Minister Balkhi seized the opportunity to broadcast a hard line, in the context of the obvious reality that Afghanistan remains a struggling country with significant economic and other problems and a grossly over populated capital, Kabul. We take judicial notice of the fact that repatriation involves a drain on limited resources. Thus the discouragement of would be repatriating countries is a far from surprising strategy.
>
> 79. We further take into account that Minister Balkhi was expressing a personal opinion. This is clear from the terminology of Dr Schuster's report:

"***He*** *is unwilling ……* ***in the Minister's view*** *……*"

[Our emphasis.]

This assessment is readily made from the text. It is reinforced substantially by later evidence. We refer particularly to the witness statements of Mr Chatterton Dickson and, especially, the accounts therein of discussions with other Afghan government members and representatives. Furthermore, subsequent events confound the words spoken by Minister Balkhi, namely the undisputed evidence of actual repatriations and how these unfolded on the ground. This evidence establishes clearly, *inter alia*, that Afghan nationals have been repatriated to provinces which Minister Balkhi had effective declared "off limits". It establishes equally clearly that, contrary to Minister Balkhi's claims, the MOU, as elucidated and supplemented by the surrounding NVs, has continued to govern repatriations."

41. The Tribunal gave long consideration to the MoU and the factual contexts in which it operated, together with other "Notes Verbales" ("NVs") exchanged between the governments, it described the character of this documentation as follows:

> "88. We consider that the MOU is, at heart, a bilaterally agreed mechanism regulating the practical implementation of the repatriation of Afghan nationals from the United Kingdom to their country of origin. It is a cocktail of highbrow principles and the purely prosaic. It enshrines a series of norms and principles to be applied by the two Governments to the repatriation exercise. It is not overly prescriptive. It is a relatively high level instrument, with its espousal of governing norms and principles and its lack of dense detail. It is clearly designed to provide the two governments with a workable, viable and flexible tool to achieve the aims of efficacious repatriation and, in the words of one of the recitals, the "*dignified, safe and orderly repatriation to and successful integration in Afghanistan*", which is clearly one of its overarching purposes."

Having reached that conclusion, the Tribunal went on to consider whether individuals could seek to invoke its terms in support of personal claims. It concluded that the MoU was

> "…not simply a bilateral inter-government agreement. Rather, it is also an expression of the <u>policy</u> of the United Kingdom Government relating to the repatriation of Afghan nationals. As such, it has the status of a material consideration which, as a matter of public law, must be taken into account in the case of every proposed repatriation. This we consider to have been the

> primary public law obligation imposed on the Secretary of State in making the impugned decisions…. ": paragraph 89.

42. The Tribunal decided that there was no evidential basis for concluding that the MoU was not in fact taken into account appropriately. It placed reliance upon an NV of 10 March 2015 which it said "confounded" the appellants' claims. The NV was quoted and said (with the Tribunal's emphasis):

> "…. It was agreed that chartered British flights carrying immigrants from the UK shall be allowed to land at Kabul Airport, unless vulnerable people (**children, families, women without a male relative and individuals whose permanent residential areas are insecure**) are boarded amongst the returnees."

The Tribunal considered that no illegality or irrationality was shown in the light of these documents and the commitment of the two governments to discussing a revised MoU.

43. Under a heading "The Paragraph 353 Challenge", at paragraph 94 of the judgment, the Tribunal concluded that "two of the main pillars" of the challenge to the respondent's impugned decisions were without foundation. In respect of "the other elements of challenge", the Tribunal said that it preferred the submissions of Ms Glass (for the respondent) "summarised in [69] – [70]" (in fact [68] and [69]). The paragraphs referred to are lengthy, but the gist of the Tribunal's summary of Ms Glass's submissions which were so accepted appear in paragraph 68 (i) to (vii) of the judgment as follows:

> "i. Particular regard must be had to the recent determinations of the FtT in the Applicants' cases. This involves in particular acknowledging the lack of novelty in the suggestion that relocating to Kabul is not safe or reasonable, in circumstances where recent country evidence was judicially considered.
>
> ii. The lawfulness of the Secretary of State's most recent decisions withstands scrutiny by reference to the standard of rationality.
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> iii. The Secretary of State's decisions are consistent with the recognition in the most recent UNHCR guidelines of the internal relocation of single able bodied men and couples of working age to urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life.
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> iv. Professor Clayton's brief report does not arguably justify a departure from the country guidance promulgated in AK.
>
> v. The statements of Minister Balkhi have been considered by the Secretary of State and must not be viewed in isolation from other evidence and events, including the efficacious repatriation

> of 24 Afghans from nine provinces pursuant to the charter flight of 11 March 2015. Furthermore, his statements are not supported by UNHCR.
>
> vi. The Secretary of State reasonably concluded that, given its limitations, Dr Schuster's report did not warrant a departure from the assessment of risk in AK. Furthermore, Dr Schuster did not suggest that breaches of Article 3 ECHR or Article 15(c) of the Qualification Directive would be occasioned by repatriation. More fundamentally, the Secretary of State rationally concluded that Dr Schuster's assessment of the issue of relocation to Kabul suffers from a series of intrinsic limitations and does not justify a departure from AK.
>
> vii. Focusing on the standard of rationality to be applied to the Secretary of State's most recent decisions, the current country evidence falls well short of sustaining the Applicant's challenges."

44. Drawing the threads together, at paragraphs 95 and 96 of the judgment, the Tribunal said:

> "95. Within the limitations of a judicial review challenge and the hearing which has taken place we find no warrant for departing from the current country guidance promulgated in AK. In particular, we find that the evidence falls short of satisfying the stringent Article 15(c) test.
>
> 96. The Tribunal is equipped to make a further, *ex post facto*, assessment of the impugned decisions having regard to the post-decision evidence which it has received. This includes evidence of the successful repatriation of Afghan nationals from the United Kingdom and other countries to a series of provinces. In this context we refer particularly to the evidence digested in [50] above, which we accept. This evidence reinforces our conclusion that the impugned decisions of the Secretary of State are unimpeachable on the grounds advanced by the Applicants."

(E) The Appeal

45. On the present appeal, Mr Westgate QC for the appellants presented three principal strands of argument. First, he submitted that the Tribunal had been in error in concluding that the respondent had reached a lawful conclusion that there was no proper fresh claim to asylum that had a "realistic prospect of success", in the sense expressed in the *WM* case. Secondly, he submitted (in somewhat modified form) the argument presented to the Tribunal that the respondent had acted in breach of established policy in returning (to Afghanistan) these appellants, who were "vulnerable people" within the meaning of a relevant government policy. Thirdly, it was argued that the Tribunal had erred in dismissing the non-lead cases summarily,

without consideration of the independent factual backgrounds of any of them in the light of the new materials presented.

46. As already indicated, we entertained some doubts at the outset of the hearing as to the usefulness of the appeal proceedings in circumstances in which it was likely that the Secretary of State was going to have to make fresh decisions in each of the present cases in any event. Mr Westgate argued that we should hear the appeal, if for no other reason than that if the Tribunal decision (which he contended to be erroneous) was undisturbed it would constitute the starting point for any fresh decision that the respondent might make in the individual cases. He told us that the Tribunal decision is referred to in the respondent's current version of her Country Information Guidance, indicating the significance already attached to it in the respondent's department. On this issue, Mr Blundell for the respondent stated his client's objection to what he called a "rolling review" of the cases and voiced the ongoing concern in government as to the Tribunal's decision on the status of the MoU, and related documents, as constituting a "policy" for public law purposes. We decided, therefore, to continue the appeal to the extent of deciding whether the respondent had made a reviewable error on the fresh claims presented.

47. Mr Westgate, in opening his argument on the Qualification Directive, reminded us of this court's decision in *R (QD Iraq) v Secretary of State for the Home Department* [2011] 1 WLR 689 in which the court had applied the interpretation of the Directive stated by the Court of Justice of the European Union in *Elgafaji v Staatssecretaris van Justitie* [2009] 1 WLR 2100 as follows (in paragraphs 35 and 39):

> "35. In that context, the word "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 – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a member state to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a 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 of that country or region, face a real risk of being subject to the serious threat referred in article 15(c) of the Directive.
>
> ...
>
> 39. In that regard, 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."

48. In the context of a decision maker's assessment of the availability of relocation, away from his place of origin, for a person returned to his country of nationality, Mr Westgate referred us to two cases indicating that the test was whether it was reasonable to expect a person to relocate or whether it would be "unduly harsh" to

expect him to do so: the references were to the speeches of Lord Bingham of Cornhill in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at paragraph 21 and *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678 at paragraph 5.

49. Mr Westgate referred us to additional passages in these cases amplifying this point, perhaps most pertinently to the submissions addressed to the specific facts of the applicants' cases, from the UNHCR Guidelines on International Protection (2003) quoted by Lord Bingham in *Januzi* as follows:

> "*Economic survival*
>
> The socio-economic conditions in the proposed area will be relevant in this part of the analysis. If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level."

50. The country guidance decision of the Upper Tribunal in *AK* in 2012 was obviously central to the decision making and to the Tribunal's decision in this case. The overall conclusions in the *AK* case as to the applicability of the Article 15(c) threshold in Afghanistan in general, and in Kabul in particular, are well known (see paragraphs 198-199 and 243 of the judgment), Mr Westgate referred us to paragraph 248 where the Tribunal said this:

> "<u>The future situation</u>
>
> 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."

51. It was Mr Westgate's submission that the situation appearing from the fresh material, presented on the appellants' behalf to the respondent, demonstrated that the time had now come for the "careful review" of which the Tribunal had spoken in *AK* and that, in this case, the Tribunal should not have accepted the submissions of Ms Glass that such material did not justify a departure from the findings in the *AK* case. He pointed to paragraph 32 of the Tribunal's own judgment in this case as indicating (in his submission) on the facts a clear and significant increase in the numbers of civilian casualties in 2014, in comparison with the figure in 2013.

52. It was further argued that some of the principal reasons given in *AK* for holding that the Article 15(c) threshold had not been crossed had subsequently been undermined. Mr Westgate called in question the calculations made in the HN decision letter as to level of casualties in percentage terms with reference to the Home Office Guidance document of August 2014. The guidance and the letter referred to a casualty percentage in the first 6 months of 2014 of 0.02% or 1 in 5000. It was argued that this broad figure did not take into account regional variations nor, in particular the situation in HN's home area of Alishang (in Laghman province) which was described as one of the "most volatile" in the EASO paper. The argument continued (as summarised in paragraph 27a. (ii) of the skeleton argument) as follows:

> "The UNAMA report (cited by the Respondent at B/Vol 1/40/1.1.10) suggests that 70% of the security incidents are in the East, South East and Southern Provinces. The combined population of these provinces is 8,019,300 (EASO figures) and if casualties are distributed in the same way as security incidents then the average casualty rate in 2014 for these provinces as a whole would be 0.092%. This is close to the 0.1% to which the Tribunal in *AK* attached significance and it is obvious that in some areas at least the level of casualties in the southern region almost tripled in 2014 as compared to 2013".

53. While not ignoring the other features relied upon by the appellants on this aspect of the case, the argument presented to us is neatly summarised in paragraph 27 e. of the skeleton argument as follows:

> "The general security situation in Afghanistan had deteriorated to a far greater degree than that which had been anticipated by the tribunal in *AK*. At §211 the Tribunal in *AK* considered that while the state was ineffective to protect its citizens, the presence of international forces provided "sources of immediate physical protection and assistance". The Tribunal recognised that the international forces would leave in 2014 but considered that resources being put into the Afghan National Security Force (ANSF) meant that "even if the ANSF does significantly less well post-2014 at providing security, there will not be a security vacuum". The material presented to the Respondent and the UT showed that the overall trend is one of

> decreasing government control outside the larger town and cities. The ANSF "lacks requisite capacities as a counter-insurgency force". They are increasingly "confined to their bases and security checkpoints, unable or unwilling to go out on patrol and the community. This leaves the Taliban free to provide its own forms of government in the countryside". The Respondent's own CIG accepts that "In general, the state is unable to provide effective protection.""

54. Addressing the issue of re-location away from more dangerous areas of the country to Kabul, the appellants argued that the population of the capital has grown tenfold in 10 years, without the city's infrastructure being capable of providing for such an increase, giving rise to significant difficulties for new arrivals seeking to integrate there: (c.f. the criteria emerging from *Januzi* and *AH* (supra)). There were, it was argued, real problems, particularly for young men without social networks capable of producing living support and employment opportunity. Even those compulsorily returned to Afghanistan, it is said, faced risks of attack because of perceived "westernization": see the appellants' skeleton argument paragraphs 28 to 36.

55. It was argued that all this was insufficiently assessed by the respondent and that, accordingly, "No reasonable Secretary of State could fail to conclude that the new material…satisfied the fresh claim test": skeleton argument, paragraph 37. It was said that the respondent failed to appreciate that there was a realistic prospect that the *AK* case ought no longer to be recognised as authoritative country guidance on the current situation in Afghanistan.

56. In this regard, Mr Westgate embarked upon detailed criticism of the respondent's decision letters which I have sought to summarise above. For example, it was said that in the letter of 1 April 2015 (HN) had failed to consider properly Article 15(c) of the Directive and had applied the wrong test with regard to medical evidence in addressing the fitness of the person concerned to fly rather than HN's vulnerability owing to his mental health issues. Before moving on, I would say immediately on these two points that the 1 April letter seems to me to address the points raised in the letters of 3, 5 and 6 March from HN's solicitors and the enclosures, in the terms in which those materials were advanced. I can find no reference to Article 15(c) in any of the three letters and the medical report provided was framed precisely in terms of the question of whether HN was or was not fit to fly: see the quotation from the report in the original "Grounds for Interim Relief" of 9 March 2015, paragraph 21, already quoted above.

57. It is true that the arguments advanced by the appellants became more refined and relied upon more detailed submissions in the course of the proceedings below (e.g. in the Amended Grounds and in the skeleton arguments), but it seemed to me that Mr Westgate's criticisms of the detailed decision letters of late March and 1 April 2015 were somewhat unfair in attacking the decision letters on the basis of later materials. All that aside, in considering my conclusions on the decisions in the next section of this judgment, like the Tribunal, I will try to address the criticisms of the decisions in the light of all the arguments.

58. Mr Westgate criticised the decision letters in their approach to the expert reports of Professor Clayton and Dr Schuster, saying that the criticisms were (in reality)

statements of the respondent's own views of them, rather than an assessment of how the reports might be regarded by a hypothetical Tribunal considering the new material, together with the old, in assessing whether or not a true fresh claim was being made. He argued that before a new Tribunal the experts would have the opportunity to answer criticisms that were made of their reports. The respondent ought, therefore, to have considered more carefully the part that such evidence played in considering whether a realistic prospect of success before a new Tribunal might exist.

59. Further, it was submitted that, in the concluding passage of its judgment on the rule 353/fresh claim issue, in paragraph 95 the Tribunal made a similar mistake, as that said to have been made by the respondent, in asking themselves the question whether the Article 15(c) threshold had been crossed, rather than asking whether the Secretary of State in her decisions had reached a rational conclusion in applying the test set out in the *WM* case to the new claims advanced.

60. The second main point on the appeal was the issue of the alleged "policy" arising out of the MoU and the contention that the respondent had failed to follow that policy in directing the return of these appellants to Afghanistan.

61. As noted already, the argument on this part of the case shifted ground considerably from that which was advanced before the Tribunal. In the arguments below the appellants were contending (and the Tribunal found) that relevant policy, properly to be considered by the Secretary of State in cases such as this, was to be found in the MoU and related NVs. This finding gave rise to considerable consternation in government that documents recording understandings between this country and foreign sovereign states could give rise to domestic judicial review rights based upon the international instruments themselves. The result was that a volume of authorities (beginning with *JH Rayner (Mincing Lane) Ltd v Department of Trade & Industry* [1990] 2 AC 418) was prepared for us in order to address arguments upon the status and role of international treaties and other instruments in domestic law. However, on the appeal, the appellants focused their arguments, not upon the MoU itself, but upon policy derived from an Operational Guidance Note ("OGN") within the respondent's department, rather than upon the international documents themselves.

62. The appellants did not seek to uphold the Tribunal's decision in paragraphs 88 and 89 of the judgment as to the status of the MoU as independent statements of policy to be considered by the respondent in decision-making of the present character. Instead, the argument was advanced on the OGN. Parts of this document clearly had origins in the fact that the UK government had reached understandings in the MoU. However, the document is simply a statement of domestic government operational policy and the revised argument was not required to trespass on the delicate field of foreign relations.

63. With this more modest objective, Mr Westgate argued that the Appellants were entitled to be regarded as "vulnerable persons" who should not be compulsorily removed to Afghanistan under the OGN.

64. We were directed to a number of isolated passages in the OGN document. However, the most material passages for present purposes were those at paragraphs 6.1 and 6.4 on page 39 of the document as follows:

> "6. Returns
>
> 6.1 There is no policy which precludes the enforced return to Afghanistan of failed asylum seekers who have no legal basis of stay in the United Kingdom.
>
> …
>
> 6.4 The preferred option for repatriating those Afghan asylum applicants who having exhausted the independent appeal process, are found not to need international protection is assisted voluntary return. This policy is in line with the Tripartite Memorandum of Understanding on Voluntary Return, between the UK, the UNHCR and the Afghan Transitional Administration. However, as agreed with the Afghan authorities, from April 2003 those not choosing voluntary return and found to be without protection or humanitarian needs have been liable to be considered for enforcement action although those individuals or groups identified as vulnerable are excluded from the programme of enforced returns. All Afghans returned by charter operation from the UK are given immediate post arrival assistance including temporary accommodation and onward transportation if required, and offered access to a reintegration programme which includes vocational training and business support options."

Mr Westgate referred to the passage at paragraph 6.4 to the words, "…as agreed with the Afghan authorities…", which he said hinted at the existence of some other documents, but he told us that those instructing him had been informed that there was no further documentation.

65. Proceeding upon the basis of the OGN, it was argued that the respondent had to form a view, in the case of each person potentially to be removed to Afghanistan, as to whether he or she was "vulnerable" within the terms of this paragraph of the OGN.

66. In the course of this submission Mr Westgate took us to the NVs, to some of the reported statements of Minister Balkhi and to the statement of Mr Chatterton-Dickson, the Chargé d'Affaires, on the state of negotiations between the governments upon the MoU. However, the crux of the submission was that in the decision letters there was no reference to any consideration of whether the appellants were "vulnerable" persons within the terms of the OGN. However, the letter of 1 April 2015 (for example) included the following passages, referring to the MoU:

> "Finally, you have referred to the acceptance criteria as expressed by Minister Balkhi, specifically that the MOU prohibits the return of (a) women; (b) children; (c) those with mental health problems, and (d) those from dangerous provinces because they will not be permitted entry upon arrival. Firstly, it is noted that your client is a single adult male, therefore neither (a) nor (b) apply.

…

> With regards to (c), the MOU does not expressly prohibit the return of individuals suffering from mental health problems, rather it places specific obligations on behalf of the contracting parties to the MOU to take additional steps in ensuring the wellbeing of individuals returning either voluntarily or enforced. For example:
>
> PARAGRAPH 12
> Special Measures for Vulnerable Groups
> The Participants will take special measures to ensure that vulnerable groups receive adequate protection, assistance and care throughout the repatriation and reintegration process. In particular, measures will be taken to ensure that unaccompanied minors are not retuned prior to successful tracing of family members or without specific and adequate reception and care-taking arrangements having been put in place in Afghanistan.
>
> And
>
> PARAGRAPH 15
> Health Precautions
> The UK government will ensure that all Afghans returning under this MoU are provided with a basic medical examination prior to their repatriation and given the opportunity, if necessary, of access to medical care in the United Kingdom, in the circumstances where no previous health check had been carried out whilst persons have been in the United Kingdom, or if some time has elapsed since contact with health services. Furthermore, vaccinations will be provided by the UK Government prior to repatriation, where considered necessary by the UK Government"

Mr Westgate argued that no adequate consideration had been given, in the context of the policy, to the appellants' provincial origins, the state of HN's mental health or to SA's position as someone who had been an unaccompanied minor on entry to the UK.

67. Turning to the non-lead cases, Mr Westgate argued that the Tribunal had been wrong and had acted unfairly in failing to give independent consideration to these cases in which applications for permission to apply were also before it. Each case, he submitted, had independent factual considerations and the findings in the lead cases could not be simply "read across" into the others. The Tribunal had been wrong, therefore, simply to dismiss the applications for permission to apply for judicial review.

68. Finally, the appellants also raised an issue with regard to the contents of the judicial headnote to this case, composed for the Tribunal's official written and published decision. I hope that I may be allowed to deal with that issue as a "footnote" to my

present judgment, since it clearly did not found any arguable ground of appeal for the benefit of the appellants.

69. Turning to the arguments of Mr Blundell for the respondent, he emphasised, first, that the test that the Tribunal had to apply was whether the respondent's decision had been a rational one in the *Wednesbury* sense. He submitted (uncontroversially, of course) that the test for the respondent to apply was the one articulated by Buxton LJ in the *WM* case: the starting point for the decision-maker, therefore, was to assess the new material himself and then to ask its likely effect on the hypothetical Tribunal judge hearing a fresh claim. This exercise, he submitted (secondly), inevitably required the decision-maker to form and express his own views on what had been presented. That was a necessary starting point in the exercise. The court should not, therefore, be over exacting in its demands as to how a decision is expressed, if it is clear (as here) that the decision-maker is applying his mind to the correct test in law. He argued, thirdly, that the appellants were, in effect, advancing an ambitious claim that the only rational decision that could have been reached was that there was a clear case giving rise to a fresh claim that the Article 15(c) threshold had been crossed in Afghanistan in the light of the new material.

70. I note in passing that Mr Blundell, in support of this third submission, referred us briefly to cases in the European Court of Human Rights, in which judgments had been handed down on 12 January 2016, involving claims of breaches of Article 3 of the Convention by Afghan nationals who had been high-ranking officers in the former Afghan army or intelligence service. Mr Blundell invited us to note an apparently robust approach against these claims adopted by the Strasbourg court. He referred us to only one of these cases in any detail: *AGR v The Netherlands* (no. 13442/08). The particular passages relied upon were in paragraphs 54 and 59 of the judgment as follows:

> "54. ... The mere possibility of ill-treatment on account of an unsettled situation in the requesting country does not in itself give rise to a breach of Article 3. Where the sources available to the Court describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence, except in the most extreme cases where the general situation of violence in the country of destination is of such intensity as to create a real risk that any removal to that country would necessarily violate Article 3.
>
> ...
>
> 59. The Court has next examined the question whether the general security situation in Afghanistan is such that any removal there would necessarily breach Article 3 of the Convention. In its judgment in the case of *H. and B. v. the United Kingdom*, (cited above, §§92-93), it did not find that in Afghanistan that was a general situation of violence such that there would be a real risk of ill-treatment simply by virtue of an individual being returned there. In view of the evidence now before it, the Court has found no reason to hold otherwise in the instant case."

71. For my part, however, I did not consider that these relatively sparse remarks by the court were of any significant assistance with the issues before us.

72. Mr Blundell's main point was that it was clear from the decision letters that the respondent correctly directed herself as to the law and that the appellants' criticisms were largely directed to the writer's manner of expression. He argued that there was little more that the decision-maker could say in showing a conscientious application of the *WM* test in long and conscientiously detailed letters which addressed the specific material that the solicitors had presented. He argued that the appellants' arguments might have had force but for the impeccable self-directions that appeared at the beginning and at the end of the letters in these cases. As it was, he argued, the letters were unimpeachable.

73. Mr Blundell addressed the criticisms made by Mr Westgate of the respondent's approach to the new material. He submitted that the respondent was justified in identifying flaws in that material. He argued that the various objective reports recognised that there was a deterioration in the security position in Afghanistan, but when one looked at detailed figures (without seeking to be callous) the variations were in fractions of 1%. There were, he argued, real deficiencies in the reports of the experts when related to the facts of the specific cases which the respondent had to consider. To point out those deficiencies was the foundation of explaining why the respondent had taken the rational view that the material as a whole did not afford the relevant "realistic prospect of success" required by rule 353.

74. Turning to the policy point and the MoU/OGN. Mr Blundell opened by saying that the appellants' lack of "appetite" for the Tribunal's decision as to the status of the international documents supported the submission that the respondent now made that it was plainly wrong. He was anxious to state the respondent's contention on this point, although it no longer arises in the light of the new way in which the argument was presented in this court.

75. On the OGN itself, Mr Blundell stressed paragraph 6.1 of the document, quoted above, which makes it clear that there is no policy precluding enforced returns to Afghanistan. He accepted that the test for vulnerability was an objective one, but that it was a matter to be decided by the respondent, subject only to challenge on a *Wednesbury* basis. He argued that particular categories of the "vulnerable" had been identified and the understanding of the term had to be taken in that context. He pointed to various further passages in the document in which categories or types of vulnerability were identified. Without reciting the paragraphs, he referred to paragraphs 2.2.16-17, 2.3.3-4, 2.3.10, 3.12.10. These passages particularly addressed the situation of unaccompanied women and children. He argued that vulnerability in other contexts would be addressed but a specific case would have to be made by the individual applicant. Mr Blundell submitted that the references by Mr Westgate to the MoU/NV material were not appropriate tools for the construction of the domestic policy, but in any event the evidence of Mr Chatterton-Dickson indicated that appropriate action under the MoU was still being taken to protect those returned.

76. Mr Blundell submitted that, in these individual cases, no vulnerability within the meaning of the OGN had arguably been raised. The respondent had addressed HN's mental health issues, which had only been raised in the context of his fitness to fly, and the relative youth of SA had got nowhere as a true badge of vulnerability.

(F) My conclusions on the arguments

77. Underlying the appeal there has been a vast array of factual material, international reports and expert evidence. In the arguments both written and oral it has been impossible to refer to more than selected extracts. That is why it is important, in my judgment, to concentrate firmly upon the correct legal issues that fell/fall to be addressed by the respondent in her decisions, by the Tribunal on the judicial review claims and by this court respectively.

78. All are agreed that the task for the respondent was that identified in the *WM* case, the relevant passage in the judgment having been already quoted above, I will not repeat it. The test for the Tribunal was whether the respondent had reached an unlawful conclusion in deciding that the appellants had no realistic prospect of success in their respective fresh claims. Subject to Mr Westgate's argument that the Tribunal addressed the wrong question in paragraphs 95 and 96 of the judgment, the Tribunal decided that the respondent's decisions were not unlawful. Our task is to review the Tribunal's decision, not to re-hear the case that was before it: CPR 52.11(1). An appeal will be allowed if, on such a review, the court decides that the lower court's decision was wrong or unjust: CPR 52.11(3).

79. All this is to state the obvious, but it is important in the present case, however, because it seems to me that it is not the function of either the Tribunal or this court to enter into a detailed examination of the security situation in Afghanistan. This is not that, as human beings, we are not concerned by the dangers faced by many in that troubled country, but because the court is not adequately equipped to make factual judgments about them and it is not our role in these proceedings. Our task, at its root, is to assess the lawfulness of the conclusion reached by the *Tribunal* as to the lawfulness of the *respondent's* decisions in the individual cases, in the context of the appellants assertions that they faced dangers entitling them to subsidiary protection within the meaning of the Qualification Directive.

80. Assuming that limited task, it seemed to me clear that the parties were quite correct in asserting and accepting that the decision-maker in each case had correctly identified the test which the law required him/her to apply. The decision-maker in each case set out that test in full in each of the important letters in the case. The letters then proceeded to address the material presented. The bona fides of the assessments of the points raised is not in question. In the end, the argument turned in reality into a dispute as to whether, in making the assessment of those points, the decision-makers had turned their backs on the lawful test that they had identified and had simply decided whether or not they themselves accepted the arguments raised on the appellants' behalf.

81. Mr Westgate, for example, criticised the comments made by the decision-makers upon the reports of Professor Clayton and Dr Schuster and argued that those comments showed that decision-makers were making up their own minds about the cogency of the reports, rather than asking what the hypothetical Tribunal judge would make of them.

82. During the course of the hearing and in preparing my judgment, I have considered whether Mr Westgate's argument was another example of defective decision making of the type criticised by this court in *R (TK) v Secretary of State for the Home*

Department [2009] EWCA Civ 1550. In that case, the decision letter had concluded with a brief statement of the test to be applied. It had said this:

> "Anxious scrutiny has been given to the decision in LP and the effect it has on your client's case, but it has been determined that the findings by the Tribunal in LP in addition to the most recent country information, when taken together with material previously considered in your client's case, would not create a realistic prospect of success before an immigration judge."

However, the statements in earlier parts of the letter indicated fairly clearly that the writer was stating his/her own view of the claims rather than assessing what a Tribunal might find. My Lord, Laws LJ, said this:

> "We are required to approach these matters with anxious scrutiny albeit consistently with the public law test limited by the Wednesbury rule. In this case it seems to me that the Secretary of State has not given reasons why in her view the appellant would enjoy no realistic prospect of success before the AIT. If realistic prospect of success means only a prospect of success which is more than fanciful, the Secretary of State has not made it clear that she has adopted that approach. But in relation to reasons Mr Kovats sought to defend the letter by submitting in effect that proper reasoning on the realistic prospect issue may be supplied by paragraphs in the letter earlier than the critical passage at paragraph 21. That, I think, will not do. The Secretary of State's earlier reasoning goes to her overview of the new representations, and it is as it happens to be noted that the decision letter omits express reference to the detention and ill treatment of which complaint was made. In my judgment the standard of reasoning on the second but critical issue arising under Rule 353 was not supplied in the Secretary of State's decision letter in this case."

83. In my judgment, the same cannot be said of the decision letters here. The writers have spelled out the test at the outset and have said what they see as significant deficiencies in the material in support of a fresh international protection claim and have ended up by concluding that *for the reasons given* the claims would not create a reasonable prospect of success before an immigration judge. I consider that Mr Blundell was right in his submission that it is difficult to see what more the writers could have said. It could hardly have been right to say, after each point had been considered, that the specific point would not present a realistic prospect before a judge. It was not the individual points that mattered but the amalgam of them. I agree with Mr Blundell's submission that the decision-makers' assessment of the appellants' points should properly be read as their assessment of the hypothetical judge's likely reaction to those points in the round, leading to an overall conclusion that the material as a whole did not present a realistic prospect of success before such a judge.

84. In his reply, Mr Westgate said that the decision letters were flawed because they should have expressly identified the points that would be in favour of the appellants' cases and that the fact that cogent criticism could be made of some of the material was

not enough to demonstrate that the cases had no realistic prospect of success. I do not accept these points. It seems to me that nothing could have been served by reciting again the points that were being made by the appellants. The respondent was endeavouring to state her reaction to those very points. Further, as I have said, the respondent was giving reasons why she had concluded that there were no realistic prospects of success. The challenge has to be to the rationality of the conclusion not as to its correctness or otherwise.

85. One can agree with the respondent's stated decisions or not, but, in my judgment, it is not possible to say that those decisions were irrational in the light of the test that the letter-writers identified both at the beginning of the exercise and at the end of it. Equally, one must approach the decision-letters fairly and as a whole; criticisms of infelicity of expression do not take one very far.

86. I found myself in some initial sympathy with Mr Westgate's submission that at the very end of its judgment (in paragraphs 95 and 96) the Tribunal may have strayed into language suggesting that it too was making its own decision on the merits, rather than testing the lawfulness of the respondent's decision. However, in the end, I do not think that that was the case. That appears from the Tribunal's reiteration of its own paragraph 67 (in paragraph 94) and the adoption of Ms Glass's submissions which seem to me to have been properly embedded in the correct test in law.

87. I have reached the conclusion that both the respondent and the Tribunal made a fair assessment of the *AK* decision and of whether or not it had been fundamentally overtaken by the materials more recently presented. It seems to me that each were assisted by what the Tribunal in *AK* had found the overall country conditions to be; they had then considered the evidence and accepted that there had been some deterioration, which each then recognised and took into account. Each then properly considered the cases of the appellants in the light of the new material and weighed up those cases under Article 15 of the Qualification Directive.

88. I turn to the "policy" issue which I consider can be addressed relatively shortly.

89. It seems to me that the appellants' arguments on this point made no progress. In my judgment, there was not a glimmer of a case that the respondents' decisions had failed to have proper regard to any true vulnerability on the part of either of these appellants. The decisions quite properly addressed such submissions as had been made to the respondent and needed to go no further. There was nothing in the subsequent material to suggest that the decisions had been flawed in any way. The OGN indicated that the respondent had a policy requiring proper regard to be had to vulnerability, particularly to women and children, but to others as well. There was nothing to suggest that the particular vulnerabilities of each appellant, such as they might be, were not and would not be taken into account at the time when each was to be returned to Afghanistan.

90. In short, I accept Mr Blundell's submissions on this issue which I have already summarised above.

91. For these reasons, I would dismiss the appeals by HN and SA.

(G) The "Non-Lead" cases

92. I have reached the conclusion that the Tribunal cannot be criticised in the decision that it reached on these cases in view of the common ground that they would have to be the subject of new decisions by the respondent in any event. The matters of principle, as had to be accepted, were resolved by the Tribunal and those would have to be properly taken into account in making the new decisions, in the light of the facts of the individual cases. Moreover, it seems that when judgment was handed down in draft in the Tribunal these applicants were asking for *deferral* of adjudication on their applications for permission to apply for judicial review until after further representations and further decisions on their cases by the respondent: see paragraph 103 of the judgment. In the circumstances, I can well see why the Tribunal should consider that the permission applications should be dismissed. I do not consider that the decision in this respect can be faulted.

93. I would dismiss the appeals in the non-lead cases also.

(H) Footnote on the headnote

94. In the appellants' skeleton argument (paragraphs 66 and following) criticisms are raised by counsel as to the form of the headnote (of the Tribunal's own composition) that appears in the reported version of the judgment. The headnote reads as follows:

> "(i) It is intrinsically undesirable that judicial review proceedings be transacted in circumstances where material evidence on which the Applicants seek to rely has not been considered by the primary decision maker.
>
> (ii) There is a strong general prohibition in contemporary litigation against rolling review by the Upper Tribunal in judicial review proceedings.
>
> (iii) Where a judicial review applicant is proposing to make further representations to the Secretary of State in circumstances where a new decision will forseeably be induced, it will normally be appropriate, to refuse permission or to dismiss the application substantively on the ground that it will be rendered moot and/or an alternative remedy remains unexhausted and/or giving effect to the prohibition against rolling review.
>
> (iv) The principles rehearsed above are to be similarly applied to applications for permission to appeal to the Court of Appeal."

95. The appellants submit that paragraphs (iii) and (iv) above do not reflect the decision in the case. It is also argued that such headnotes should only give a summary of the decision rather than any general directions in respect of future cases. It is also argued that the note is also unduly prescriptive of the attitude to future cases, not justified by the decision itself.

96. For my part, I do not consider it appropriate for this court to say much (if anything) about these submissions. I would confine myself to observing that it is obviously

correct that a headnote should summarise the decision of the court or Tribunal and no more. I would not wish to make any further comment.

(I) Suggested Outcome

97. For the reasons given in sections (F) and (G) above, and in the circumstances set out in the earlier sections, I would dismiss these appeals.

Lord Justice Laws:

98. I agree

Lord Justice Floyd:

99. I also agree.