Neutral Citation Number: [2010] EWHC 3359 (Admin)

Case No: CO/9503/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2010

Before :

ELISABETH LAING QC
Sitting as a Deputy Judge of the High Court

- -

Between :

THE QUEEN **on the application of** **ABDUL WAHID NASIRE**	**Claimant**
- and -	
SECRETARY OF STATE FOR **THE HOME DEPARTMENT**	**Defendant**

- -
- -

Nabila Mallick (instructed by **Messrs Duncan Lewis**) for the **Claimant**
Tom Poole (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 9 November 2010

- -

Judgment

Elisabeth Laing QC:

INTRODUCTION

(1) the applications in this case

1. This is an application for judicial review, by Abdul Wahid Nasire ("the Claimant"), of decisions of the Defendant rejecting representations made for him by his solicitors in letters dated 29 June and 24 August 2009. Permission to apply for judicial review was granted by Stuart Isaacs QC sitting as a Deputy High Court Judge on 26 March 2010. He said that "The Claimant's submissions on *BA (Nigeria)* are arguable".

2. The reference to "*BA (Nigeria)*" is to the decision of the Supreme Court in *Secretary of State for the Home Department v BA (Nigeria)* [2009] UKSC 7; [2010] 1 AC 444. After the grant of permission to apply in this case, the Court of Appeal gave its decision in *ZA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 926, upholding the decision of the Divisional Court ([2010] EWHC 718 (Admin). The Court of Appeal held, in short, that outside the deportation context, the rejection

of further submissions by the Secretary of State does not amount to, or require, the making of an immigration decision, and does not generate a right of appeal.

3. The Appellant in *ZA (Nigeria)* then applied to the Supreme Court for permission to appeal. The Claimant in this case asked for this substantive application to be stayed pending the decision of the Supreme Court whether to grant permission to appeal, and if permission were granted, pending its final decision. On 9 November 2010, after oral argument, I gave my reasons for refusing to stay the hearing in this case. As it happens, the Supreme Court refused permission to appeal in *ZA (Nigeria)* on 17 November 2010. I now give my reasons on the substantive application.

(2) the main issue

4. The main issue in this application is whether the Claimant's further representations dated 29 July 2009 and 25 August 2009 entitle him to an in-country right of appeal under sections 82 and 92 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). This depends on whether in refusing the Claimant's further representations in this case the Defendant either made, or should have made, an "immigration decision" as defined in section 82 of the 2002 Act. For it is only if the Defendant makes an immigration decision that there is a right of appeal.

5. That involves 3 sub-issues:

   i) whether those further representations are a "fresh claim" such that the Defendant was bound, by paragraph 353 of the Immigration Rules (HC 395 as amended) ("the Rules"), to make a fresh immigration decision, which would give the Claimant a further in-country right of appeal ("the paragraph 353 issue"); and if not

   ii) whether the effect of the recent decision of the Supreme Court in *BA (Nigeria)* is that, even if the representations do not satisfy paragraph 353, so that the Defendant is not bound by paragraph 353 to issue a further immigration decision, the making of any further representations based on asylum or human rights grounds nonetheless entitles the Claimant to an in-country right of appeal ("the *BA (Nigeria)* issue"); and in any event,

   iii) the legal effect of representations which to any extent invoke Article 15c of the Qualification Directive (Council Directive 2004/83/EC of 29 April 2004) ("the QD"). This issue emerged for the first time in the course of the Claimant's reply. It seemed to me that it was a difficult and potentially important issue. The Defendant's counsel was, understandably, not in a position to deal with it at the hearing. I therefore asked both counsel to provide me with sequential written submissions on it before I gave my decision. I reserved judgment at the end of the oral hearing on 9 November 2010. The Claimant's solicitors had, in their letter to the Defendant of 24 August 2010, pointed out that they were making a claim for Humanitarian Protection ("HP") and that if the decision on that claim were adverse, that the Defendant should grant the Claimant a right of appeal. But this point had not subsequently been alluded to, still less developed in any way, in the written materials produced before the hearing.

(3) the country guidance issue

6. There is a further issue. This is whether the Defendant erred in law in refusing the Claimant's request (made in the letter dated 24 August 2010) that she stay the Claimant's removal while a country guidance case concerning the application of the QD to an appellant from Afghanistan was pending in the former Asylum and Immigration Tribunal ("the AIT"). That case was *GS (Afghanistan) (Indiscriminate Violence: Article 15 c)* [2009] UKAIT 00044 (*"GS"*).

7. The hearing in *GS* had taken place on 22 and 23 July 2009. The AIT reserved its decision and promulgated its determination on 19 October 2010. The AIT held that there was not such a high level of indiscriminate violence in Afghanistan that substantial grounds existed for believing that a civilian would, solely by being present there, face a real risk which threatened that civilian's life or person such as to entitle that person to a grant of subsidiary protection, pursuant to article 15c of the QD.

8. The AIT refused permission to appeal to the Court of Appeal in *GS* on 22 December 2009. The appellant in that case did not seek permission to appeal from the Court of Appeal. I am told by Ms Mallick that he absconded. So the position now is that *GS* is the current country guidance decision about Afghanistan and article 15c of the QD.

9. The Claimant contends that the Defendant could not lawfully decide to remove him while a determination was pending in a "relevant" country guidance case. Ms Mallick, on his behalf, argues that it is implicit in the AIT's decision to hold a hearing in a country guidance case concerning Afghanistan that it considered that an Article 15c claim was arguable. I do not accept that that can necessarily be inferred from a decision to convene a country guidance hearing. There may be good reasons, relating to the number of claims from a particular country raising common issues, which could lead to such a decision, without the implication that the AIT also considered any underlying claim in question to be arguable at the time when the decision was made to have a country guidance hearing. One of the functions of country guidance cases is, as their name suggests, to give general help to fact-finders on commonly encountered issues.

10. It is, of course, right that in making its order for reconsideration in *GS*, the AIT must have held that the AIT might have made a material error of law in that case. But that was because the parties had agreed, at an earlier hearing, that the original immigration judge who heard *GS*'s appeal had erred in law by failing altogether to consider article 15c (see paragraph 8 of *GS*). All that can be inferred, it seems to me, is at the date when the AIT made its order for reconsideration in *GS* it considered that *GS*'s claim under article 15c should be heard. Further, the relevance of any decision by the AIT to hold a country guidance hearing to decisions made by the Defendant under paragraph 353 will also depend on developments between the date when the AIT decides to hold a country guidance hearing, and the date when the Defendant makes any decision under paragraph 353.

11. Ms Mallick also relies on a decision of Collins J in *R (Lutete) v Secretary of State for the Home Department* [2007] EWHC 2331 (Admin). I shall consider that case, and her argument based on it, in due course.

12. This judgment is arranged out as follows:

i) the facts

a) the original claim, and the AIT's decision

b) the Claimant's further representations and the Defendant's response to them

c) the AIT's decision in *GS*

d) the litigation history so far as relevant

ii) the law

a) paragraph 353

b) the *BA (Nigeria)* issue

c) the article 15c issue

d) the Country Guidance issue

iii) discussion and decision on the issues.

I. The facts

(1) in outline

13. The Claimant is a citizen of Afghanistan. He was born on 1 January 1976. The Claimant arrived clandestinely in the United Kingdom on 1 April 2007. On 13 April 2007, he claimed asylum. That claim was refused by the Defendant on 14 May 2007. The Claimant appealed to the AIT. His appeal was dismissed by the AIT in a determination promulgated on 10 September 2007.

(2) the Claimant's original claim and the AIT determination

14. The Claimant appealed on the following grounds, which are recorded in the AIT's determination:

i) he was a refugee and was entitled to asylum;

ii) he was entitled to HP under paragraph 339C of the Immigration Rules; and

iii) his removal would be incompatible with the European Convention on Human Rights ("the ECHR").

15. The notice of appeal to the AIT was not in the bundle for the judicial review hearing, so I do not know whether, and if so, how, the second ground of appeal was elaborated. It is not possible to tell from the determination of the Immigration Judge what arguments were relied on in this regard. Ms Mallick accepts that this ground of appeal is wide enough to cover a claim based on article 15c of the QD.

16. The Claimant claimed to have come from Akhond Khell in Kapisa Province. He claimed to have been a member of the Taliban for 7 years from about 1997. He had

been recruited from his village where he worked as a farmer. He was in charge of a small group and fought the Northern Alliance and then US troops in various particles of the country. He had also taken prisoners.

17. He then decided to leave the Taliban. He remained hidden for 2 years in the cellar of his house. At the end of 2004 he came out. He went with his brother to his land. On the way he was shot at by 3 members of the Taliban and wounded. His brother was killed. He woke up 3 weeks later in his uncle's house. He had no idea how he had got there or what had happened to his family. He then sold his house, and went to Iran, where he stayed for about a year. He then came to the United Kingdom with the help of an agent.

18. He claimed to fear both the current Government and the Taliban if returned to Afghanistan: the Taliban because he had left them, and the Government because he claimed that the Government had found documents showing his involvement with the Taliban.

19. Immigration Judge Lambert found that the Claimant's account lacked credibility for a number of reasons which are set out at paragraphs 9.5-9.10 of his determination. There is no express reasoning in his determination which deals with the application of article 15c of the QD to the Claimant's case, but, as I have already indicated, the appellant's appeal based on a claim for HP was dismissed.

20. According to the immigration history produced by the Defendant, on 25 September 2007, the Claimant absconded. His appeal rights were exhausted on 1 December 2007. On 23 June 2009, the Claimant was encountered at Forest Gate Police Station. On 29 July 2009, his solicitors on his behalf made further representations to the Defendant, based on an escalation of the conflict in Afghanistan. Those were added to by further representations in a letter dated 24 August 2009.

21. It seems to be common ground that if the Claimant were returned to Afghanistan, he would be returned to the capital, Kabul.

(3) the further representations and the Defendant's response to them

(a) the representations of 29 July 2010

22. The representations of 29 July 2010 stated that the Claimant maintained that he would be at risk in Afghanistan because the whole country is a war zone, there was nowhere he could seek shelter, and he therefore sought HP. The letter said that the Claimant would be at risk for the reasons referred to in his statement. The Claimant's solicitors appear to have accepted that paragraph 353 applied, and asserted that the test in paragraph 353 was met. Articles 2 and 3 of the ECHR would be breached because the Claimant could not return to his family home, had no resources and would have no access to medical treatment. The letter accepted that there was limited protection in Kabul, but stated that this was ineffective. It continued "Our client was not aware of the contents of the envelopes and far as he was concerned he was just running errands for his brother. He will not be given a fair trial or an opportunity to defend himself."

23. In summary, the representations relied on the following:

i) the Defendant's April 2009 Operational Guidance Note ("OGN") which described a poor human rights situation in Afghanistan, though it was better in Kabul;

ii) a US State Department Report on human rights practices dated 25 February 2009 which referred to arbitrary and unlawful killings;

iii) a Human Rights Watch report 2009 which referred to widespread human rights abuses, violence and insecurity, deaths from bombs, targeted killings, civilian deaths at hands of the US armed forces; NATO-led International Security Force airstrikes, poor governance and impunity; and executions by the Government.

(b) the Defendant's response to representations of 29 July

24. The Defendant responded to the 29 July 2010 representations in an undated letter which, according to a later letter dated 25 August from the Defendant, was sent on 9 August 2010. The following points were made:

i) Any risk of execution was discounted as it relied on material advanced in the unsuccessful asylum claim.

ii) The Defendant accepted that there has been a rise in attacks in South and East Afghanistan but Kabul remains more stable and secure.

iii) The current OGN, and its legal analysis, and factual conclusion, based on *Elgafaji v Staatssecretaris van Justitie* Case 465-07, were quoted. The OGN concluded that the evidence did not support view that the levels of indiscriminate violence were so high in any part of Afghanistan that anyone who returned there would be at risk, absent individual risk factors.

iv) The UNHCR and Amnesty International ("AI") reports for 2009 were considered. While both recognised that security in Southern and Eastern Afghanistan had deteriorated, and that attacks in Western Afghanistan and in Kabul were becoming more frequent, neither organisation recommended that the forced return of failed asylum seekers should end, nor did they find that any civilian is at risk because of indiscriminate violence.

v) The Country of Origin Information Service report for June 2009 had also been considered. This also noted that security had deteriorated in the past year.

vi) Nonetheless, "at present, there is no evidence to show that the level of indiscriminate violence is such that any civilian would be at risk on return to Kabul."

vii) The author of letter concluded that some of the points raised in the representations had been considered previously. Given the Defendant's views on the current situation in Afghanistan, the representations would not have created a realistic prospect of success.

viii) It followed that there was no right of appeal.

(c) the Claimant's representations of 24 August 2009

25. The representations of 24 August 2010 attached the decision of the ECJ in *Elgafaji*, and 28 pieces of objective evidence. These were all listed at the beginning of the letter. The objective evidence included two news items briefly quoting the mid-2009 report produced by the United Nations Assistance Mission in Afghanistan ("UNAMA"). These quotations mentioned that 1013 civilians were killed in Afghanistan in the first six months of 2009, an increase of 24 per cent on the same period the previous year. The report itself was not attached. The objective evidence had dates ranging between 21 March and 20 August 2009. It included, among other things, the AI report dated 28 May 2009; and the Defendant's OGN dated 8 April 2009.

26. The letter mentioned that no reply to the representations dated 29 June 2009 had been received. "In addition", it recorded, the Claimant claimed HP, relying on the representations made in the second letter. The letter referred to the pending country guidance case, *GS*. The Defendant was asked to defer removal pending that decision. It stated that in *GS*, the Defendant had conceded that for the purposes of international humanitarian law there was an internal armed conflict in the whole of Afghanistan. The Defendant was asked to consider the Claimant's eligibility for HP before removal, and to give the Claimant a right of appeal if the representations were refused. The objective evidence which was said to support the application for HP was then set out. Paragraph 353 was not mentioned expressly. The case put forward was that the level of indiscriminate violence was so high that any civilian would be at risk in Afghanistan.

(d) the Defendant's response to the representations of 24 August 2010

27. The Defendant responded to the 24 August representations in a letter dated 25 August 2009. The author of the letter referred to

    i) the request that the Claimant be permitted o remain in the United Kingdom pending decision in *GS*, and his reliance on *Lutete*;

    ii) an acknowledged rise in attacks on civilians in South and East Afghanistan. The Defendant was nonetheless satisfied that the situation in Kabul (where the Claimant would be returned to) was more stable and secure. The level of indiscriminate violence was not such that any civilian would be at risk, solely by his presence in Afghanistan. Nor did the news reports refer to a rise in attacks in Kapisa province, where the Claimant came from;

    iii) the Defendant's view that the situation in Afghanistan was not such as to warrant the suspension of removal pending *GS*. No stay had been ordered by the courts. There was no reason for an exception in the Claimant's case;

    iv) the Claimant's asylum claim, which had been considered by the immigration judge not to be credible;

    v) the Defendant's conclusion that for the above reasons, the Claimant would not be at risk of indiscriminate violence on his return to Kabul, solely on account

of presence there, or because of any association with the Taliban. The claim for HP was rejected;

vi) the fact that some of the points had been considered previously. The situation in Afghanistan did not reach the level referred to in *Elgafaji* or in *QD (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620, with the result that the representations would not have created a realistic prospect of success; and

vii) the result, which was that there was no right of appeal against this decision.

(3) these proceedings

28. On 25 August 2009 the Claimant lodged the current application for judicial review, and Cranston J restrained the Defendant from removing the Claimant until the conclusion of that application.

29. On 15 September 2009, the Defendant served an acknowledgement of service. The covering letter explained that the undated decision letter had been sent on 9 August 2010, and that since it did not appear to have been received by the Claimant's solicitors, it was being re-served. There were then various developments which are not relevant to the issues in this case.

30. On 27 January 2010, Lloyd Jones J ordered both sides to serve written submissions on the effect of the decision in *BA (Nigeria)*. As I indicated at the beginning of this judgment, permission to apply for judicial review was granted on 26 March 2010.

(4) the decision of the AIT in GS (Afghanistan)

31. At the end of the determination there is a Schedule of just over 10 pages which lists the objective evidence which was submitted to the AIT by the parties in *GS*. This material dates both from 2008 and from 2009. Paragraph 104 of the determination lists the background material submitted on 23 July 2009, the second day of the hearing. The AIT also heard evidence from an expert in War Studies, Professor Farrell of King's College, London. He suggested that there were four ways of measuring the severity of the conflict and the consequent risk to civilian: battle deaths, civilian casualties, population displacement and state failure.

32. Military battle deaths were relatively low. He gave an estimate of civilian casualties of fighting between the Taliban and pro-government forces for 2008 of 2118 (determination, paragraph 85). That figure did not include those killed by the Taliban in their campaign of violence and intimidation designed to subdue the Afghans. Up to 1000 civilians were killed in this way in 2006. In 2006-7, there were 3.1 million externally displaced persons from Afghanistan, and there were 150,000 internally displaced persons in Afghanistan as of May 2008.

33. In paragraph 88 of the determination, the AIT recorded Professor Farrell's view that the number of civilian deaths was low by comparison with other conflicts, though the deaths from the campaign of intimidation by Al Qaeda and the Taliban were much greater. He said that population displacement was extremely high. He noted an intensifying, and significant increases, in the numbers of attacks in 2008. He said that

the direct risk to civilians remained very high. At paragraph 93 of the determination he is recorded as saying that the risk from air strikes was a small element of the risk in Afghanistan. At paragraph 94, the AIT noted that he was unable to say how accurate the figures for casualties were. The AIT determination records, at paragraph 95, his view that the figures from UNAMA probably referred to direct, rather than indirect, casualties.

34. At paragraph 97 of the determination the AIT recorded Professor Farrell's evidence about a chart which showed that there had been 1445 civilian casualties in first 8 months of 2008. He accepted that that figure was low compared with other conflicts. It did not include those deliberately killed by the Taliban or by Al-Qaeda. He was taken to the figures produced by UNAMA in January 2009. 1160 of casualties for 2008, 55% of the total, had been caused by anti-government elements. The figures for civilian deaths were low, and, he said, "This war does not hit a lot of civilians". He accepted that 4-5 million people had returned to Afghanistan since 2002. At paragraph 99, the AIT recorded his view that the figures were increasing, and at paragraph 101, that the direct risk to civilians was low but that the indirect risk was high because of the last 30 years of conflicts. The risk varied from area to area, and in Kabul, for example, it was low. Risk from criminal gangs was not a problem in Kabul (determination, paragraph 102).

35. The AIT noted (determination, paragraph 104) that the most recent UNHCR eligibility guidelines did not designate any area of conflict in Afghanistan in which there is a serious and indiscriminate threat to the life, physical integrity or freedom of Afghans a result of generalised violence. Claims based on indiscriminate violence should be assessed individually on their merits.

36. At paragraph 116, the AIT referred to figures given in a UN Security Council briefing on 3 July 2009. These showed that the number of security incidents rose above 1000 for the first time in May 2009, an increase of 49% over the equivalent period in the previous year. There had been an increase in assassinations, abductions, incidents of intimidation and targeting of aid workers in the first four months of 2009.

37. The AIT was influenced (determination, paragraph 117) by Professor Farrell's view that the number of civilian casualties was low compared with other conflicts. It concluded that the article 15c threshold was not met. The AIT considered that there were enough statistics to give "a good indication of the proportion of civilian casualties which can be attributed to indiscriminate violence". The figures turned out to be lower than might otherwise have been expected (determination, paragraph 124). Even if the known figures were multiplied several times over, the threshold would still not be crossed (determination, paragraph 125).

II. the law

(1) paragraph 353 of the Rules

38. Paragraphs 353 and 353A are the only provisions in Part 11 of the Rules, which is headed "Procedure." Paragraphs 353 and 353A of the Rules provide:

> "353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of

> these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas.
>
> 353 A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.
>
> This paragraph does not apply to submissions made overseas."

39. There have been several decisions of the Court of Appeal which explain what the approach of a supervising court should be when it decides a challenge to a decision of the Defendant, made under paragraph 353 of the Rules, that further representations are not a fresh claim. The decisions do not speak with one voice.

    i) One possible approach, advanced by the Court of Appeal in, for example, *R (YH) v SSHD* [2010] EWCA Civ 116 is that the Court must decide whether it is satisfied, giving the matter anxious scrutiny, that the decision of the Secretary of State is correct.

    ii) A second approach, favoured by the Court of Appeal in *R (TK) v SSHD* [2010] EWCA Civ 1550, is that the Court should adopt a *Wednesbury* approach to its review of the decision of the Defendant.

40. For the purposes of this application, counsel agreed that I should adopt a *Wednesbury* approach. I have done this, but I have also asked myself, in case the decision in *YH* is to be preferred to the decision in *TK*, whether I consider that the decision of the Defendant is correct. Counsel further accept that the Court can only assess the decision of the Defendant by reference to the material which was put before the Defendant, and not by reference to any subsequent material. So it was in the end accepted by Ms Mallick that she could not rely on the full text of the UNAMA report of mid-July 2009 to undermine the decisions of the Defendant in this case; she could only rely on the material from that report which was actually put to the Defendant in the representations of 29 July and 24 August 2010.

41. The decisions of the Defendant here (in short) were that the material advanced in the representations of 29 July and 24 August 2010, including the claim based on the level

of indiscriminate violence in Afghanistan, would not have created a realistic prospect of success. The question for me, according to the Court of Appeal in *TK*, is whether that decision was Wednesbury unreasonable, or irrational. As I indicated in the previous paragraph, I will also ask myself whether the Secretary of State's decision is correct. Whatever the correct test is, I must consider the decisions of the Defendant with anxious scrutiny.

42. Although the decisions of the Defendant are to be tested by reference to the material which was before her at the time when she made her decision, I consider that the decision of the AIT in *GS* is a useful tool. It was, of course, promulgated after the date of the Defendant's two decisions in this case. So that the analysis and conclusions of the AIT were not available to the Defendant, or to the Claimant, either when the representations were made or when they were considered. There is an overlap, but not an identity, between the objective material considered by the AIT and by the Defendant. I bear in mind that some material was put before the Defendant by this Claimant which was not before the AIT. This material includes the statistics from the mid-2009 UNAMA report, about which I say more below. The upshot is that although legally irrelevant to the issues I have to decide, the decision of the AIT does provide a helpful, objective, and nearly contemporaneous analysis of the trends in the objective evidence and of the general issues relating to the application of article 15c of the QD to the situation in Afghanistan.

(2) the BA (Nigeria) point

43. I am bound by the decision of the Court of Appeal in *ZA (Nigeria)*. I will summarise the steps in the reasoning of the Court of Appeal and then explain why they are decisive on this point here.

44. I have already set out paragraph 353 of the Rules. Section 82(1) of the 2002 Act gives a right of appeal to the Tribunal against a number of specified "immigration decisions". Section 92 creates a general rule that rights of appeal are exercisable from outside the United Kingdom. There are exceptions to this rule. One, made by section 92(4), is that where a person has made an asylum or human rights claim while in the United Kingdom, his right of appeal is exercisable in-country. Section 94 applies where a person has made an appeal. If that person has made an asylum or human rights claim, section 94 gives the Defendant the option to certify that claim on the grounds that it is clearly unfounded. If she so certifies, a person may not bring an appeal, in reliance on section 92(4), from within the United Kingdom.

45. In *ZA (Nigeria)* the Claimant argued that section 94 had rendered paragraph 353 generally redundant. The Defendant argued that paragraph 353 and section 94 can co-exist happily, as they occupy different territory. Indeed, recent legislation assumes that paragraph 353 still has a part to play in the scheme of things: see section 53 of the Borders Citizenship and Immigration Act 2009 (which is not yet in force).

46. Lord Neuberger MR gave the leading judgment. Laws and Sullivan LLJ agreed with him. The Master of the Rolls held that there were two questions for the Court of Appeal

    i) whether absent authority, paragraph 353 can co-exist with section 94; and if it can; and

ii) whether the decision of the Supreme Court in *BA (Nigeria)* was binding authority to the contrary.

47. He concluded

i) (Judgment, paragraph 30) that while there was plainly a substantial argument to the contrary, he would hold that the words of section 94(2) are not wide enough to catch further submissions which are not a fresh claim within paragraph 353. Section 94 and paragraph 353 have different functions. This meant that the Defendant could invoke paragraph 353 in relation to a purported fresh claim.

ii) Having considered the decision of the House of Lords in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348 and the decision of the Supreme Court in *BA (Nigeria)* and bearing in mind that

a) the context in *BA (Nigeria)* was a refusal to revoke a deportation order, so that an immigration decision had to be made, so that the only issue was whether that appeal was to be exercised in country or out of country; and

b) the Supreme Court did not say that they were overruling *ZT (Kosovo)*,

paragraph 353 was not a dead letter.

48. This means that, outside the context of a refusal to revoke a deportation order, paragraph 353 still has a part play. The Defendant is not obliged to make an immigration decision giving a claimant who makes further representations a further right of appeal unless she is satisfied that those representations satisfy the test in paragraph 353. That is the conclusion of the Court of Appeal in *ZA (Nigeria)*. To the extent that any inference can be drawn from the refusal of permission to appeal by the Supreme Court in *ZA (Nigeria)*, the inference must be that the Supreme Court considered that the decision of the Court of Appeal was correct.

(3) the article 15c point

49. The QD lays down "minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted." It establishes common minimum criteria for decisions on refugee status. It also establishes common minimum criteria for decisions about "subsidiary protection", that is, the protection to be granted to a person who is not a refugee, but in respect of whom "substantial grounds have been shown for believing that…if returned to his or her country of former habitual residence, [he or she] would face a real risk of suffering serious harm as defined in Article 15." Article 15 defines "serious harm" and includes, at Article 15c, "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 15c has been interpreted by the ECJ in *Elgafaji*, and by the Court of Appeal in *QD (Iraq)*. It is clear from those decisions that it confers protection which goes further than the protection conferred by article 3 of the ECHR.

50. The QD does not lay down any minimum procedural protections. In this respect it is to be contrasted with Council Directive 2005/85/EC ("the PD"), which lays down "minimum standards on procedures in Member States for granting and withdrawing refugee status". The PD provides a number of basic principles and guarantees. Chapters III, IV and V provide an elaborate procedural framework, including, among other things, a right of appeal against an adverse decision. These guarantees apply to decisions concerning refugee status, but where a person does not qualify for, or is not claiming, refugee status, they do not apply.

51. The QD is implemented in domestic law by partly by The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI No 2525 ("the 2006 regulations") and partly by the Rules. The 2006 regulations appear to be aimed at decision makers, in the Home Office, and on appeal, who are confronted with an asylum application in its narrow sense (see the definition in regulation 2) in which asylum issues and issues relating to HP are raised. They give those decision makers instructions about how to approach certain issues. Those instructions appear to be consistent with the terms of the QD, but I have not considered this point in any detail, and no argument has been addressed to me on it.

52. Part 11 of the Rules is headed "Asylum". The first paragraph in Part 11 of the Rules, paragraph 326A, states that "the Procedures set out in these rules shall apply to the consideration of asylum and [HP]". Importantly, paragraph 327 provides that "Under the Rules" an asylum applicant includes a person who makes an application for asylum, or who otherwise makes a request for international protection", and that "application for asylum" is to be construed accordingly. As Mr Poole points out, "international protection" is not defined in the Rules, but is defined in article 2(g) of the QD. By a cascade of definitions in the QD, one arrives at the conclusion that "an asylum applicant" for the purposes of the Rules can include a person who makes a claim under article 15c of the QD. Paragraph 393C sets out the criteria, which, if satisfied, will lead to a grant of HP. Paragraph 339E provides for the procedural consequences of the recognition of a claim to HP. Paragraph 339P makes clear that the Defendant is obliged to consider whether a person has made a valid sur place claim to HP. Some provisions (paragraphs 339I, 339J, 339L and 339M) refer to "asylum claim, eligibility for [HP] or human rights claim" distinctly.

53. I have not been referred to any authorities which decide the point in this case. There are, however, two decisions which are helpful. Section 83 of the 2002 Act confers a right of appeal, limited to asylum grounds only, on a person whose asylum claim has been rejected, but who has been give limited leave to remain for more than twelve months. In *FA (Iraq) v Secretary of State for the Home Department* [2010] EWCA Civ 696, the issue was whether, on such an appeal, the AIT had jurisdiction to consider a claim for HP. The AIT had held that it did not. The Court of Appeal allowed the appeal. The Court held that on the face of it, the language of section 83 was clear, and that it meant that the tribunal could not consider a claim for HP on such an appeal.

54. But, the Court continued, EU law required that section 83 be interpreted in such a way as to include such a claim. This was because the QD made directly effective provision about HP. In order to satisfy the EU doctrines of equivalence and effectiveness, section 83 was to be interpreted as conferring a right of appeal on HP grounds in those situations where a right of appeal was conferred on asylum grounds only. Some other

provisions of the 2002 Act were also to be interpreted as including references to claims for HP (notably, the definition of "asylum claim" in section 113) (judgment, paragraphs 16-25).

55. *FA (Iraq)* has been followed by CMG Ockleton, sitting as a Deputy High Court Judge, in *Ismael Abdulla Omar v Secretary of State for the Home Department* [2010] EWHC 2792 (Admin). One of the issues considered by the Deputy Judge was whether a claim under article 15c had correctly been considered by the Defendant under paragraph 353. At paragraph 23 of his judgment, the Deputy Judge said this:

> "In accordance with the decision of the Court of Appeal in *FA v Secretary of State for the Home Department*, it is clear that the principle of equivalence requires a reference to "an asylum or human rights claim" to be read as including a claim for subsidiary protection. .....There was some dispute about this at the hearing, but it seems to me that the position is clear. Indeed, paragraphs 353 and 353A are in their own separate part of the rules, Part 12 (placed, rather oddly, between Part 11 and Part 11A). The heading of Part 12 is 'Procedure'. Paragraph 326A provides that
>
> > *"The procedures set* [note the plural] *set out in these Rules shall apply to the consideration of asylum and humanitarian protection."*
>
> It would be difficult to establish that a Part of the Rules headed 'Procedure' was unaffected by that provision."

56. The Deputy Judge then considered a further submission by the Claimant in that case, which is also relevant to this case, and was based on a narrow reading of the decision of the Court of Appeal in *ZA (Nigeria)*. The submission was that paragraph 353 only applies to repeat claims, and that if a claim merely lacks merit, it must be certified under section 94 of the 2002 Act. The Defendant submitted that *ZA (Nigeria)* supported the view that paragraph 353 applies "not just to submissions that precisely repeat an earlier claim, but also to obviously untenable submissions that are made following an earlier rejected claim (even though the submissions do not simply repeat the earlier claim)". The Deputy Judge rejected the Claimant's submission because the Claimant in that case had already made a claim based on article 15c (judgment, paragraph 33). He went on to hold, obiter, that the Court of Appeal in *ZA (Nigeria)* had not, in any event, decided that paragraph 353 was to be interpreted as the Claimant had submitted. That conclusion was supported by the practical problems which such an interpretation of paragraph 353 would cause (judgment, paragraph 35).

(4) the country guidance point

57. In *Lutete*, ten applications for judicial review were brought by nationals of the Democratic Republic of the Congo ("the DRC"). They sought an injunction to restrain the Defendant from removing them to the DRC. Their asylum claims had failed. They argued that the mere fact that they were failed asylum seekers would put them at risk if they were returned to the DRC. Earlier that year, about 40 failed asylum seekers had been removed to the DRC. 38 of them were admitted to the DRC, and there was a

factual issue whether some of them had been ill treated. In a country guidance determination in 2004, the AIT had decided that there was no real risk on return for failed asylum seekers simply because they were failed asylum seekers. At the time of the proposed removals, a new country guidance case was part-heard in the AIT. There was evidence from three immigration officers and a person who had escaped from the DRC, and further expert evidence from the expert who had given evidence in 2004. All that evidence suggested there was a real risk on return to the DRC. It was a risk that applied not at the actual point of return (the issue to which the Respondent's evidence in that case was directed) but risk that the returnees' addresses would be noted at the airport and that they would later be arrested and detained.

58. It was submitted for the claimants (judgment, paragraph 12) that "in the context of the circumstances of this case", they should not be removed. Collins J held that the new evidence was evidence which was before the AIT in the part-heard country guidance case and was evidence which "might reasonably result in a different decision" from that reached on the claimants' initial asylum claims (judgment paragraph 14). In that situation, it would not be right for the Defendant to remove the claimants.

III. Consideration and decision

(1) the paragraph 353 issue

59. I have already noted that the determination of the AIT in *GS* was not available to the Defendant when the decisions which are challenged were made, and it is not, as a matter of law, relevant to the issues I have to consider. Neither side, rightly, has argued that I am bound by it.

60. Nonetheless, as a matter of common sense, the decision of the AIT is illuminating. This is because in *GS* an expert tribunal has considered much objective material, dating from roughly the period with which the Defendant was concerned in this case, and has come to the conclusion that the overall numbers of casualties in that period was not sufficient, by quite some margin, to pass the article 15c threshold. While I am not bound by that conclusion, as a matter of law, and I remind myself again that it was not available to the Defendant when she made the decisions which the Claimant challenges, I do consider that it is of some persuasive value. It does not, of course, show that the decision of the Defendant was right. But it goes some way to allaying any humane anxiety that might otherwise exist that the decisions of the Defendants might be harsh, or unfair, in their effect. The decision in *GS* is a cross-check, but no more than that. Even the limited weight which I am able to give it may, of course, be diminished or counteracted if material which was available to the Defendant, and not to the AIT, undermines the AIT's conclusions. So I am interested to see if there is any material, not considered by the AIT, which might have that impact.

61. The only material on which Ms Mallick relies in this regard is the extracts from the UNAMA report for the first half of 2009, which I have already mentioned. As I have said, the report was not served on the Defendant by the Claimant, but extracts from it are mentioned in two adjacent parts of the representations made on 24 August 2010. It is said in the amended grounds that this report gives reliable statistics which were previously lacking. However I do not accept that the figures referred to in the two extracts provide an accuracy in figures which was previously absent.

62. I have already referred to a number of extracts from the determination of the AIT. In my judgment the extracts from the UNAMA report add little. What they do is to give some figures for the first half of 2009: more than 1000 civilians killed for that period, an increase of 24% on the UNAMA figures for the same period in the previous year. However the Defendant accepted in the decision letters that there had been a rise in attacks on civilians, and this acceptance is consistent with these up-dated UNAMA statistics. The critical issue is not whether there had been a rise, but whether that rise had increased the level of risk to one which reached the article 15c threshold. These figures do not advance matters very far. This is because whatever the precise numbers, they were acknowledged, even by the appellant's expert in *GS*, Professor Farrell, to be low overall, and to be lower than in areas of comparable conflicts.

63. Ms Mallick made three attacks on the decision letters. She argued that they are inadequately reasoned; in particular because there is no express reference to the recent UNAMA figures. She also contended that the decisions are irrational. In her written submissions in reply to the Defendant's written submissions, she also argued that the Defendant had not approached the article 15c representations correctly.

64. I reject those arguments.

i) The Claimant's solicitors served much material on the Defendant. It cannot be argued that that material was not taken into account, merely because each item was not specifically mentioned. In my judgment the reasons are adequate. They deal with the main points made, explain the Defendant's approach to the article 15c issues, and summarise the effect of the objective evidence sufficiently. In particular, they accept the gist of the new UNAMA figures, which was that there had been an increase in civilian casualties in recent months.

ii) The decisions were not irrational. Relevant material was taken into account, and I do not consider that I can conclude that relevant material was ignored. The Defendant's view was supported, in my judgment, most materially, by the fact (mentioned in the first decision letter) that neither the UNCHR nor AI were recommending that failed asylum seekers should not be returned to Afghanistan on the basis of subsisting article 15 c risk.

iii) The Defendant's approach was not incorrect. The decision whether material is significantly different for the purposes of paragraph 353 has two components. Even if Ms Mallick's argument is right, and the Defendant is obliged to identify precisely what material had been considered previously, and what material had not (and I do not consider that she is), the key question is whether all the material (old and new) creates a realistic prospect of success. The Secretary of State was entitled, and correct, to conclude that the material advanced in the letters of 29 July and 24 August did not create a realistic prospect of success.

65. I have considered the Claimant's representations and the decision letters carefully. In my judgment, the challenge to the Defendant's decisions fails, whether the correct test is a *Wednesbury* test, or whether I must be satisfied that those decisions are correct. The representations I have been considering do not create a realistic prospect of

success before the tribunal, applying anxious scrutiny. The decisions of the Defendant to that effect are rational, and adequately reasoned.

(2) the BA (Nigeria) point

66. I am bound by the decision in of the Court of Appeal in *ZA (Nigeria)*. The result of that is that having correctly, as I have held, rejected the Claimant's further representations of 29 July and 24 August 2009, the Defendant was not obliged to make, nor did she make, a further immigration decision conferring on the Claimant a further right of appeal.

(3) the article 15c arguments

67. There are two arguments which I must consider. If either succeeds, it would provide a basis on which *ZA (Nigeria)* could be distinguished. The first argument is that paragraph 353 does not in terms apply to a claim relying on the QD. The second is that even paragraph 353 does apply to such a claim, it does not apply where, in the second or subsequent claim, the QD is relied on for the first time.

68. I have already set out the text of paragraph 353. Paragraph 353 refers at the outset to "a human rights or asylum claim". It goes on say that where such a claim has been made and has failed, the decision maker will consider "any further submissions" and, if rejected, will determine whether they amount "a fresh claim". The test for a fresh claim is then set out.

(a) does paragraph 353 apply at all to a claim invoking article 15c of the QD?

69. The "fresh claim" to which paragraph 353 refers, can, in context, only be a fresh "asylum or human rights" claim. The question for me is whether, in the context of the Rules as a whole, the words "asylum claim" in paragraph 353 can (or must) be construed so as to include a claim for HP. This point appears only to have surfaced for debate in recent authorities. The reason is may be that until the decision in *Elgafaji*, no-one would have doubted that a human rights claim was capable of including a claim for HP, since HP was thought to be co-extensive with the protection conferred by articles 2 and 3 of the ECHR.

70. I remind myself that while the Rules are required to be laid before Parliament, they are not secondary legislation, and are, in essence, statements of policy by the Defendant (see *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230). So the Rules are not to be construed in the same way as legislation. I also remind myself that this version of the Rules was made in 1994, and has been amended piecemeal since then.

71. Part 11 of the Rules was amended extensively in October 2006 to give effect to the QD. I see that both the Court of Appeal in *FA (Iraq)* and the Deputy Judge in *Omar* (at paragraphs 16 and 7, respectively) doubted whether this was an adequate transposition of the QD into domestic law, since the Rules are not "law". Ms Mallick highlighted this expression of doubt in her written submissions.

72. However, it seems to me (with respect) that this concern may be misplaced. It is true that, as *Odelola* shows, the Rules are statements of policy. However, by statute, and

on authority, they are statements of policy of an unusually lapidary kind. For the purposes of an immigration appeal, they do have something approaching the quality of law. The first ground of appeal in section 84(1) of the 2002 Act is that the decision challenged is not in accordance with immigration rules, and section 86(3)(a) requires the tribunal to allow an appeal in so far as it thinks that a decision against which the appeal is brought "was not in accordance with the law (including immigration rules)." Moreover, the Rules cannot themselves be added to by substantive criteria contained in policy guidance which has not been laid before Parliament (*Pankina v Secretary of State for the Home Department* [2010] EWCA Civ 719). The transposition of the QD into the Rules means that the relevant "policy" is published, has to be laid before Parliament, and that it is given effect, and a consistent interpretation, firstly by decision makers in the Home Office, and secondly, by all those who decide immigration appeals.

73. Apart from the specific references to HP to which I mentioned, the technique used by the drafter in order to transpose the QD was to provide an expansive definition of "asylum applicant" and "asylum application" so as, by that means, to bring the concept of subsidiary protection into the Rules.

74. I hope I do no injustice to Ms Mallick's argument on this point if I summarise it in this way. She submitted that the QD distinguishes between a claim for subsidiary protection and an asylum claim. By implication, a claim for asylum cannot be a claim for subsidiary protection. She noted that article 15c is wider than article 3 of the ECHR. When Paragraph 353 was inserted in the Rules in 2004, the possibility of a claim for subsidiary protection ("HP" in the Rules) was not foreseen. Paragraph 353 was not amended in 2006, and must therefore be understood as not including a claim for HP. She submitted that it was not right to import a definition made in Part 11 of the Rules into Part 12.

75. She also submitted that there were practical difficulties in using paragraph 353 to assess a claim based on article 15c, as a second article 15c claim could never be "significantly different" from a first claim, since both would rely on civilian casualty figures. I reject that submission. Whether a claim is "significantly different" for the purposes of paragraph 353 depends in part on whether it is likely to succeed in a tribunal. Suppose that at the time of the first claim, which has failed, the figures are very low. If there is a sufficient increase in civilian casualty figures between the dates of two claims so that, by the time of the second claim, the figures pass the article 15c threshold, the second claim will be 'significantly different' from the first.

76. In my judgment, the question is whether it is legitimate to construe "asylum claim" in paragraph 353 ("asylum claim", not "asylum application") in a manner which is consistent with the apparent intention of the drafter, which as I see it, was to give effect to the provisions of the QD. On balance, I consider that it is. This is despite the terms of paragraphs 339I, 339J, 339L and 339M, which mean that the picture is not totally clear. It would be wrong to ignore that apparent intention. Such an approach would rely too heavily on the fact that two different terms, "asylum claim" and "asylum application" are used in some places in the Rules, in circumstances where the conceptual difference between the two is elusive. Like the Deputy Judge in *Omar*, I consider that the heading of Part 12 is material, and is linked with the terms of paragraph 326A of the Rules. I therefore conclude that paragraph 353 applies to further submissions in which HP is claimed.

77. The next question is what follows if this interpretation of paragraph 353 is wrong. If this approach is wrong, it seems to me that a person who has made meritorious further submissions invoking article 15c would be in a worse position than a person who had made meritorious further submissions which only relied on asylum or human rights grounds. The latter would be entitled, via the mechanism of paragraph 353, to an immigration appeal, whereas the former would not.

78. Ms Mallick accepted that the Defendant should have amended the Rules so as to comply with EU law, but submitted that *FA (Iraq)* did not entail that paragraph 353 should be read so as to include a claim for HP. In this respect, she invited me not to follow *Omar*. She submitted that if persons claiming HP were excluded from paragraph 353, this would not breach the principles of effectiveness and equivalence. The phrase "or otherwise" in paragraph 353A must be interpreted as referring to claims for HP. Such claims were to be considered "otherwise" than in accordance with paragraph 353. They would not be in a worse position, Ms Mallick continued, for reasons which I will consider in due course.

79. I should deal here with the meaning of "or otherwise" in paragraph 353A. The purpose of paragraph 353A is to oblige the Defendant to consider, and decide, any outstanding representations made in-country before a person is removed. The phrase "or otherwise" is needed in order to catch all submissions which are made in-country, whether or not they are submissions to which paragraph 353 applies. The words "or otherwise" do not therefore add anything to Ms Mallick's argument, as they can be given content without necessarily referring to submissions which rely on paragraph 15c of the QD.

80. Leaving Ms Mallick's other point on one side, for a moment, it is here, in my judgment, that the analysis of in *FA (Iraq)* and *Omar* may come into play. Those decisions support the view, if, contrary to my conclusion, paragraph 353 does not, on its proper construction, include a claim based on article 15c of the QD, that it must be interpreted, in accordance with the doctrines of effectiveness and equivalence, in such a way that the person invoking paragraph 15c is in no worse position than a person relying on the Refugee Convention or on the ECHR (which are similar types of claim). So even if on a strictly textual approach, paragraph 353 does not apply to such a claim, it must be read as including such a claim in order to be consistent with EU law.

81. Mr Poole mentions in his submissions that the Supreme Court has granted permission to appeal in *FA (Iraq)*. Be that as it may, a similar result is achieved, in this case, if necessary, by the application of the *Marleasing* principle (*Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89; [1990] ECR 1-4135), and I so hold. Mr Poole relies on this principle, rather than on the approach in *FA (Iraq)* as an alternative to his primary contention, which is that, properly construed, paragraph 353 applies to a claim invoking article 15c.

82. I return to Ms Mallick's submission. This was that if paragraph 353 does not apply to further submissions which rely on a claim for HP, a person making such submissions is not in a worse position than a person making such submissions which rely on an asylum claim or on the ECHR. She submitted that if paragraph 353 does not apply to such submissions, they are to be evaluated under paragraph 339C of the Rules. I agree with that point, but it does not take the argument far enough. She then submitted that

if the decision was adverse, the Claimant was then entitled to a statutory right of appeal. But she did not explain why, or how. I accept that a person whose claim for HP is refused might have an arguable ground of appeal, under section 84(1)(a) of the 2002 Act. But the fact that an arguable ground of appeal might exist is not enough: it must be attached to a subsisting right of appeal. As I understand her submission, Ms Mallick argued that the fact that an immigration decision had been in the past in this case (under section 82(2)(g) of the 2002 Act) was sufficient, alternatively, that the principles of effectiveness and equivalence required such an approach.

83. Unless there is something in EU law which requires this result (and I will consider this in a moment), I would reject this submission. Excluding the deportation regime, in a case where an immigration decision has been made in the past in a claimant's case, the current effect of authority which binds me is that a further immigration decision is not required by the statutory scheme; and none need be made, unless the paragraph 353 test is passed.

84. I see nothing in the QD or in the PD which supports the submission that EU law requires a right of appeal to be granted against every adverse decision dealing with HP. Indeed the indications are otherwise. What EU law does require, in my judgment, is, first, that a person who is seeking HP should be in no worse a position in enforcing that claim than is a person who is making a similar claim, such as a claim under the ECHR, or under the Refugee Convention, and, second, that the remedies for enforcing that claim are effective. It does not, however, require him to be put in a better position than persons enforcing similar claims.

85. In my judgment that is the position as things stand. A person who is the subject of a first, adverse, immigration decision, may rely on his claim for HP as a ground of appeal against that decision: see section 84(1) of the 2002 Act, which I have already mentioned. Indeed, it seems that this is what the Claimant in this case did. If that person makes a second or subsequent claim in which he asks for HP, he is (if I am right in my approach to paragraph 353) in exactly the same position as a person who makes a second or subsequent claim based on the Refugee Convention or on the ECHR. In other words, if the Defendant accepts that the claim satisfies paragraph 353, which has been described by the Court of Appeal as a "somewhat modest test", he will be entitled to a further appeal on the merits. If the Defendant does not accept that his claim passes the paragraph 353 test, that person will not be entitled to a further appeal unless he successfully challenges that decision by an application for judicial review.

86. There is therefore, in my judgment, no reason based in EU law for construing the statutory scheme so as to require the Defendant to confer a right of appeal on a claimant who raises an HP claim which does not pass the test in paragraph 353. The question then is whether there is any other basis for an argument that in rejecting the Claimant's further representations, the Defendant was making, or is to be taken to have made, a fresh immigration decision which would generate a right of appeal. I can see none.

87. If Ms Mallick's argument were right, it would put a person who made a second or subsequent claim in which he invoked the QD in a better position than a person who makes a second or subsequent asylum or human rights claim; for the person who made a second or subsequent claim invoking the QD would be entitled to a second or

subsequent appeal merely because he invoked the QD (whatever the merits of that claim) whereas a person making a second or subsequent asylum or human rights claims is only entitled to a second or subsequent appeal if his further representations pass the paragraph 353 test.

88. I therefore conclude that paragraph 353 applies to further representations claiming HP, including a claim based on article 15c, just as much as it does to further representations based on the ECHR, or the Refugee Convention. There are two reasons. First, I consider that when given a purposive construction, which is legitimate in this somewhat unusual context, the Rules have this effect. Second, if I am wrong about the proper construction of the Rules, then I consider that, either, applying the *Marleasing* principle, or, following *QD (Iraq)*, paragraph 353 of the Rules must be read in this way so as to comply with EU law.

(b) if paragraph 353 does apply to such a claim, does it make a difference if, in the second or subsequent claim, the QD is relied on for the first time?

89. There is a further issue about the scope of paragraph 353. This is whether when paragraph 353 applies, it is to applied disjunctively to each discrete element of the further claim. In this case, Ms Mallick argued that an initial claim for HP had not been made, so that the Claimant's representations in July and August of 2010 were a first, not a subsequent, claim, for HP. It followed, she contended, that even if paragraph 353 could be interpreted as applying to a claim for HP, it would not apply here, because no first claim for HP had been made.

90. I reject this submission for two reasons. First, on the basis of the AIT's determination in this case, I consider it likely that a first claim for HP was in fact made. Second, in any event, I consider that the effect of the terms of paragraph 353 is that if a first relevant claim fails (whether that claim is based on the ECHR, the Refugee Convention, or the QD, singly or in combination), and further representations are then made (whether they are based on the ECHR, the Refugee Convention, or the QD, singly or in combination), paragraph 353 applies. This is similar to the conclusion which was reached by the Deputy Judge in *Omar* (at paragraphs 31-36 of his judgment), to which I have already referred, and which I consider to be correct.

(4) the country guidance point

91. In *Lutete*, there was evidence which "might reasonably result in a different decision" about the safety of returning failed asylum seekers, and the AIT was actively considering that evidence. In that situation, Collins J ordered the Defendant not to return the claimants, who were failed asylum seekers, to the DRC.

92. I do not deduce from *Lutete* any rule of law that the Defendant must always defer the removal of an individual to a country when there is a country guidance case pending in the tribunal relating to that country. In some cases it will be lawful, and in others, not. The lawfulness of a decision to remove will depend on the circumstances of the case, including the strength or otherwise of the claimant's case, the nature of his case, the state of the objective evidence, and the issues with which the tribunal is concerned in the pending country guidance case. The Defendant must, as Mr Poole accepts, in every case assess the claim and the objective evidence on a rational and fair basis. If the outcome of such an assessment is that there is evidence which, as in *Lutete* "might

reasonably result in a different decision" on the Claimant's claim, and that evidence is to be evaluated, or is likely to be evaluated, by the tribunal in a pending country guidance case, then she should defer removal of any individual whose claim would be affected by that evidence. By "pending", I mean one which is part-heard, or in which the tribunal has completed any hearing, but not yet promulgated its determination.

93. The situation here was not analogous to the facts in *Lutete*. Crucially, in my judgment, while the Defendant acknowledged that the figures for civilian casualties had increased, she was also aware that neither the UNHCR, nor AI, were recommending stays on forcible removals of failed asylum seekers to Afghanistan on account of any article 15c risk.

94. This is not a case where, in all the circumstances, I consider that the Defendant acted unlawfully in deciding to remove the Claimant to Afghanistan notwithstanding the pendency of a country guidance case. This part of the claim therefore fails.

CONCLUSION

95. I therefore dismiss this application for judicial review. I will hear (or deal in writing with) submissions about the consequences of that decision.