Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 5 June 2007

Before

Senior Immigration Judge Gleeson
Immigration Judge EB Grant
Mr P Bompas

Between

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr P Jorro of Counsel
Instructed by Wilson & Co

For the Respondent: Mr P Deller
Home Office Presenting Officer

(1) There is a risk to serving soldiers from the Taliban and Hizb-i-Islami, principally during troop movements and home visits. A soldier cannot be expected to desert in order to access protection and in fact such protection would be unavailable to him as a deserter.

(2) There is always a risk to soldiers of a country's army from rebel factions and the forces against which they are fighting. That is a risk which is assumed by those serving their country in its armed forces, and while on active service and with his unit, a soldier of the Afghan National Army has sufficiency of protection. Any risk which arises during home leave and troop movements is reasonable to the Horvath standard; total

protection cannot be expected and any military service entails an element of physical risk.

(3) After the end of military service, former Afghan National Army soldiers are not at risk engaging international protection solely for that reason, absent individual factors particular to their individual circumstances and characteristics which may put them at increased risk.

(4) Where there are individual risk factors it is a question of fact whether the interest in a former soldier is likely to be confined to his home area or be more widely pursued. In particular, elements of 'double cross' in relation to the Taliban or Hizb-i-Islami, if true, may be sufficient to elevate the pursuit of the appellant and the risk to him to such a level that international protection is engaged.

(5) Where the risk to a particular appellant is confined to his home area, internal relocation to Kabul is in general available. It would not be unduly harsh to expect an appellant with no individual risk factors outside his home area to live in Kabul and assist in the rebuilding of his country.

(6) If an appellant establishes a wider risk, extending beyond the home area, internal relocation is not necessarily available and sufficiency of protection will depend on his individual circumstances and characteristics. In particular
(a) internal relocation outside Kabul is unlikely to provide sufficiency of protection as the areas outside Kabul remain under the control of local warlords, and the population is suspicious of strangers; and
(b) the safety of internal relocation to Kabul is a question of fact based on the particular history of an individual appellant and of the warlord or faction known to be seeking to harm him.

DETERMINATION AND REASONS

1. This is the appeal of an Afghan national against the Secretary of State's refusal to recognise him as a refugee or grant humanitarian protection under paragraph 339C of the Immigration Rules HC 395 (as amended)). The appellant's claim is based on military service. The appeal was listed initially under the fast track procedure at Harmondsworth but was removed from fast track to enable the appellant to produce certain documents. On the suggestion of Immigration Judge Grant and with the consent of both representatives, the appeal was then listed as a possible country guidance determination on the risk to former members of the Afghan National Army from the Taliban and Hizb-i-Islami.

2. The appellant is currently 18 years old (date of birth 1 January 1989) and he claims to have served three years in the Afghan military before leaving Afghanistan in or about November 2006, walking for three hours into Iran, and then with the help of an agent and nine or ten lorries, coming by a circuitous route to the United Kingdom. The final lorry was heat-scanned at Dover on arrival and the appellant, along with several

others, was discovered and arrested there. He claimed asylum once he arrived at the police station and said he had no relatives in the United Kingdom.

The refusal letter

3. After setting out the account, and making incomprehensible findings at paragraph 12 (not now relied upon) the letter of refusal considered the appellant's claim at its highest. The Secretary of State considered that -

   (1) The appellant's claim to know himself to be wanted by Hizb-i-Islami and the Taliban was mere speculation;
   (2) His army service was no longer a risk factor now that he was discharged; the opposition groups had what they wanted in that respect.
   (3) His threats came only from family members of the appellant and were localised.
   (4) State protection alternatively protection from actors of protection (the International Security Assistance Force) was available and would be adequate.
   (5) There was an internal relocation option to areas outside the East and southeast of Afghanistan.
   (6) Humanitarian protection as defined by the Qualification Directive Regulations 2006 was not available as the claim was not believed and the appellant personally had never been threatened.

The appellant's claim

4. The core of this claim is that the appellant says he comes from a Hizb-i-Islami family and knew the whereabouts of two weapons depots used by Hizb-i-Islami and the Taliban, in his local area. He served in the Afghan National Army for the full three years required, having lied about his age to join up; he was 15 but they said he looked 18 and he did not disagree. There was a great need for recruits at the time.

5. His father's cousins, who were members of the Taliban and Hizb-i-Islami, threatened harm to him and members of his family if he did not leave the army, but the appellant was not put off. After two years, he returned home for five days to marry . He then returned to his posting (in Kunar at the time), only to be telephoned by his uncle who said that his father had been taken. His father had not been seen since. It is the appellant's case that he was so angry that he showed the army where the weapons depots were, and the weapons were removed; now, he fears the wrath of Hizb-i-Islami and the Taliban should he return to Afghanistan.

6. The Secretary of State considered that the problems were local and that the appellant could either relocate or seek state protection from the Afghan police force, army, or the International Security Assistance (ISAF) in Kabul. Both the asylum and humanitarian protection claims failed on that basis.

The history of the appeal

7. The appellant appealed. He relied on the Refugee Convention, paragraph 339C and Articles 2 and 3 ECHR. He contended that the appellant's account was credible and that, despite reporting the threats to his army superiors during the appellant's service, they were unable to do anything and given the end of the appellant's service, would be even less inclined to do so now. The power of the Taliban and Hizb-i-Islami in Afghanistan was rising; outside Kabul, individuals were at the mercy of the local warlords.

8. The appeal had two abortive hearings at Harmondsworth before coming before the present Tribunal. There were interpreter difficulties on the second occasion; the appellant needs an Afghan Pushtu interpreter but was provided with a Pakistani one whom he could not properly understand. By the 2 March 2007 the appellant had obtained documents to confirm the appellant's military service. After further directions hearings, the appeal was finally effective on 5 June 2007.

The hearing

9. The appellant prepared a chronology and two witness statements, one dated 29 January 2007 and one 25 May 2007. He also gave oral evidence at the hearing through an interpreter who spoke Afghan Pushtu. Due to difficulties caused by the Tribunal not having booked the correct interpreter, there was a delay in reaching the appellant's evidence while one was found. The Tribunal also had the benefit of expert evidence from Mr Peter Marsden, MBE, a country expert who had assisted the Tribunal in a number of its leading cases on the situation in Afghanistan (most recently in *SO and SO* (KhaD, members and family) Afghanistan CG [2006] UKAIT 00003) and from Mr Abdulmalik Bahaar of the Afghan Academy in London.

10. For the Secretary of State, having seen the documents, Mr Deller accepted that the appellant had indeed carried out military service for the Afghan National Army as claimed; including that he had managed to join the army aged only 15 and completed the appellant's military service at 18 years old. That element of the letter of refusal, and also paragraph 12 (which deals with the question of threats by the Taliban or Hizb-i-Islami) were not relied upon.

The chronology

11. The appellant comes from Tehzin in Kabul province. He had two sisters, one older and one younger, and three brothers, all younger. He left school after just a few years, age only 13. He joined the Afghan National Army (ANA) in July 2003. He had three months training at the Army College in Kabul, including basic English. He then had three months' combat training and was posted in early 2004 to Ghazni province, where he spent a year in the run-up to the Presidential elections. It was at this time that the appellant's father started to receive threats from Hizb-i-Islami and the Taliban intended to persuade him to leave the army. He did not do so.

12. In October 2004 President Karzai was elected. From December 2004 to January 2005, the appellant completed an Engineer Refresher Course conducted by the US Army Engineer Mobile Training Site at Camp Dawson. He was then posted to Kunar, Laghman, Jalalabad, Khogiani, Nooristan, Zabul and Jabal Saraj. On 31 May 2005 the appellant received his ANA Drivers' Licence and from 4 July 2005 he spent three weeks helping the ISAF construct the Afghan National Army compound.

13. In late 2005, the appellant returned to Tehzin where he married his wife Fozia. He did not go to the family home; he considered that unsafe. He only had five days' leave, and then it was back to the army. The threats continued after the appellant's marriage.

14. In early 2006, the appellant's father was kidnapped in the middle of the night by the Taliban. Other villagers saw it happen. The appellant reported the kidnapping to his Army Commander, who sent a troop of about 20 soldiers, American and Afghan, to

the village to investigate. They spoke to the village chief who confirmed that the Taliban had taken the appellant's father but gave no more information than that.

15. Incensed, the appellant revealed to the Afghan and United States troops the location of two weapons depots in the Tehzin area. The weapons were confiscated and the threats continued. The appellant's family moved, and went into hiding. On 25 July 2006 the appellant received his official ANA discharge certificate but was retained on operational duty until November 2006.

16. Once released from the army, the appellant left Afghanistan via Iran, Turkey and various unknown countries, arriving in the United Kingdom in early 2007.

Evidence at the hearing

Expert witnesses

(1) Mr Peter Marsden

17. By reason of the delay in obtaining an interpreter, we heard the expert evidence first. The first witness heard was Mr Marsden, an acknowledged country expert. In the appellant's written evidence, Mr Marsden explained that he had worked full-time for the British Agencies Afghanistan Group (BAAG) from 1989. Initially, he worked as the Group's Information Coordinator, and from June 2005 he became the BAAG's Special Advisor. The rôle of the Group was to provide a secretariat to support the British aid effort in Afghanistan. He also produces the BAAG's monthly review, of which he is the sole author.

18. Mr Marsden receives information on a daily basis from Afghanistan through the internet, email, and direct communication with the field offices of 25 humanitarian and development agencies which are part of the BAAG. The Monthly Review goes to all of those, and also to Governments across Europe and the European Commission. Although he had often visited Afghanistan over that period, Mr Marsden's last visit was in 1994 due to the deteriorating security situation in Afghanistan. Mr Marsden's report sets out at paragraph 4 his duty to the Court and the way in which the report had been prepared.

19. Much of the report is very general and not targeted at the particular facts of the present appeal. The relevant parts begin at paragraph 39 on page 10 of the report. In a detailed commentary on the letter of refusal, Mr Marsden made the following relevant points –

    (i) the current practice of the Taliban is to attack convoys of the Afghan National Army on the move, rather than bases; the risk therefore is to soldiers on patrol;

    (ii) The Taliban have a support base throughout the South, increasing the risk to returning soldiers on home leave;

    (iii) That the appellant's previous known connection with the Afghan National Army, which works with the United States army, did indeed put him at risk both from the Taliban and Hizb-i-Islami. The level of risk might be lowered

by the appellant's leaving the army, but remained serious because of his disclosure of the location of the arms depots;

(iv) The Taliban and Hizb-i-Islami would have an interest in taking punitive action because the appellant's disclosure of the arms depots, which were large, would have significantly weakened their military capacity and correspondingly strengthened that of the Afghan National Army and the US Army. Punishment would be ruthless: hanging or decapitation were likely;

(v) A US State and Defence Department Report by the Office of the Inspector General, 'Inter-Agency Assessment of Afghanistan Police Training and Readiness Programme' (no date is given) indicated that the Inspector General considered that the Afghan police were incapable of conducting law enforcement operations and were more 'a security force than a law enforcement organization'. The same report made it clear that the Afghan authorities could not provide sufficiency of protection for individuals and that the ISAF was neither mandated nor in a position to provide individual protection, nor to prevent terrorist attacks in Kabul city; and that

(vi) The appellant could neither return in safety to his uncle's house, nor relocate safely elsewhere in Afghanistan. The women of the family and the appellant's younger brother would be safer than he, partly because of the Taliban's code of honour (they would apparently regard attacking a woman as dishonourable) and partly because the appellant was no longer in Afghanistan and that was known.

20. The general background evidence set out in Mr Marsden's report supported the appellant's core account.

21. Mr Marsden gave oral evidence. He reminded the Tribunal that the Foreign and Commonwealth Office's current advice is that British nationals should not go to Afghanistan unless essential. He could not return at present; he would have to travel round the city, which would put him much more at risk than the average expatriate visitor. Further, information sources were actually better on the internet and by email than on the ground, due to the collapse of the Afghan infrastructure; Mr Marsden's 2004 visit had been ineffective as an information-gathering exercise compared with the information he received by other means, before and after the appellant's journey.

22. Mr Marsden said he knew of, and respected the Afghan Academy, which was independent with no particular political affiliation within the Afghan spectrum. He had seen the appellant's documents and considered it very likely that they were genuine (Mr Deller had conceded that they were). Mr Marsden confirmed that the photographs of the appellant alongside US Army soldiers were typical of service with the US Army and international forces. He was aware that the US Army had helped to train the appellant.

23. In cross-examination, Mr Marsden was asked to comment on the risk to an Afghan National Army ex-soldier with no other risk factor. He said that memories were long and even where service was complete, someone who 'betrayed the cause' by joining the occupying forces would still be viewed in a negative light. Those associated with

the West were deemed to have abandoned Islam; the passage of time would not help. Mr Marsden accepted that the incidents set out in his report (but not, for that reason, in the present determination), all related to serving soldiers. Merely because that was not documented did not mean there was no risk. Neither the UN Department of Safety and Security (UNDSS) nor the Afghan NGOs with whom he worked recorded incidents of harm to ex-servicemen, which were not considered newsworthy.

24. Mr Marsden was nevertheless certain of the risk to the appellant, based on a judgment that in a situation where there was no effective law and order, and against a background of a consistent pattern of reprisals over a long period against people who had taken particular political positions, it was likely that the Taliban and other insurgents would resort to violence against ex-servicemen. Mr Marsden reminded the Tribunal of his Afghan sources and added that he attended regular meetings with the Foreign and Commonwealth Office, the Ministry of Defence, and the Department for International Development in which each of those bodies described the situation in their areas of operation. He also read widely on the web, Western and Islamic websites (Afghan and Pakistani) with different perspectives, and press reports in both West and East. Mr Marsden had endeavoured to present a balanced view and not to give information which did not fit with his subjective and objective knowledge of the region.

25. All these meetings and written sources had reinforced Mr Marsden's understanding that a pattern existed which would lead to former soldiers being targeted. If it occurred in Afghanistan, the press there would not report it. He accepted that he had received no direct information from any of these sources to indicate that there had been acts of violence against former soldiers.

26. It was suggested to Mr Marsden that the principal concern of the Taliban and Hizb-i-Islami was to coerce soldiers into leaving the Afghan National Army, rather than to punish them for their past membership; he insisted that it was both. The strategy was to undermine the Afghan National Army recruitment and encourage desertion, but also to punish soldiers for joining the 'other side'.

27. In relation to the specific account in this appeal, Mr Marsden told the Tribunal that the appellant's home area of Sorobi was of huge historical significance. Sorobi was a town between Kabul and Jalalabad, which was the Hezb-i-Islami's stronghold from 1987-1995. Sorobi was an area where power and history counted; it was a narrow pass through which access was gained to Kabul, formerly controlled by Commander Zardad of the Mujahideen, who was from the Hekmatyar faction of Hizb-i-Islami.

28. Until December 1996, Zardad ran a checkpoint there, robbing, abducting and killing travellers. He was subsequently tried in the United Kingdom and convicted of conspiracy to torture. He was in prison here: Mr Marsden was unable to judge whether there remained a risk from Zardad's followers as opposed to Hizb-i-Islami as a whole.

29. Mr Marsden explained that the Hizb-i-Islami were part of the intellectual Mujahideen movement, of which the radical element sought to create an Islamic state. Hizb-i-Islami was vocal and was prepared to be violent towards opponents. The Taliban, on the other hand, were mainly people from rural areas and were opposed to the intellectuals of the Mujahideen, who had reduced Kabul to rubble

with their quarrels. There was no link between the parties in the years of the Taliban Government, and since the Karzai Government had come into power, the Mujahideen had opted to participate, except for Hekmatyar, who remained outside and opposed to the occupying forces.

30. Both the Taliban and the Hekmatyar Hizb-i-Islami still engaged in violence and attacked military convoys. Both were putting pressure on the Government and the authorities were unable to provide protection in places like Sorobi. The Taliban seemed to be gaining the ascendancy, despite the Afghan authorities' efforts to make Afghanistan safe by countering the insurgency. They were still trying to create a functioning police force and to remove judicial corruption.

31. There was a climate of impunity and the situation in Kabul was no better; the police there had links with Jamiat-e-Islami. Basically, if someone wanted to get you then the protection in Afghanistan would not be enough; outside your home area you would be at risk because of intense suspicion of foreigners and a powerful rumour mill. There would be questions as to the incomer's origin and discussions as to whether they were a threat. Any Pashtun coming into Kabul would be viewed with suspicion and could establish themselves only in particular regions. If a young man turned up alone, that would be suicide; it would be very difficult to escape detection and Kabul was not very far at all from Sorobi, where the appellant's story was known. Much of the capital was still bomb damaged, rents were high and the only available work was construction.

32. Young men who could not find work would typically be vulnerable to recruitment by the Taliban. The broad mass of the population in Afghanistan was living on the margins: in Kabul, there were four million now where before the war the city had supported only a quarter of a million people; in Pakistan there were 2.3 million registered afghans (and another 200,000 unregistered) and there were a further two million in Iran. Those in Iran and Pakistan were there for the minimum wage, which was still more than they could earn in Afghanistan. Employment was available only through personal contacts, which the appellant could not risk. He would have to keep the appellant's head down as much as possible.

33. In answer to questions from the Tribunal, Mr Marsden stated that it was his opinion that all former members of the Afghan National Army were at risk, if the Taliban or Hizb-i-Islami could locate them. The risk was accentuated in areas where the Taliban were physically present. The appellant could not go to the Mazar-i-Sharif area; although there was a Pashtun community there, they were viewed as alien colonisers by their neighbours and Hizb-i-Islami also had a presence there. The appellant would still come to attention.

34. In re-examination, Mr Marsden drew a distinction between the position of a former Afghan National Army soldier who, if discovered, he insisted would be treated badly, and a person in this appellant's position. He accepted that there must be many Afghan National Army soldiers who were not attacked. The present appellant, however, would be personally sought out, as he had caused Hizb-i-Islami and the Taliban serious harm by disclosing the arms depot; punishing him was strategically important, because the transfer of those weapons to the US Army and Afghan National Army, would have had a significant strategic effect. The appellant had relatives in the Taliban and Hizb-i-Islami who would be keen to seek him out.

(2) Mr Abdulmalik Bahaar of the Afghan Academy

35. We next heard from Mr Abdulmalik Bahaar, a board member of the Afghan Academy. Mr Bahaar's written report, dated 23 May 2007, indicated that many of his sources prefer to remain unidentified. The report deals largely with the issue of the appellant's service in the Afghan National Army, which was not now in dispute. He explains at point 5 the difficulties in claiming asylum in Turkey or Iran (countries through which the appellant passed) as neither gives asylum or human rights recognition to Afghans.

36. The most useful part of Mr Bahaar's report was at point 6. He had been able to verify that Hejrat, whom the appellant said was his cousin, was indeed a Director with the Taliban's intelligence service, having previously worked with Ittehad-e-Islami. The verification includes information that three other brothers were involved with Hizb-i-Islami (the Mawalwi Khalis subgroup) and that the family originates from Tehzin and was part of the large Babkerkehl branch of the Ahmadzai family. The information was not good enough to prove the cousinage but it did confirm that there were Hizb-i-Islami and Taliban members of the appellant's wider family in the correct geographical area with the history he had set out. That was strongly corroborative of the appellant's account.

37. In oral evidence, Mr Bahaar explained that the Afghan Academy had been established over ten years ago and registered as a volunteer organisation in the United Kingdom, tasked with helping the Afghan community with interpretation and translation in its dealings with Government and private bodies, including solicitors, courts, hospitals and Social Services. It had later developed as a non-political cultural organisation to try to play a positive rôle within the deeply fragmented Afghan community.

38. The organisation publishes a monthly magazine, 'Millat' (The Nation), formerly called 'Warandar' (Fellow Countryman). It holds meetings, conferences, social events and celebrations of all important festivals with the aim of contact with all divisions and fractions of the Afghan political situation, the Afghan embassy, scholars, intellectuals, and professionals such as doctors, media services and journalists.

39. In his evidence-in-chief, Mr Bahaar clarified that Hejrat, the possible cousin, was in Taliban intelligence in Kabul. He had been involved in Jihad, had trained at the War University, and then changed his allegiance from Ittehad-e-Islami (of which he was an active member) to the Taliban. As a Director of Intelligence he was high-ranking and influential. He explained that it was not unusual for a degree of exaggeration by Afghans when describing their own position or that of others; Hejrat was a Director but he was not, as the appellant had claimed, either chief of Intelligence or chief of the Security Services.

40. Tehzin, the appellant's home area, was in the Sorobi district to the East of Kabul, and was dominated by the Ahmadzai tribe. They, like most Pashtun, had an extremely low literacy level. The area was only 50 km to the East of Kabul, between Nangahar and Logar. His task of establishing the facts for the Tribunal was to sift, among the very many events of the last three decades, and the claims and counterclaims by rival factions (habitually and customarily exaggerated) the facts which could be authenticated. His report contained those which could be authenticated to that

standard, using Government publications, independent newspapers, NGO reports, UN reports, and publications from opposition groups, as well as their own contacts. The Afghan Academy had very strong links with the Afghan community in all walks of life, inside and outside the United Kingdom.

41. Tehzin had been at the centre of intense activity during the resistance against Russian occupation and thereafter until 1992. The presence of the Mujahideen had contributed to that intensity and the arms and ammunition stores would have been used if it had been necessary to attack and take Kabul by force. The majority of those in the Tehzin area belonged to Hizb-i-Islami, which was dominant in that area. The presence of such depots was therefore to be expected, and local people would know where they were.

42. There was another piece of information which was not in Mr Bahaar's report because he had not been able to verify it to the exacting standards set out above; he had made contact with the brother of the Hizb-i-Islami commander from Chakari, who now lived in Peshawar, Pakistan. He confirmed that an arms and ammunition depot had been seized in that area in 2005 and another two in 2006, though he was unsure of the month or date. The area where it had happened was to the East of Kabul in the mountains surrounding Tehzin and Sorobi, where the Mujahideen activity had been intense.

43. In re-examination, Mr Bahaar said that many of his personal sources were very reluctant to be named. The Afghan Academy had no interest in partisan reporting: it prided itself on its impartiality. For that reason, his report was prepared objectively and contained no personal comments as he was interested only in assisting the Tribunal in the interest of justice. He had met Mr Marsden for the first time at this appellant's hearing, having been introduced by Counsel for the appellant. None of the information in the report was base on Mr Marsden's information and he did not have a copy of Mr Marsden's report. The Tribunal was very impressed by the obvious knowledge and objectivity of this witness and despite the lack of sourcing of his report we have given it considerable weight.

Appellant's evidence

44. We next heard from the appellant. He confirmed his name and address and adopted his evidence to date, including his screening interview, Statement of Evidence Form and asylum interview and two statements made in January and May 2007 (subject to two minor corrections in the May statement). The appellant was recorded as having arrived in the United Kingdom on 8 January 2007.

A. Screening interview: 11 January 2007

45. In the appellant's screening interview, he had some interpreter difficulty (the interpreter was available over the telephone not physically present). The appellant listed his family members, giving details of his mother and father (father deceased approximately 1 June 2005 at the hands of the Taliban) and of four siblings, a sister aged 19, another age 17 and three brothers ages 16, 15, and 13, all living in Sorobi in the Tehzin area of Afghanistan. The appellant confirmed that he was married and that his wife was also still in Sorobi; on his entry they had been married for just over a year and she was still about 15 years old. The appellant gave details of his journey. He had never owned a passport. His national identity card was still in Afghanistan. The appellant gave details of his schooling which ended in 2004 when the appellant

was 15. The appellant then worked with the Afghan army until just two and a half months before coming to the United Kingdom.

B. Statement of Evidence Form and asylum interview: 24 January 2007

46. In the Statement of Evidence Form the appellant gave more detail. He had come alone and the agent had only arranged the lorries: about 36 or 37 people were travelling. The appellant gave details of his journey: there was no dispute about them. He did not have his relatives' telephone numbers. Some people from his village had been in the United Kingdom for a long time but he had no blood relatives here.

47. The appellant had left Afghanistan because he was in danger from Hizb-i-Islami and the Taliban, because he had served in the Karzai Government army and they wanted him to leave it. The appellant's life had been at risk right from the beginning of his service. The people threatening him were the appellant's father's and grandfather's cousins who worked for the Taliban and Hizb-i-Islami. Nevertheless, he had completed his military service and received his completion certificate. The Taliban (that was, the family members) asked the appellant's father to ask the appellant to leave the army but he refused. Two years into the appellant's service he married, but after 5 days' leave he returned again to his duties and his father was taken by the Taliban in that time.

48. The appellant was sent to serve in Kunar province; while there, the appellant's uncle telephoned him to say that his father had been taken and to stay away and finish his army service. After that, the appellant's uncle would arrange for the appellant to go somewhere safe. The appellant's father had no active part in politics in Afghanistan after the jihad against Russian troops in Afghanistan. The appellant said he had served in Ghazni, during the Karzai election campaign, then in Laghman, Jalalabad, Khogiani, Nooristan, Zabul, Jabal and Saraj. Apart from his wedding, he had not returned home during his service. News of the threats from his father's cousins came via the appellant's uncle who would telephone him with them. He was told that if he renewed his service contract with the army, family members would be killed. The appellant was a non-commissioned officer and worked as an engineer with 30 men under the appellant's command. His work involved going to some of the front line areas and establishing checkpoints with the Americans around the base camp.

49. At question 64 of the asylum interview, the appellant said that while he was with the army he showed the Government two of the arms depots which belonged to the Taliban and the Taliban were angry with him. Hizb-i-Islami and the Taliban considered that he deserved to die because of serving in the army of the non-believers and also because he showed the arms depots to the Government. The appellant's father had known about the arms depots for a long time when working with Hizb-i-Islami during the days of the Jihad; they belonged to Commander Zardad who was now in detention in the United Kingdom. Someone had tipped off Hizb-i-Islami that it was the appellant who revealed their location. The appellant told his military commander, who sent 20 men (Afghan and American soldiers) to accompany the appellant to the village to find out exactly what had happened. The unit went to the village chief and interviewed him; they were told that the appellant's father had been taken at night and that the chief was powerless. That was about 12 days after the appellant's father's disappearance. He was not permitted by his Commander to see his family while in the village; he returned to his work.

50. The appellant's father had been taken by the Taliban in May 2004 (though in his witness statements the appellant says that date was erroneous and linked to the interpreter difficulties). The appellant had finished his army training, and then decided to leave the country as his mother told him his life was in danger. While the appellant was still undertaking his military service, his uncle had sold a piece of the appellant's land, which, together with money from his military colleagues, was enough to fund the journey via Iran and Turkey to the United Kingdom. The appellant had used an agent to organise his journey, paying $14500 for the passage.

51. The appellant said if he had spent another week or two in the village, he would have been killed and if he returned he was sure he would be slaughtered by the Taliban. He had spoken to his Commander about the problem: he was referred to the joint Commander and met him twice to discuss the issue. No protection was available as 'this was a problem faced by almost all the army personnel'. He was satisfied with the interview and repeated that he could not return, as he would put himself, the appellant's mother and his siblings at risk. There were further documents which he might be able to obtain.

52. Wilson & Co, acting for the appellant, challenged the allocation of the appeal to the Fast Track system, an application which succeeded. Two further witness statements must be considered as evidence-in-chief.

C. First witness statement: 29 January 2007

53. The appellant confirmed that he was not very literate and had corresponding difficulty with dates although he could remember what order things happened in and roughly how long ago; the appellant had a few years of schooling but had not completed his secondary education because the Government stopped paying for the schoolteachers, who stopped attending the school to teach them. He gave the background details he had given previously, adding that although the village chief was elected by the local Jirga, many locals remembered that he used to be with Hizb-i-Islami and considered that he had a secret allegiance to the Taliban. There were no other authorities in the village and the nearest police station was over two hours away. He was the eldest boy and responsible for the family and his siblings, in the appellant's father's absence.

54. The appellant confirmed the details of his service and that he had joined up underage. He had three months' military training at the Army College in Kabul, including a short course in basic English to facilitate communication with international troops. Then he went to Pule Charkae for two to three months' combat training, following by a station in Ghazni. The appellant's account of his military service was identical. The appellant says that his unit came under attack from the Taliban on many occasions and many colleagues were killed, especially by mines. It was worst in Kunar and Ghazni. He confirmed that after the initial investigatory visit to the village, the Afghan National Army Commanders dropped the investigation into the appellant's father's disappearance.

55. The appellant's uncle had arranged for safe housing of the appellant's wife, mother and sisters. He thought his wife might be at her brother's house but was unsure. The appellant's uncle said that if the appellant returned to the village he would be killed 'almost instantly' and now that he was out of the army he was vulnerable and unprotected. He had his army documents in Afghanistan and would try to get them.

A friend of his uncle's was in London and had contacted the uncle; the documents were on the way but, in the meantime, bad news had been received of the appellant's brothers, who had gone missing when leaving school and were believed to have been forcibly recruited by the Taliban. The statement also deals with the journey and with the letter of refusal.

D. Second witness statement: 25 May 2007

56. The second witness statement was described as supplementary, made to correct some errors in the first. A correction to the appellant's army rank was minor. He did not know what had happened to his brothers; they were simply missing, and they could even be dead at the hands of the Taliban. There was very little news of the appellant's family. He had not brought his army documents with him on the journey because the agent would not permit that, so he left them with his uncle, some directly and some via a friend who took them to Jalalabad for him. The appellant explained that he had adopted a personal name of Qalamyar but that he retained his given name on his army documents. He had lied to get into the army; they accepted him because they were desperate for recruits. The appellant had been retained in the army for an extra two and a half months for landmine duties, along with many others. He reaffirmed his fear on return.

E. Oral evidence

57. The appellant adopted his evidence to date and was then tendered for cross-examination. Yet again, there were some difficulties with interpretation, as a result of which the appellant often seemed to be answering the previous question and not the most immediate one. The Tribunal was satisfied that we did obtain the appellant's evidence and we have put little weight on the repetition which was sometimes necessary to obtain it.

58. The appellant said that he first received threats to his father in relation to his Afghan National Army service about two years after joining up. He had been receiving what he described as smaller threats earlier, but then he received a letter from the Taliban threatening anyone who joined up. It was at about the same time that he went home to obtain married, but ten days before his marriage, his father was forcibly taken by the Taliban (the appellant then corrected this to ten days after his marriage).

59. The Taliban had threatened him before the marriage, saying that if they caught him, 'we will not leave it like that we will kill you'. The appellant went home secretly. His uncle called him and told him that the threats were from his father's cousin. The marriage was a small affair, with only the appellant's family and his in-laws' family present: on the appellant's side, that was his father, his mother, his three sisters and his three younger brothers. It was kept to the minimum so that nobody would know, and the appellant was only home for three days, spending his nights somewhere else and only going to the family home in the daytime. He stayed with a friend at night; he was not afraid in the daytime because he went home quietly and the Taliban were known to come only at night, on a predictable fortnightly schedule.

60. When the appellant had news of his father's abduction, he reported the matter to his commander, who sent about 20 soldiers to the village, and the appellant claims that it was then that he revealed the location of the weapons depot. The commander told the Americans about this and the search party for the appellant's father and the arms was a mixed Afghan National Army-US Army group, with two American vehicles.

They wanted to learn as much as they could from the village, including how and when the Taliban came, how his father had been kidnapped, and the whereabouts of the weapons depot. The appellant was not permitted to visit his family while there.

61. The appellant's father had told him where the weapons depot was about six months earlier in a telephone call. The appellant had given up the information about eighteen days after his father was taken, being posted three hours from Kabul in Ghazni. They were very busy with the Karzai election at the time, and the appellant 'just could not obtain any time' to go and report the location earlier. His father did not report the location himself because he was afraid of their village people.

62. The army questioned the village chief, Malik, and the appellant believes that it was he who told the village that the information about the depot came from the appellant. Also, the appellant was seen with the 20-man party clearing the weapons out of the depot. The threats from the Taliban continued and eventually they became aware that he was the one who had given the information. Now, the threats said that they would never give up and when he was found he would be slaughtered.

63. In relation to the extra three and a half months, the appellant confirmed that he had been told there would be a short extension to his service; the reason was that they were needed to pick up ammunition from another depot near Jabra-ul-Saraj where he was then serving, a place to the North of Kabul. The appellant's unit had been trained in dealing with mined areas by the French and Jabra-ul-Saraj was mined. It was likely to take some time, which was why their service was extended.

64. In answer to questions from the Tribunal, the appellant said that he had lost touch with his father and his brothers, and also had not been in contact with his wife. There was no telephone facility where she lived in Tehzin. They had been married for only three days and did not know each other at all, so there was no contact of any sort; he had not tried to get a message through. He did not have her telephone number and she did not have his. The appellant had managed to send through messages back to other members of his family by word of mouth, but not to his wife. Six days before our hearing, his paternal uncle in Jalalabad had telephoned the appellant, who asked about his brothers and sisters and his family in general. The uncle said that the appellant's mother had gone to her brothers and his wife had returned to her own brothers in Tehzin. There was no way one could telephone there as Tehzin had no telephone facility or mobile relay station. His uncle could not send through a message through to the wife as the uncle was in Jalalabad and the wife in Tehzin.

65. The appellant could not go and live with his brother-in-laws. The Taliban would not leave him alone, as they knew he had served in the Afghan National Army and disclosed the whereabouts of their weapons depot. They would not spare his life. The whole village knew the appellant, indeed the whole country: he had served in Kabul, Ghazni, Kurar, Laghman, Jalalabad, Nooristan and Khugjani. He was known in all those places.

66. In re-examination, the appellant commented on his May 2007 statement: Sorobi was a district and Tehzin was within it. The town of Sorobi, where the school and the bazaar were, was two hours from Tehzin, though the distance was difficult for him to work out. The country was hilly.

67. The appellant clarified that the depot he was clearing up in his extra service was in Jabra-ul-Saraj and nothing to do with the ones he had disclosed in Tehzin.

68. The smaller threats began five or six months into the appellant's service.

69. At the end of the appellant's evidence, Mr Jorro raised the interpreter question. The points of concern had been dealt with as the evidence proceeded and the Tribunal indicated as we have already stated that this would be taken into account when we came to assess credibility.

Submissions

Secretary of State's submissions

70. For the Secretary of State, Mr Deller helpfully indicated that it was not by oversight that he had asked no questions about the cousin who was in Taliban intelligence in Kabul. That evidence stands unchallenged. Mr Deller also confirmed that paragraph 12 of the letter of refusal was no longer relied upon and that the credibility of the appellant's military service was accepted, but that credibility was otherwise still in issue. The letter of refusal took the appellant's claim at its highest. The objective evidence supported the account of the extra three and a half months service, and he accepted that this was reasonably likely to be true.

71. Mr Deller relied on all the information now before the Tribunal and asked the Tribunal not to make the 'schoolboy error' of reaching a credibility finding out of context. The Tribunal should have proper regard to everything it had heard. The appellant's account was vague and lacked clarity, suggesting that key elements of it might be exaggerated. The appellant had left Afghanistan very shortly after completing his military service and, despite the alleged telephone call from his father some six months earlier, had delayed revealing the whereabouts of the weapons depots until very near his military service discharge which, Mr Deller suggested, simply did not ring true.

72. The appellant's evidence as to the reason for the visit of 20 soldiers to Tehzin had varied across his accounts; sometimes it was just for the weapons depots, but in the account before the Tribunal it was a multi-purpose visit to seek information from the village chief and also try to locate the appellant's kidnapped father. That changed the focus of the story significantly, putting the concern about the abduction in context. There had been threats against the appellant's family which, he claimed, had been exacerbated on the basis of his believed disclosure of the weapons depot; Mr Deller suggested that the weapons depots element of the story was an embellishment.

73. The appellant should be treated as a man who was simply a serving soldier with the Afghan National Army who had left Afghanistan when his military service ended. He had apparently gone home to get married during the period when he claimed to be receiving threats and it was beyond belief that he should show himself in daylight when the village chief was apparently implicated in the village's links with Hizb-i-Islami and the Taliban. The objective evidence and in particular the evidence of Mr Marsden was that serving soldiers (which the appellant then was) were often attacked while on leave at home, and the appellant would have been well aware of that. He would not have shown himself in his home village if he seriously believed he was threatened.

74. Other credibility issues arose under s.8 Asylum and Immigration (Treatment of Claimants etc.) Act 2004; the appellant had not attempted to claim in Iran or Turkey, through both of which he passed. The question was not whether such a claim was bound to fail, but whether the appellant made it. Mr Deller accepted that this was not a particularly central element of his claim.

75. As regards the evidence from the Afghan Academy, Mr Deller suggested that it was vague and unsourced, which limited the evidential weight it could be given. The evidence of the intelligence officer cousin was no more than that there was someone of that name in the right area, but that the family link could not be proven.

76. If the appellant were to be regarded simply as an ex-Afghan National Army member then the reprisal risks could be set out as follows –

(1) While serving with the Afghan National Army – there was heightened activity aimed at current security forces (the Army and the police), with evidence of attacks on convoys and executions of service personnel while on leave. Mr Deller accepted that there was a risk and that there were those who meant harm to serving soldiers. He would return to sufficiency of protection later in his arguments.

(2) After his Afghan National Army service the evidence of risk was that contained in Mr Marsden's report. Mr Deller recognised Mr Marsden's experience and standing, and that in the modern age it was perfectly possible to keep abreast of events in Afghanistan over the internet as Mr Marsden had. Mr Marsden's evidence was that there was hostility to ex-soldiers and that the rumour mill was active when strangers arrived in an area so that the information would reach the persecutors. His evidence was also that in the climate of impunity there was nothing to stop them carrying out their threats. Mr Deller recognised that the appellant came from an area of heightened insurgent activity, a narrow pass leading to Kabul. He suggested that the risk to ex-soldiers be treated on a case by case basis, taking into account the security situation in the home area. In the present case, the appellant had not discharged the burden of showing a risk to him.

(3) If the Tribunal were not with him on the likelihood that the appellant had received specific family-targeted threats, then the evidence before us might be sufficient to engage international protection. If the appellant were credible, the interest of Mr Malik and the village ties generally took on a more threatening aspect.

(4) As regarded the weapons depot, Mr Deller accepted that in a strategic area such as Tehzin, where the Taliban and Hizb-i-Islami were active, the military effectiveness of their anti-Government campaign would have been significantly damaged by the discovery and removal of a large depot or depots. If the Tribunal accepted that the appellant was seen as responsible for telling the Coalition Forces where it was, then that would be rather more risky. He accepted that there were dumps which had been discovered in that area at about the right time.

77. As to sufficiency of protection, law and order in Afghanistan was still a bleak picture. If the insurgents had an individual animus then Mr Deller accepted that the person threatened would be unable to access effective protection unless he had substantial

clout of his own. Two senior politicians had been killed in Kabul. The idea of total protection from non-State actors was of course utopian but in the appellant's home area, protection could not be regarded as a given for an ex-Afghan National Army soldier with the additional grudge which the Taliban and Hizb-i-Islami were said to have against this man.

78. That brought us to the question of internal relocation. There was no obvious reason why it should be unduly harsh for the appellant to go somewhere where there was no threat or alternatively there was sufficiency of protection. Of course the appellant could not be expected to disguise his physical characteristics (*Hysi v Secretary of State for the Home Department* [2005] EWCA Civ 711), but the characteristic here relied upon was simply his military history. He could not take back his service, but his pride was not involved. There was a risk of local interest and the rumour mill would try to place new people; questions would be asked to establish who they were, but merely to be at risk by reason of his Pashtun ethnicity was stretching too far. Mr Deller submitted that if the appellant were not in his home area, even with the help of the rumour mill the information was unlikely to emerge, or, if it did, to reach his intended persecutors. There was no real risk that people in Kabul would pass the information back to Tehzin.

79. Dealing next with the socio-economic conditions in Kabul, Mr Deller recognised that there was a lack of accommodation but the appellant was a resourceful man with three and a quarter years military experience and life experience. He could network with other ex-servicemen and he was employable. His position was not as bleak as it was painted.

80. Mr Deller did not rely on internal relocation other than to Kabul, on the particular facts of this appeal. It was a question of fact in each individual case, he submitted, whether internal relocation other than to Kabul was likely to be of use. To affect the outcome of an appeal, internal relocation must both dispose of the risk and be reasonable.

Appellant's submissions

Skeleton argument

81. For the appellant, Mr Jorro had prepared a skeleton argument. There, he set out the history and identified the issues:

    (1) whether the appellant's account, on which his asylum claim was based, was credible;
    (2) whether on such credible account, the appellant was at real risk of serious harm at the hands of the Taliban or Hizb-i-Islami in his home area in Afghanistan;
    (3) whether, if at risk in his home area, the appellant could avail himself of sufficient protection from the Afghan State authorities and/or from actors of protection (especially outside Kabul);
    (4) if sufficiency of protection in the home area were not available, whether the appellant could safely, and without undue hardship, relocate to Kabul or elsewhere in Afghanistan (the internal relocation option); and if not

(5) Whether the appellant was a refugee, alternatively entitled to humanitarian protection as defined by the Qualification Directive Regulations 2006 at Regulation 2 and in HC 395 (as amended) paragraph 339C).

82. Mr Jorro then set out the facts as the appellant wished them found. The submissions proper began on page 5 and gave detailed references within the documents, to which we have had regard, but which it was not necessary to repeat here. On credibility, Mr Jorro's submission was that the appellant's account had been very consistent throughout and was generally consistent with the objective evidence regarding recent events in Afghanistan. The appellant had not claimed in Iran or Turkey because he feared refoulement to Afghanistan.

83. As to the risk from the Taliban and/or Hizb-i-Islami in the home area, the appellant's case was not that he feared death or Article 3 proscribed treatment merely on the grounds of being a former Afghan National Army soldier. He relied upon the highly personal and particular reasons in his own case, namely (a) his disclosure of the arms depots, for which he feared that one or both of those organisations would seek vengeance; and (b) his father's cousins being members, in some cases senior members, of the Taliban. He was individually known and threatened, and his father and younger brothers had already been abducted or killed. There was a clear and real risk in the home area from powerful and ruthless organisations that would kill him or subject him to Article 3 proscribed treatment.

84. Mr Jorro sought to distinguish the findings relating to risk to serving soldiers or police officers in *Fadli, Re Application for Judicial Review* [2000] EWCA Civ 297 and *Gedara, R (on the application of) v Secretary of State for the Home Department* [2006] EWHC 1690 (Admin) from the situation of the present appellant. He also relied on the transposition in domestic United Kingdom law of European Union Council Directive 2004/83/EC by the Refugee Qualification Regulations and the consequent amendments to HC 395. Ex-soldiers, he contended, were entitled to access international protection at the same standard of proof as non-combatants. There was a clear risk of death or Article 3 proscribed treatment in the home area.

85. In relation to sufficiency of protection, Mr Jorro reminded the Tribunal that the appellant no longer had the protection of his army superiors; as an ex-soldier, he would be on his own. The Afghan State authorities and international actors of protection were not in a position to assist him.

86. Internal relocation was not available, in his submission; the appellant could not be expected to change or conceal his identity or to keep a low profile such as to deny his individuality. Hiding himself away in Kabul or elsewhere in Afghanistan outside his home area was not the answer, and the expert evidence of Mr Marsden was that it was unrealistic in practice for new arrivals in an area not to attract attention. On his credible evidence, the appellant was personally targeted and unsafe, wherever he went in Afghanistan (*Bagdanavicius & Anor, R (On the Application of) v Secretary of State for the Home Department* [2003] EWCA Civ 1605).

87. Further or in the alternative, relying on *AH Sudan* [2007] EWCA Civ 297, the appellant contended that he was a person from a farming family with military experience and it was unduly harsh to expect him to relocate to an urban life. Jobs such as security work which might suit his military experience would more readily

bring him to the attention of Hizb-i-Islami or the Taliban and would be unsafe. Outside Kabul, the humanitarian situation in the rest of Afghanistan was such that the appellant would not be safe alternatively it would be unduly harsh to expect him to live there. Internal relocation was not an option.

88. In conclusion, Mr Jorro contended that the appellant was at real risk of persecution at the hands of the Taliban alternatively Hizb-i-Islami and that he was a refugee entitled to the international protection which the Refugee Convention of 1951 affords. If not, he was certainly entitled to humanitarian protection as defined by the Qualification Directive Regulations 2006.

Appellant's submissions

89. In oral argument, Mr Jorro relied upon his skeleton argument and made the following further submissions. It was now accepted that the appellant was a former Afghan National Army member from a Hizb-i-Islami /Taliban family whose father had fought with Zardad. The appellant would be perceived as a turncoat who had betrayed the family cause. The Afghan Academy report was compelling and its author had been very careful not to say things which he did not believe to be true and verifiable. As regards the cousin in Taliban intelligence in Kabul, 'cousin' was a vague term in Afghanistan and it seemed, from the Afghan Academy evidence, that a person did exist who would have been some sort of relative of the appellant's father. There was strong corroborative evidence and it was an extra risk factor.

90. The appellant had joined the Afghan National Army in the teeth of family opposition and his account had always turned on the weapons depots (always two, not just one). Tehzin was an area where weapons depots were to be expected. As to the timing and distances between places, the Tribunal should remember that these were unasphalted mountain roads. Kabul sat in a bowl with mountains all around it. Zardad was linked to Hekmatyar. Some of the appellant's evidence might be confusing but viewed as a whole it was not discrepant with his earlier statements. He had always said that Tehzin had no telephone and that he had been threatened throughout. His father had been abducted and he knew about the weapons depots: revealing them was an act of vengeance. It was true that the appellant had known where the weapons depots were before his father's abduction but he had no real motive to reveal them until his father disappeared. The father's kidnap had not been challenged, either in the letter of refusal or Mr Deller's cross-examination.

91. Mr Bahaar, a careful, truthful witness, had explained his sources and confirmed the loss of one weapons depot in 2005 and two in 2006 from the Tehzin area. The appellant should not be penalised for failure to claim in Turkey or Iran; he knew from the agent that they were unsafe and would not grant asylum to him. There was no s.8 point there. Mr Jorro asked the Tribunal to find the appellant credible.

92. Mr Jorro reminded the Tribunal that on the basis of a credible account, Mr Deller had accepted that there would be a real risk in the home area because of the appellant's relatives and the disclosure of the weapons depots. There was no sufficiency of protection, as Mr Marsden's evidence set out, and it was axiomatic that the Taliban and Hizb-i-Islami could target people in the home area. The appellant's father and younger brothers had disappeared. There was no system of law and order in place and no actors of protection as set out in the Qualifications Directive Regulations (Reg. 4(2)); the situation in Afghanistan today did not meet that

standard. He relied upon the decision of the Court of Appeal in *Bagdanavicius* and the guidance on imputed political opinion in *K and Fornah (Secretary of State for the Home Department v. K* [2006] UKHL 46).

93. In relation to internal relocation, the appellant could not go to his uncle's house in Jalalabad; it was a Pashtun area, a Taliban stronghold and he would be known immediately. Mr Jorro asked the Tribunal to look at the current OGN which stated (paragraph 3.6.10) that internal relocation was not available in non-Pashtun areas or outside Kabul.

94. The appellant was also at real risk in Kabul for the reasons set out in the skeleton argument, for this appellant who was not just an ex-soldier but one with Taliban relatives and a cousin in the Taliban intelligence there. That was not an answer to his refugee claim (see the Australian decision set out in the skeleton argument). Kabul was unsafe for him: the Country of Origin Information Report for April 2003 (still the latest report), showed at paragraph 8.08 that the Taliban was growing stronger and the situation was deteriorating. The appellant could not be expected to conceal his true identity and would in any event, have to explain himself if he arrived in a new area. The ISAF in Kabul was not in the business of protecting individuals and there was nothing in the evidence to suggest that the appellant could join or access protection from other NGOs as an individual, or as an ex-soldier. He would be more visible as a target there. Mr Jorro relied upon paragraphs 21-22 of *ZN*

95. Following *AH Sudan* [2007] EWCA Civ 297 it was also unduly harsh to expect him to live in Kabul; he would have to live in a city bulging with eight times its original population, no accommodation or work, and in slum conditions.

Discussion

96. The Tribunal then reserved its determination, which we now give. We reminded ourselves of the standard of proof (real risk or reasonable degree of likelihood) and the burden of proof (which was always on the appellant). We have been greatly assisted by the evidence both of Mr Marsden and Mr Bahaar, both generally and, in the case of Mr Bahaar, in relation to the specific facts of the appellant's appeal. We considered first what general conclusions could be drawn as to the risk to members and former members of the Afghan National Army in Afghanistan, before proceeding to consider the individual circumstances of this appellant.

97. Having regard to Mr Deller's concession and to the evidence before us, we accepted that there was a risk of death or ill-treatment of soldiers while on active service: such a risk to a country's army from its opponents is a normal feature of military service. The country background evidence indicated that the risk was at its most acute when troops were deployed from one area to the other and when they visited their homes and families. That risk was accompanied by a willingness of the authorities to protect serving soldiers (as evidenced in this case by the efforts of the appellant's Commanders). A country was not required to provide absolute protection for its citizens, and still less for its armed forces; the nature of military service was that armed conflict and the risk of death or injury in service formed part of the normal conditions of service.

98. No question of internal relocation arises whilst on active service; that would involve desertion and put the soldier outside the protection of the Afghan State. *Fadli, Re*

Application for Judicial Review [2000] EWCA Civ 297 considered a similar situation in Algeria –

> "17. There will no doubt be a spectrum of situations in which an Algerian soldier may find himself. At one end he will, under the command of his superior be pointing a gun at someone who is pointing a gun at him. At the other end a soldier might well be given periods of leave when he would return to his village to see his family and be exposed to terrorist attacks by the GIA because he was a member of the army. Mr Blake submitted that if the evidence showed, as it might on examination, that the Algerian state was unable to give the appellant practical protection against that risk on leave then he could claim that he was exposed to persecution as a member of a particular social group, namely, serving soldiers. The argument, if right, must embrace times when a soldier is going out to a cinema in the evening. This will be in the middle of the spectrum. Perhaps precisely where it is will depend on whether the soldier is on call or not. In substance his submission was that the soldier could not seek the surrogate protection of the international community if the hostile forces remained on the battlefield but could do so if the hostile forces moved off the battlefield and engaged in terrorist attacks against in the private houses of the soldiery.
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> 18. In our judgment the Special Adjudicator was right to conclude that the Geneva Convention does not confer the status of refugee on someone who has a well founded fear of such things happening to him whilst he is a soldier. The life of a soldier is a hazardous one. We are not persuaded that the Convention draws a distinction between, on the one hand, the position of soldiers engaged on a battlefield in combat against other soldiers observing the rules of war and, on the other hand, soldiers engaged on internal security duties against terrorists. Breaches of the rules of war are regrettably common. To allow soldiers' claims for asylum based on the failure by a State to provide practical protection to its soldiers against such an eventuality would we consider hinder the home state in providing the very protection for the generality of its citizens which the definition of refugee in the Convention assumes that the home state should provide. It would give the GIA and those like them the power, by adopting terrorist tactics, to weaken the power of the home state to provide protection for its citizens.
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> 19. We do not accept Mr Blake's submission, for which he cited no authority, that serving soldiers in the circumstances of Algeria either do or could constitute a "particular social group" who is at risk of being "persecuted" for the purposes of the definition of refugee in the Convention. We note that the 1997 guidelines in relation to Algeria from the UNHCR, while suggesting some categories of persons who would benefit from a presumption that they should be granted asylum status, do not suggest that those in the army fall into that category."

99. We next considered the position of those whose service had come to an end. In *Gedara, R (on the application of) v Secretary of State for the Home Department* [2006] EWHC 1690 (Admin), the High Court considered the position of an ex-policeman in Colombo, Sri Lanka. Whilst on active service, as here, the officer had sufficient State protection. He objected to return since as an ex-policeman he felt additionally vulnerable –

> "29. The only reason advanced by the claimant for not relocating to another part of Sri Lanka, for example such as Colombo, is that, in taking up some form of employment outside the police, he would be "even more vulnerable to the LTTE". In my judgment, Ms Giovannetti is correct when she submits that this is simply not borne out by the objective evidence. The two reports from Professor Good do not identify any evidence to demonstrate there is a real risk of harm to the former intelligence officers in Colombo. In his first report, Professor Good cited no examples of former police officers being victims.

> In his supplementary report he identified one case of a former police officer, Mr Rilvan, who was allegedly killed by the LTTE. But the reports indicate that the police in Sri Lanka did not believe that he was killed simply because of his former role as an intelligence officer as opposed to having been suspected by the LTTE of double crossing them. The incident did not take place in Colombo, which is the area identified by the Secretary of State as suitable for internal relocation by the claimant."

100. To establish risk post-service requires evidence and we note that the Court drew a distinction between the generalised post-service risk and the risk for those who were known to have double-crossed the insurgents, a differential analysis which was useful also in the present appeal. Mr Marsden indicated that the NGOs and other bodies of which he was aware did not seek to record deaths and disappearances of ex-Afghan National Army soldiers and none of the evidence before us deals with incidents occurring after the end of a person's service. Although the standard of proof in asylum and humanitarian protection appeals was low, the appellant must nevertheless show a real risk or a reasonable degree of likelihood of risk to ex-service personnel, and the evidence before us on post-service risk was nowhere near that.

101. However, where an individual was 'wanted' by the Taliban or Hizb-i-Islami, then the evidence was that the situation in Afghanistan remains sufficiently lawless that if he were found, there would be nothing to prevent them dealing with him as they thought fit. A person who was wanted in his home area for a specific reason would be able to show a real risk of persecution (or treatment entitling him to humanitarian protection, as appropriate) in his home area.

102. The next question was whether such a person could relocate away from the risk and whether it would be unduly harsh to expect him or her to do so. Where there was an individual risk, it would be a question of fact whether internal relocation was an option. In general, for a person with no particular profile, the Tribunal had held that there was no risk in Kabul engaging the international protection Conventions (*M v Secretary of State for the Home Department* (Afghanistan) [2004] UKIAT 00035).

103. The authorities and international instruments relating to internal relocation were reviewed by the Court of Appeal in *Januzi v. Secretary of State for the Home Department & Ors* [2006] EWHL Civ 5 and summarised by Bingham LJ as follows –

> "21…There can, however, be no absolute rule and it is, in my opinion, preferable to avoid the language of presumption. The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so. The source of the persecution giving rise to the claimant's well-founded fear in his place of ordinary domicile may be agents of the state authorised or directed by the state to persecute; or they may be agents of the state whose persecution is connived at or tolerated by the state, or not restrained by the state; or the persecution may be by those who are not agents of the state, but whom the state does not or cannot control. These sources of persecution may, of course, overlap, and it may on the facts be hard to identify the source of the persecution complained of or feared. There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department* [2002] 74 [2002] 1 WLR 1891, paragraph 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. The more closely the persecution in question is linked to the state, and the greater the control of the state over those acting or purporting to act on its behalf, the more likely (other things being equal) that a victim of persecution in one place will be similarly

vulnerable in another place within the state. The converse may also be true. All must depend on a fair assessment of the relevant facts."

104. The most recent Country of Origin Information Report for Afghanistan (April 2007) cites without comment or contradiction the following extract from the UNHCR Update on the Situation in Afghanistan and International Protection Considerations, published June 2005.

"INTERNAL FLIGHT OR RELOCATION

28.07 A UNHCR paper of June 2005 advised:
"Given the fragmented nature of power and control in parts of Afghanistan, an examination of the availability of internal flight or relocation alternatives may appear to be warranted. UNHCR however continues to recommend against the application of the internal flight or relocation alternative in the context of Afghan claims, for reasons noted below.
"The assessment of whether or not there is a relocation alternative in the individual case requires two main sets of analysis – its relevance and its reasonableness. For both, the personal circumstances of the individual applicant and the conditions in the area to which the internal flight or relocation alternative is proposed must be examined. With regard to the 'relevance' of an internal flight or relocation alternative, it is of particular importance to assess the willingness and the ability of the State to protect from risks emanating from non-State agents. Local commanders and armed groups act as agents of persecution in the Afghan context that have set themselves above the law, both at the local and central levels. In some cases, they are closely associated to the local administration while in others they may be linked to and protected by more powerful and influential actors, including at the central level. As a result, they largely operate with impunity, with the State authorities being unable to provide protection against risks emanating from these actors. In most instances, the State is still unable to provide effective protection against persecution by non-State actors. The links to other actors may, depending on the circumstances of the individual case, expose an individual to risk beyond the zone of influence of a local commander, including in Kabul. Even in a city like Kabul, which is divided into neighbourhoods (gozars) where people tend to know each other, the risk remains, as news about a person arriving from elsewhere in the country travel [sic] fast.
"Additional to the 'relevance' of internal relocation to the individual case, it must also be 'reasonable' for a claimant to relocate to that location in order to overcome his or her well-founded fear of persecution elsewhere in the country of origin. It is particularly with regard to this 'reasonableness analysis' that UNHCR continues to advise against resort to the notion of an internal flight or relocation alternative in the Afghan context, considering elements of safety and security, human rights standards as well as options for economic survival during the relocation journey and upon arrival at the destination of relocation. The traditional family, extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism in the current situation. It is these structures and links on which Afghans rely for their safety as well as for economic survival, including access to accommodation and an adequate level of subsistence. The protection provided by families, extended families and tribes is limited to areas where family or community links exist and without them, a relatively normal life without undue hardship at another location than one's place of origin or residence is unlikely. As documented in studies on urban vulnerability, the household and the extended family remains the basic social network in Afghanistan and there are indications that existing traditional systems of sharing and redistribution function less in the extended urban family. It would therefore, in UNHCR's view, be unreasonable to expect any Afghan to relocate to an area to which he or she has no effective links, including in urban areas of the country."

28.08 "It is not difficult to track people down in Afghanistan, although it might take time. Neighbours and landlords will check people's backgrounds, because everyone thinks in terms of security, and so they would want to check a newcomer's background in their home area. Further, messages are sent across the country via chains of communications based on personal contacts, and it would be natural to investigate where someone was from in order to see what role they could play in such a network. The postal service is unreliable and only delivers to the district centres, not to the villages, so that travellers are often used to deliver messages and goods to relatives and friends."

(Dr Antonio Giustozzi, Afghanistan Notes, 28 June 2006)"

105. That extract supported the evidence of the appellant and his expert witnesses. Outside Kabul, we accept that enquiries would be made about an individual's background and that the rumour mill would wish to satisfy itself as to whether an incoming unknown individual posed a risk to that community. We do not consider that (absent family connections who could provide safety in a particular area) internal relocation outside Kabul would be available to appellants with difficulties in their home areas.

106. We next considered whether internal relocation is available to Kabul city. The objective evidence is that in general that is a reasonable option, although (as stated in *M)*, the situation in Kabul may be harsh and unattractive. We have considered whether the Court of Appeal's decision in *AH Sudan* [2007] EWCA Civ 297 is of such general application that a subsistence farmer from elsewhere within Afghanistan could not be expected to undertake city living. Such an approach if generally applied would, we suggest, be unrealistic; in much of the third world, the breadwinner of the family would routinely opt to relocate to a city environment, with or without his family, in times of economic difficulty. We do not find that *AH* extends that far; it is a case on the particular facts of the desperate situation in Khartoum and we are not satisfied that the Court of Appeal intended to make a general finding that internationally no subsistence farmer could ever be expected to relocate to a city environment.

107. However, if news of being specifically wanted by a warlord or commander is likely to reach Kabul, we accept that an appellant's safety in Kabul cannot be satisfactorily assured to the domestic protection standard set in *Horvath v. Secretary of State for the Home Department* [2000] UKHL 37. *ZN* (Warlords, CIPU list not comprehensive) Afghanistan [2005] UKIAT 00096, approving *AF* ("Warlords/commanders", evidence expected) Afghanistan CG [2004] UKIAT 00284, says this –

"10. … As we understand it, [the CIPU Country Report October 2003] and other main sources on Afghanistan fully recognise that even under the Kharzai regime, the political and military landscape in Afghanistan remains dominated by a shifting and uncertain array of commanders, warlords or other chiefs. Even within Kabul it does not appear that the authorities are able to entirely prevent warlord activities in connection with individual cases. …

21. Turning to the second limb of the grounds of appeal, we consider it to be weak. The CIPU reference to a UN Security Council report did not establish that the authorities in Kabul were capable of affording adequate protection against a real risk of serious harm from non-state actors in every case. There is nothing in this report which contradicts the Adjudicator's assessment that it remains possible for certain categories of persons to fall through protection gaps, albeit the latter have been significantly reduced: see para 8. The

Adjudicator made very clear that he did not dispute that, in the light of the objective evidence, the authorities, supported by ISAF were able to ensure protection for the generality of its citizens, including the generality of Pashtuns. What he relied upon was rather that they would be ill-placed to afford protection to this particular claimant. We think that this was a finding which on the evidence was entirely open to the Adjudicator, particularly given that Jan Ahmed's men had already been able to attack persons associated with the claimant and to raid the claimant's house with apparent impunity. There was no improper application of *Horvath* [2000] INLR 239 principles in this case."

108. Evidence that the appellant would be personally pursued remains necessary on the principles set out in *AF*. Where such a real, individual risk is established, the evidence remains that the authorities in Kabul are not capable of individual protection to the *Horvath* standard and that the ISAF is not tasked with individual protection but rather with generalised peacekeeping within Kabul. It would always be a question of fact whether relocation to a city (in this case Kabul) is reasonable or is unduly harsh, both in relation to the conditions in the city of relocation and the individual history and aptitudes of the particular appellant.

109. The following, in summary, are the Tribunal's general conclusions

(1) There is a risk to serving soldiers from the Taliban and Hizb-i-Islami, principally during troop movements and home visits. A soldier cannot be expected to desert in order to access protection and in fact such protection would be unavailable to him as a deserter.

(2) There is always a risk to soldiers of a country's army from rebel factions and the forces against which they are fighting. That is a risk which is assumed by those serving their country in its armed forces, and while on active service and with his unit, a soldier had sufficiency of protection. Any risk which may arise during his home leave and troop movements is reasonable to the *Horvath* standard; total protection cannot be expected and any military service entails an element of physical risk.

(3) After military service had ended, the country evidence did not support a continuing risk at a level capable of engaging the international protection Conventions, unless there are individual factors which make the pursuit of the ex-soldier more likely.

(4) Where there are individual risk factors it is a question of fact whether the interest in the ex-soldier is likely to be confined to the home area or be more widely pursued. In particular, elements of 'double cross' in relation to the Taliban or Hizb-i-Islami, if true, may be sufficient to elevate the risk to a level where the international protection Conventions are engaged.

(5) Internal relocation to Kabul is not in principle impossible. Conditions in Kabul are not pleasant but they do not approach the *AH* level and unless there are particular reasons not to do so, it would not be unduly harsh to expect an appellant with no individual profile to live in Kabul and assist in the rebuilding of his country.

(6) If there is a risk in the home area which is not localised to that area, internal relocation outside Kabul is unlikely to provide sufficiency of protection as

the areas outside Kabul remain under the control of local warlords, and the population is suspicious of strangers.

(7) Where there is individual risk not local to the home area, the safety of internal relocation to Kabul would be a question of fact based on the particular history of that individual appellant and of the warlord or faction seeking to harm him. The country background evidence did not as yet suggest that domestic protection in Kabul is sufficient to meet the *Horvath* standard where an individualised risk exists; the Afghan authorities did not have the resources to protect individuals, and ISAF's remit is generalised and not individual protection.

The individual circumstances of this appellant

110. We considered that the appellant's account is generally credible and very consistent across the various accounts. He had 'double crossed' the Taliban and Hizb-i-Islami by revealing the location of the arms depots. He is an ex-soldier and his home area, Sorobi, is an area of enormous historical significance for Hizb-i-Islami and the Taliban, and is a mountain pass leading directly to Kabul. The leaders in Sorobi would be well able to pursue their enquiries within Kabul and to track the appellant down there.

111. He cannot rely on his military service but could, and did, rely on the personal risk caused by his having served in the Afghan National Army, taken with the known (or at least strongly suspected) fact that he revealed the location of the arms depots in Sorobi maintained over many years by the Taliban and Hizb-i-Islami. The effect of that was to weaken them and strengthen the coalition and Afghan National Army forces significantly, and the objective evidence is that the dumps existed and were indeed revealed and cleaned out when the appellant says that they were.

112. Accordingly, and having regard to the lower standard appropriate for the international protection Conventions, we are satisfied that this appellant had shown that there is a real risk or a reasonable degree of likelihood of persecution alternatively treatment contrary to Articles 2 and 3 ECHR if he were to be returned to Afghanistan now, and humanitarian protection (which applies only to non-refugees) is not a relevant factor.

DECISION

1. The appellant is a refugee as defined by the Geneva Convention and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

2. The appeal is not entitled to humanitarian protection as defined in those Regulations; and

3. The appeal is allowed on human rights grounds.

Signed Dated: 2 August 2007

Senior Immigration Judge Gleeson

SCHEDULE OF MATERIALS
BEFORE THE TRIBUNAL

Individual documents		
1.	Chronology	
2.	Bundle of documents and photographs evidencing military service with the Afghan National Army (not disputed at hearing)	*Various*
3.	Screening interview	*11 January 2007*
4.	Statement of Evidence Form and asylum interview	*24 January 2007*
5.	Respondent's letter of refusal	*25 January 2007*
6.	Appellant's witness statements	*29 January 2007* *25 May 2007*
7.	Skeleton argument of Mr Peter Jorro	*29 May 2007*
Expert reports		
8.	Mr Peter Marsden	*18 May 2007*
9.	Mr Abdulmalik Bahaar of the Afghan Academy	*23 May 2007*
Country background evidence		
2005		
10.	Amnesty International Annual Report	*23 May 2005*
2006		
11.	Freedom House: Freedom in the World report 2006: Afghanistan	*6 September 2006*
12.	UN: the situation in Afghanistan and its implications for peace and security	*11 September 2006*
13.	Combined Forces Command: Afghanistan: extremists show no remorse for Afghan citizens	*26 September 2006*
14.	IPS: Afghanistan – Hope loses out to fear on Kabul Streets	*13 October 2006*
15.	International Crisis Group: Countering Afghanistan's Insurgency: No quick fixes	*2 November 2006*
16.	COEDMHA: Continuing violence across Afghanistan leaves five dead	*7 November 2006*
17.	US Institute of Peace: Five Years after the Fall of the Taliban: Afghanistan and the War on Terrorism	*22 November 2006*
18.	Radio Free Europe: neo-Taliban claim to have killed four afghans over alleged spying for US	*27 November 2006*
19.	Radio Free Europe: district Chief gunned down in Western Afghanistan	*8 December 2006*

20.	Council on Foreign Relations (United States): Afghanistan's new security threat	*14 December 2006*
21.	UNAMA: Taliban suicide attack and United Kingdom ISAF firing upon Afghan civilians, 3 December 2006	*18 December 2006*
2007		
22.	Human Rights Watch World Report 2007 (Afghanistan)	*11 January 2007*
23.	Radio Free Europe: Afghanistan: US see increased Taliban threat in 2007	*15 January 2007*
24.	Radio Free Europe: Ten Afghan labourers killed in suicide attack in southeast…as Taliban claim responsibility	*24 January 2007*
25.	Human Rights Watch: Afghanistan: slow progress on security and rights	*30 January 2007*
26.	Respondent's Country of Origin Information Report for Afghanistan	*April 2007*