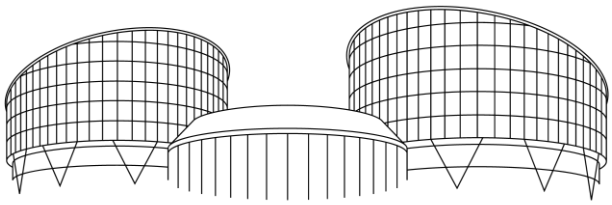

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

**CASE OF S.H.H. v. THE UNITED KINGDOM**

*(Application no. 60367/10)*

JUDGMENT

STRASBOURG

29 January 2013

**FINAL**

08/07/2013

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of S.H.H. v. the United Kingdom,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 8 January 2013,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 60367/10) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr S.H.H. ("the applicant"), on 18 October 2010.

2. The applicant, who had been granted legal aid, was represented by Duncan Lewis Solicitors, a law firm practising in London, assisted by Mr M. Symes, counsel. The United Kingdom Government ("the Government") were represented by their Agent, Mr M. Kuzmicki of the Foreign and Commonwealth Office.

3. The applicant alleged that, if expelled from the United Kingdom to Afghanistan, he would face a real risk of ill-treatment contrary to Article 3 of the Convention.

4. On 29 October 2010, the Vice-President of the Fourth Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court that the applicant should not be expelled to Afghanistan pending the Court's decision.

5. On 3 January 2011, the Vice-President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1) and to grant the applicant anonymity (Rule 47 § 3 of the Rules of Court).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. The applicant is an Afghan national from Nangarhar province in eastern Afghanistan who was born in 1979 and lives in the United Kingdom.

8. He arrived in the United Kingdom on 30 August 2010 and claimed asylum on 1 September 2010. The basis of his claim was that he would be arrested and killed by the Afghan authorities because, after the death of his father, he had taken over the role of the military commander of 25 men for Hizb-i-Islami. He also claimed that Hizb-i-Islami would force him to become a suicide bomber. Finally, he claimed that he had been seriously injured during the course of a rocket launch in Afghanistan four years earlier and had been left disabled. He relied on the fact that his lower right leg and penis had both been amputated and he had a false limb; that his left leg and right hand had been seriously injured; and that he suffered from depression.

9. On 17 September 2010, his asylum application was refused by the Secretary of State.

10. First, due to the inconsistencies in the applicant's claim and the vagueness of his account, it was not accepted either that the applicant's father had ever been involved with Hizb-i-Islami or that the applicant had ever been a Hizb-i-Islami commander.

11. Second, it was not accepted that he would be of any adverse interest to the Afghan authorities upon return given, *inter alia*, that he had not demonstrated any Hizb-i-Islami involvement; that he had remained in hospital for two months after the rocket attack without any problems; that he had returned from hospital to his home village where he had lived for six months without any problems from the authorities; and that, in any event, a number of ex Hizb-i-Islami members occupied high positions within the Afghan Government and the objective evidence demonstrated that even former commanders did not have any problems with the Afghan authorities if they made it clear that they were no longer working with Gulbuddin Hekmatyar (Hizb-i-Islami's leader).

12. Third, it was not accepted that he would be at risk from Hizb-i-Islami given that he had claimed that they had supported him when he had been injured; that they had provided him with funds to travel to the United Kingdom; and the fact that, in his original screening interview with the United Kingdom immigration authorities, he had only made reference to his fear of the Afghan authorities and had not mentioned any risk from Hizb-i-Islami.

13. The Secretary of State did not consider that the absence of a medical report on the applicant's physical injuries would prejudice his asylum application from being decided fairly because it was not disputed that his injuries existed and any report would not be able to corroborate how his injuries had been sustained. Further, it was not considered that the applicant's disabilities could support his claim to be at risk upon return because the applicant himself was uncertain as to who had been responsible for the rocket attack which had caused his injuries.

14. Although it was acknowledged that the medical facilities in Afghanistan were limited and underdeveloped, it was noted that the applicant had previously received hospital care there and it was considered that any further medical care would similarly be available to him upon return. Additionally, it was noted that the applicant's family remained in Afghanistan and it was considered that there was no reason to suggest that they would not adequately support and assist him upon return. Consequently, it was not accepted that his case was "very exceptional" or that it would cross the high threshold of severity such as to engage Article 3 within the meaning of *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008.

15. Finally, with reference to the country guidance case of *GS (Article 15(c): indiscriminate violence) Afghanistan CG* [2009] UKAIT 00044 (see paragraphs 28-29 below), it was not accepted that the applicant would be personally at enhanced risk of indiscriminate violence in Afghanistan as a person with an amputated limb. To that end, the Secretary of State noted that there were an estimated 800,000 mobility impaired persons in Afghanistan of whom 40,000 were limb amputees. The applicant had shown the resolve and ability to travel to the United Kingdom via various methods of transport and had resided in Afghanistan for four years following his injuries. As such, he had not shown that he would be at enhanced risk or that there was no viable relocation option open to him in Afghanistan.

16. The applicant appealed against the refusal of his asylum claim claiming that his return to Afghanistan would violate, *inter alia,* Article 3 of the Convention. In his appeal statement, he claimed that he had no one in Afghanistan to support him and that he would find life extremely hard in Afghanistan. He claimed that he had lost contact with his two sisters who were both married and living with their own families in Afghanistan.

17. On 4 October 2010, the First-tier Tribunal (Immigration and Asylum Chamber) ("the First-tier Tribunal") dismissed the applicant's appeal for substantially the same reasons as the Secretary of State as set out above. The Immigration Judge accepted certain aspects of the applicant's claim stating:

> "103. I accept that he is an Afghan national who may well have come from a village in Nangarhar province and may well have spent the early part of his life as a farmer. I accept that he may well be a single man and that he has clearly suffered certain severe

injuries as a result of an accident which may well have involved a mortar, rocket or some form of bomb. I accept that he does have an amputated lower leg with a false limb together with the other injuries he has described.

104. I accept that he made his way to the UK and this may well have been over a six month period in a variety of modes of transport including a lorry. I accept that he will have paid an agent for this and that sum may well have been in the region of 15,000 US dollars. I accept that it may have been impractical for him to make a separate application for asylum en route. It is likely that he would have been under the control of the agent.

105. However, beyond these findings I cannot go. I cannot be satisfied as to any other details of the appellant's case. I cannot be satisfied that he has established that he was a commander for the Hizb-e-Islami and for approximately a year and thereafter he remained with them after a brief stay with his family in the family village until he decided to leave, when it was suggested that he became a suicide bomber."

18. The Immigration Judge found, in the alternative, that even if the applicant had at some stage been a member of the Hizb-i-Islami, he had not shown that he would not be able to return to Afghanistan and make his peace with the Afghan authorities as someone who had left Hizb-i-Islami a number of years earlier. The Immigration Judge considered that there was no reason why the applicant could not return to Afghanistan to resume living either in Nangarhar or in Kabul without any fear from the authorities.

19. In relation to the applicant's disability, the Immigration Judge commented that it might "well be that there would be limited prospects for him in Afghanistan in view of his injuries", and stated that:

"[H]e would have certain disadvantages greater than others by reason of his disability. But as referred to in the objective evidence he would not be alone with 80,000 amputees and 400,000 rendered disabled by the effects of war. This may not be a comforting statistic but it demonstrates how persons with such disadvantages are continuing to exist in Afghanistan."

20. Finally, the Immigration Judge did not accept that the applicant had demonstrated that he would be more susceptible to indiscriminate violence by reason of his disability noting that:

"[T]he fact that he has survived in Afghanistan for three to four years without any indiscriminate violence overcoming him demonstrates that he has managed to cope with his disability in the political unrest that exists. The fact that he managed to come the whole of the way from Afghanistan in a variety of means of transport indicates that he is a resilient man who has overcome difficulties in a practical way. He may well have received assistance from those sympathetic to them. There is no reason to think that he will not continue to do so throughout his life."

21. On 7 October 2010, a Senior Immigration Judge of the First-tier Tribunal refused permission to appeal because the grounds of appeal only pleaded to be allowed to remain in the United Kingdom but did not identify any arguable error of law and there was no other good reason to grant permission to appeal.

22. On 13 October 2010, the Upper Tribunal of the Immigration and Asylum Chamber ("the Upper Tribunal") refused permission to appeal because no arguable error of law could be found in the Immigration Judge's determination.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Primary legislation

23. Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002"), provides a right of appeal against an immigration decision made by the Secretary of State for the Home Department.

24. Appeals in asylum, immigration and nationality matters are heard by the First-tier Tribunal (Immigration and Asylum Chamber), which replaced the former Asylum and Immigration Tribunal ("AIT") on 15 February 2010.

25. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides a right of appeal to the Upper Tribunal, with the permission of the First-tier Tribunal or the Upper Tribunal, on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

26. Section 2 of the Human Rights Act 1998 provides that, in determining any question that arises in connection with a Convention right, courts and tribunals must take into account any case-law from this Court so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

### B. Country guidance determinations

27. Country guidance determinations of both the former AIT and the Upper Tribunal are to be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the AIT or Upper Tribunal that determined the appeal. Unless expressly superseded or replaced by a later country guidance determination, country guidance determinations are authoritative in any subsequent appeals so far as that appeal relates to the country guidance issue in question and depends upon the same or similar evidence.

#### 1. *GS (Article 15 (c) : Indiscriminate violence) Afghanistan CG [2009] UKAIT 00044*

28. In the country guidance determination of *GS*, of 15 October 2009, the then AIT held that there was not in Afghanistan such a high level of indiscriminate violence that substantial grounds existed for believing that a

civilian would, solely by being present there, face a real risk which threatens the civilian's life or person, such as to entitle that person to the grant of humanitarian protection, pursuant to Articles 2(e) and 15(c) of Council Directive 2004/83/EC (see paragraphs 33-34).

29. In considering the concept of a group of people at enhanced risk of indiscriminate violence, the AIT further commented that:

> "The European Court made it clear in Elgafaji that where a person comes within a group of people for whom there is an enhanced risk, the degree of indiscriminate violence does not need to be as high as it would otherwise have to be in order to invoke Article 2 or Article 15(c). We have already observed that the ultimate test is that of real risk of serious harm. We have not heard much evidence about enhanced risk categories, and that is not an issue we have had to consider in relation to the appellant. It was accepted by counsel for the respondent that those who could be perceived as collaborators may be considered to be in such a category. That may include teachers, local government officers and government officials. The concept of a group of people at enhanced risk of indiscriminate violence is not an immediately obvious one. The difficulty concerns the use of the word "indiscriminate", but the answer is partly contained in QD and AH, which considered the "individual risk of indiscriminate violence". The way in which an enhanced risk might arise for a group can best be demonstrated by example. If, say, the Taliban wanted to make a point about teachers continuing to teach girls, it may resolve to kill a teacher. It would not be any specific teacher but one who came into their sights. A teacher is of course not a combatant and an attempt to kill the first teacher they came across could be argued to demonstrate that teachers were then at enhanced risk of indiscriminate violence. Another possible example could be disabled people. If a bomber, or sniper, were to walk into a crowded marketplace, the public may well flee. A man with only one leg would move considerably more slowly and arguably as a result would be in a higher risk group than the general public. In view of the paucity of evidence, we cannot give a list of risk categories, and certainly cannot say that any particular occupation or status puts a person into such a higher risk category. We merely record that there may be such categories, and that if a person comes within one, the degree of indiscriminate violence required to succeed may be reduced depending upon the particular facts of the case both in terms of the individual concerned, and the part of Afghanistan from which he comes. It should also be borne in mind that such a person may, depending on the facts, be entitled to refugee status rather than relying on the subsidiary protection offered by Articles 2 and 15 of the Qualification Directive. We emphasise that those examples should not be taken to indicate that teachers, or the disabled, are members of enhanced risk groups, without proof to that effect."

### *2. Further consideration of the level of indiscriminate violence in Afghanistan by the Upper Tribunal*

30. In *HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG* [2010] UKUT 378 (IAC), the Upper Tribunal, in a determination dated 21 October 2010, concluded, *inter alia*, that the evidence as to the level of indiscriminate violence affecting civilians generally in Afghanistan which had become available since *GS* (see paragraphs 28-29 above) was not sufficient to show that the guidance given by the AIT in *GS* was no longer to be regarded as valid.

31. In *AA (unattended children) Afghanistan CG* [2012] UKUT 00016 *(IAC)*, promulgated on 1 February 2012, the Upper Tribunal found that there could be no doubt that the material before it revealed a deterioration in the security situation in Afghanistan since *HK and others*. However, the Upper Tribunal found that there was no evidence to suggest that there was any material difference to the risk to which the adult civilian population was subject in Afghanistan.

32. In *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC), promulgated on 18 May 2012, the Upper Tribunal reconsidered the evidence as to the level of indiscriminate violence affecting ordinary civilians which had become available since *GS* (see paragraphs 28-29 above). The Upper Tribunal concluded as follows:

> (i) This decision replaces *GS (Article 15(c): indiscriminate violence) Afghanistan CG* [2009] UKAIT 00044 as current country guidance on the applicability of Article 15(c) to the on-going armed conflict in Afghanistan. ...
>
> (ii) Despite a rise in the number of civilian deaths and casualties and (particularly in the 2010-2011 period) an expansion of the geographical scope of the armed conflict in Afghanistan, the level of indiscriminate violence in that country taken as a whole is not at such a high level as to mean that, within the meaning of Article 15(c) of the Qualification Directive, a civilian, solely by being present in the country, faces a real risk which threatens his life or person.
>
> (iii) Nor is the level of indiscriminate violence, even in the provinces worst affected by the violence (which may now be taken to include Ghazni but not to include Kabul), at such a level.
>
> (iv) Whilst when assessing a claim in the context of Article 15(c) in which the respondent asserts that Kabul city would be a viable internal relocation alternative, it is necessary to take into account (both in assessing "safety" and reasonableness") not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many Internally Displaced Persons (IDPs) living there, these considerations will not in general make return to Kabul unsafe or unreasonable..."

## III. RELEVANT EUROPEAN UNION LAW

33. Council Directive 2004/83/EC of 29 April 2004 (on 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: "the Qualification Directive") has the objective, *inter alia*, of ensuring EU Member States apply common criteria for the identification of persons genuinely in need of international protection (recital six of the preamble).

34. In addition to regulating refugee status within the European Union legal order, it makes provision for granting subsidiary protection status. Article 2(e) defines a person eligible for subsidiary protection status as someone who would face a real risk of suffering serious harm if returned to

his or her country of origin and who is unable, or, owing to such risk, unwilling to avail himself of the protection of that country.

"Serious harm" is defined in Article 15 as consisting of:

> "a) death penalty or execution; or
>
> b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

35. In case C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, 17 February 2009, the Grand Chamber of the then Court of Justice of the European Communities was asked to give a preliminary ruling on the meaning of Article 15(c) of the Qualification Directive and the criteria for its application. The court considered it appropriate to compare the three types of "serious harm" defined in Article 15 of the Directive and continued:

> "...the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.
>
> 33 By contrast, the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm.
>
> 34 Reference is made, more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.
>
> 35 In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.
>
> ...
>
> 39 In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.
>
> ...

43 Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) of the Directive, must be interpreted as meaning that:

– the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;

– the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place -- assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred -- reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

44 It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, *inter alia*, [*NA. v. the United Kingdom*, no. 25904/07, §§ 115-117, 17 July 2008] and the case-law cited).”

## IV. RELEVANT INTERNATIONAL LAW

36. The United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol were adopted by the United Nations General Assembly on 13 December 2006. Twenty-six Contracting States have ratified both the Convention and the Optional Protocol. A further seven Contracting States have ratified only the Convention. The United Kingdom ratified the Convention on 8 June 2009 and the Optional Protocol on 7 August 2009.

37. Article 1 provides that:

“The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

38. Article 11 provides that:

“States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.”

39. Article 15, where relevant, provides that:

"...

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment."

40. Article 16, where relevant, provides that:

"...

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs...."

## V. RELEVANT INFORMATION ABOUT AFGHANISTAN

### A. United Nations High Commissioner for Refugees ("UNHCR")

41. On 17 December 2010, UNHCR issued the most recent Eligibility Guidelines for Assessing the International Protection needs of Asylum-Seekers from Afghanistan ("the December 2010 UNHCR Guidelines") and set out the categories of Afghans considered to be particularly at risk in Afghanistan in view of the security, political and human rights situation in the country at that time.

42. Those Guidelines observed:

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

In light of the worsening security environment in certain parts of the country and the increasing number of civilian casualties UNHCR considers that the situation can be characterized as one of generalized violence in Helmand, Kandahar, Kunar, and parts of Ghazni and Khost provinces. Therefore, Afghan asylum-seekers formerly residing in these areas may be in need of international protection under broader international protection criteria, including complementary forms of protection. In addition, given the fluid and volatile nature of the conflict, asylum applications by Afghans claiming to flee generalized violence in other parts of Afghanistan should each be assessed carefully, in light of the evidence presented by the applicant and other current and reliable information on the place of former residence. This latter determination will

obviously need to include assessing whether a situation of generalized violence exists in the place of former residence at the time of adjudication.

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

43. The Guidelines further recorded a worsening security environment in certain areas of the country and characterised the situation as one of generalised violence in the Helmand, Kandahar, Kunar and parts of Ghazni and Khost provinces. The Guidelines stated the following:

"The intensification and spread of the armed conflict in Afghanistan took a heavy toll on the civilian population in 2009 and continued to worsen through the first half of 2010. At least 5,978 civilians were reported killed and injured in 2009, the highest number of civilian casualties recorded in one year since the fall of the Taliban in 2001. 3,268 casualties were recorded during the first six months of 2010, representing a 31 percent increase over the same period in 2009. Compared to previous years and contrary to seasonal trends, a significant increase in the number of security incidents has been observed during the first half of 2010. This increase is in part attributable to an increase in military operations in the southern region since February 2010 and to significant activities of armed anti-Government groups in the south-eastern and eastern regions of Afghanistan. It is reported that armed anti-Government groups remain responsible for the largest proportion of civilian casualties, whether due to targeted or indiscriminate attacks.

The continued instability in Afghanistan has resulted in the shrinking of the humanitarian space, limiting the presence and activities of humanitarian workers and NGOs. Conflict-related human rights violations are on the rise, including in areas previously considered relatively stable. The escalation of the conflict between the Afghan and international military forces, and the Taliban and other armed groups, has contributed to limiting the access to health care and education, particularly in the southern and south-eastern regions of the country. A broad spectrum of civilians, including community elders, humanitarian personnel, doctors, teachers and construction workers has been targeted by armed anti-Government groups..."

44. In relation to internal relocation, the Guidelines stated that:

"The traditional extended family and community structures of Afghan society continue to constitute the main protection and coping mechanism, particularly in rural areas where infrastructure is not as developed. Afghans rely on these structures and links for their safety and economic survival, including access to accommodation and an adequate level of subsistence. Since the protection provided by families and tribes is limited to areas where family or community links exist, Afghans, particularly unaccompanied women and children, and women single head of households with no male protection, will not be able to lead a life without undue hardship in areas with no social support networks, including in urban centres. In certain circumstances, relocation to an area with a predominately different ethnic/religious make-up may also not be possible due to latent or overt tensions between ethnic/religious groups."

## B. Other United Nations Reports

### *1. United Nations Assistance Mission in Afghanistan*

45. The United Nations Assistance Mission in Afghanistan ("UNAMA") Mid Year Report 2011 on the Protection of Civilians in Armed Conflict ("the UNAMA Report") covers the period from 1 January 2011 and 30 June 2011 and is compiled, *inter alia*, to monitor the situation of civilians in Afghanistan. In the Executive Summary, the UNAMA Report states:

> "In the first six months of 2011, the armed conflict in Afghanistan brought increasingly grim impacts and a bleak outlook for Afghan civilians. As the conflict intensified in the traditional fighting areas of the south and southeast and moved to districts in the west and north, civilians experienced a downward spiral in protection. At the same time, non-State armed groups or Anti-Government Elements (AGEs) altered their tactics with deadly results. Increasingly, AGEs undertook unlawful means of warfare including increased use of improvised explosive devices (IEDs) – particularly victim-activated pressure plate IEDs which act like anti-personnel landmines and are indiscriminate, as they are detonated by any person stepping on or any vehicle driving over them – targeted killings of high profile civilians, and attacks on protected places such as hospitals."

### *2. United Nations Committee on Economic Social and Cultural Rights ("UNCESCR")*

46. In its Concluding Observations on Afghanistan dated 7 June 2010, the UNCESCR stated:

> "The Committee, while taking note of the adoption of the 2008 Afghanistan National Disability Action Plan [see paragraph 48 below], regrets that the report does not accurately reflect the current situation of persons with disabilities and characterizes disability mainly as a matter of charity and a medical concern. The Committee is concerned at the lack of sufficient measures to implement the Action Plan.
>
> The Committee recommends that the State party take concrete steps to implement the 2008 Afghanistan National Disability Action Plan without discrimination and, in this regard, consider ratifying the Convention on the Rights of Persons with Disabilities and its Optional Protocol."

## C. Reports from Afghanistan

### *1. The Afghanistan Independent Human Rights Commission ("the AIHRC")*

47. In its Report on the Situation of Economic and Social Rights in Afghanistan – IV, Qaws 1388 (November/December 2009), the AIHRC stated:

> "Persons with disabilities are among the most vulnerable segments of population and the government has taken no measures to enable their full participation in society and to ensure their access to social and educational services. Due to the lack of public

awareness about the concept of disability, persons with disabilities are often perceived as a family and societal burden and are humiliated and discriminated against. Article 22 of the Afghan Constitution has emphasised the equality of all people and has outlawed all forms of discrimination among citizens. Article 53 of the Constitution requires the government of Afghanistan to take the necessary measures to ensure rehabilitation, training, and active social participation of persons with disabilities and provide them with medical and financial assistance.

Under ANDS ["the Afghanistan National Development Strategy"], the government is obligated to provide further assistance to meet the special needs of persons with disabilities, including their inclusion in the community through providing education and job opportunities. No significant progress is visible in this area.

...

Thirty years of war in Afghanistan had unfavourable effects and one of these is the rise in the number of persons with disabilities. The Afghan conflict not only physically incapacitated people, but it also had negative implications for the psyche of Afghan public.

...

There is no precise assessment of the number and situation of persons with disabilities in Afghanistan and different authorities have presented different statistical data on the number of persons with disabilities. Handicap International estimates that there are 800,000 persons with severe disabilities, however, according to the national disability survey in Afghanistan, out of 25 million Afghan people, 747,500 to 867,100 people have severe disabilities, 17% of which are persons with war disability and 6.8% are victims of mines and other unexploded ordinance (UXO). On an average basis, for every five families, there is a person with a disability.

...

Approximately 70% of persons with disabilities aged over 15 are jobless. Disability has had a direct and strong correlation with the rising trend of unemployment.

...

Growing insecurity, homelessness, disputes over property, and lack of livelihood are the factors obstructing the return of refugees and the reintegration of returnees and IDPs. Insecurity in many parts of the country have made return to places of origin almost impossible. Several regime changes in the course of the Afghan conflict have given rise to several ownership claims on one single land plot. Many commanders have illegally expropriated lands and distributed them among their soldiers and relatives. Family size increased almost three times during forced migration and their return to their places of origin is obstructed, for their existing lands or houses are too small to accommodate them all. Additionally, many people who fled Afghanistan lacked property and are reluctant to return to their places of origin because there are no livelihood options. Inadequate economic opportunities have made return to one's place of origin either impossible or undesirable. Most people who are unable to return to their places of origin migrate to other cities due to lack of livelihood options and homelessness and therefore join the category of the urban poor."

*2. The Afghanistan National Disability Action Plan 2008-2011 (Ministry of Labour, Social Affairs, Martyrs and Disabled, May 2008)*

48. The Afghanistan National Disability Action Plan examined the challenges faced by persons with disabilities in Afghanistan and set national objectives and strategies for the Afghan Government and other stakeholders to help improve the lives of persons with disabilities throughout Afghanistan. It observed, *inter alia*, the following:

> "Services are not equitably spread across all areas of the country and many people with disabilities lack appropriate care or must travel long distances to access it. For example, physical rehabilitation activities are available in only 80 out of 364 districts in 19 of 34 provinces in Afghanistan. Prior to the completion of the ANDS there was insufficient data available on the socio-economic conditions of people with disabilities. However, it was recognized that people with a disability were among those in the most socio-economically vulnerable situation in Afghanistan.
>
> ...
>
> For example, the ANDS found that 70 percent of people with a disability aged over 15 are unemployed; 53 percent of males and 97 percent of females. In comparison, 25 percent of men and 94 percent of women without disability are unemployed."

## D. United States of America Department of State Report

49. In its 2011 Country Report on Human Rights Practices – Afghanistan, published in May 2012, the State Department observed:

> "Continuing internal conflict resulted in civilian deaths, abductions, prisoner abuse, property damage, and the displacement of residents. The security situation remained a problem during the year due to insurgent attacks. According to a 2011 report by UNAMA, civilians continued to bear the brunt of intensified armed conflict as civilian deaths increased by 8 percent during the year compared with 2010.
>
> The large number of attacks by anti-government elements limited the capability of the central government to protect human rights in many districts, especially in the South. The growth in civilian casualties was due primarily to the armed opposition's indiscriminate use of land mine-like pressure plate improvised explosive devices
>
> ...
>
> The government cooperated with the UNHCR, the International Organization for Migration (IOM), and other humanitarian organizations in providing protection and assistance to internally displaced persons, refugees, returning refugees, and other persons of concern but was limited by lack of infrastructure and capacity.
>
> ...
>
> **Internally Displaced Persons (IDPs)**
>
> The country continued to experience high levels of internal population movements, triggered by military operations, natural disasters, and irregular labor conditions. Large numbers of refugees returned but were unable to reside safely in their previous

homes because of poor service infrastructure in rural areas, and the volatile security situation in some parts of the country.

At year's end, an estimated 447,547 persons were displaced, according to the UNHCR. Of these, 116,741 persons were displaced prior to December 31, 2002 (referred to as IDPs in protracted displacement). Between January and December, 185,631 persons were displaced due to conflict. The main areas in which displacement originated were Badghis, Farah, Ghor, and Herat in the West and Faryab in the North. The displaced populations largely remained in their regions of origin. The key provinces that received IDPs, in order of the numbers displaced, were Herat, Kandahar, Nangarhar, and Helmand.

Local governments provided access to land for basic accommodation, while international organizations and the Afghan Red Crescent Society provided shelter, food, and other life-saving aid. However, access to land and rights for returnees and IDPs were hampered by a weak judiciary. Some IDPs in protracted displacement established self-sufficient settlements in the Herat, Kandahar, Helmand, and Jalalabad areas.

Unverified populations, including IDPs and refugees who returned, were also known to reside alongside urban slum dwellers in unauthorized informal settlements in the larger urban areas of Kabul, Jalalabad, Mazar-e-Sharif, and Herat. These settlements were prone to serious deficiencies in several areas, including health, education, security of tenure, and absence of registration of child births and identity cards.

Restricted access due to poor security limited the UNHCR's efforts to assess the numbers of displaced persons and made it difficult to provide assistance.

...

**Persons with Disabilities**

The constitution prohibits any kind of discrimination against citizens and requires the state to assist persons with disabilities and to protect their rights, including the rights to health care and financial protection. The constitution also requires the state to adopt measures to reintegrate and ensure the active participation in society of persons with disabilities. The MoLSAMD [Ministry of Labor, Social Affairs, Martyrs, and Disabled] drafted and the cabinet approved a five-year National Action Plan on March 16, which directs ministries to provide vocational training, establish empowerment centers, distribute food, build handicapped ramps in some government offices, conduct public awareness programs about the disabled, and take other steps to assist Afghans with disabilities.

The government and NGOs estimated that there were up to 900,000 mobility-impaired persons, of whom approximately 40,000 were limb amputees. The MoLSAMD stated that it provided financial support to 79,202 individuals with disabilities. The MoLSAMD accorded special treatment to families of those killed in war.

In the Meshrano Jirga, two of the presidentially appointed seats were reserved for persons with disabilities."

## E. Non-governmental Organisations' reports

### *1. Landmine and Cluster Munition Monitor*

50. In a report entitled "Key Developments since May 2005", the Landmine and Cluster Munition Monitor reported that:

> "A survey by the Ministry of Labor and Social Affairs and the International Rescue Committee found an estimated 84 percent unemployment rate among people with disabilities."

### *2. Austrian Centre for Country of Origin and Asylum Research and Documentation*

51. In a report entitled "Country Report Afghanistan. 11th European Country of Origin Information Seminar (Vienna, 21-22 June 2007)", published in November 2007, the Austrian Centre for Country of Origin and Asylum Research and Documentation summarised the presentations made during an expert seminar, including representatives from UNHCR, in June 2007. The report observed that:

> "In addition to Afghans who are or continue to be in need of international protection, there are certain Afghans currently outside Afghanistan for whom return would not constitute a durable solution and would endanger their physical safety and well-being, given their extreme vulnerability and nature of their special needs. In the context of return to Afghanistan, extremely vulnerable cases can be divided into two broad categories:
>
> - Individuals whose vulnerability is the result of a lack of effectively functioning family and/or community support mechanisms and who can not cope, in the absence of such structures,
> - Individuals who can not cope, either because such support structures are not available or because Afghanistan lacks the necessary public support mechanisms and treatment opportunities.
>
> Against this background, there are Afghans for which UNHCR Afghanistan strongly advises that, at least temporarily, solutions be identified in countries of asylum and that exemptions to obligations to return are made on humanitarian grounds. This may be the case for Afghans who fall into the following categories. Groups of concern are (see upcoming UNHCR paper for details):
>
> - Unaccompanied females,
> - Single parents with small children without income and family and /or community support,
> - Unaccompanied elderly,
> - Unaccompanied children,
> - Victims of serious trauma (Including sexual violence),
> - Physically disabled persons,
> - Mentally disabled persons,
> - Person with medical illness (contagious, long term or short term)."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

52. The applicant complained that his removal to Afghanistan would violate Article 3 of the Convention, which provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

53. The Government contested that argument.

### A. Admissibility

54. The Court considers that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

#### *1. The parties' submissions*

##### (a) The applicant's submissions

55. The applicant acknowledged that his account of activities with Hizb-i-Islami in Afghanistan had not been accepted by the domestic authorities, but he pointed out that they had accepted that, in 2006, he had been injured and left disabled with his right leg and penis amputated and his left leg and right hand seriously injured. The applicant also asserted that the domestic authorities had further accepted that he was single, that he had previously worked as a farmer and that he was not educated. The applicant also argued that his evidence relating to his family (that both of his parents had died, that he had no brothers and that he was not in contact with his two married sisters who were living with their own families) had not been explicitly rejected by the Immigration Judge.

56. Given the above facts, the applicant argued that his return to Afghanistan would violate Article 3 of the Convention in two ways. First, he asserted that disabled persons were at particular risk of violence in the armed conflict in Afghanistan, both because they would be unable to remove themselves from dangerous situations swiftly (as suggested by the AIT's comments in the country guidance determination of *GS (Article 15 (c) : Indiscriminate violence) Afghanistan CG* [2009] UKAIT 00044 (see paragraphs 28-29 above)) and because they would be at greater risk of homelessness and thus more prone to being affected by the indiscriminate violence which occurs on the streets of Afghanistan. He

argued that the Immigration Judge had barely considered the impact of this risk upon him and, in any event, had done so without reference to most of the background evidence that he now cited (see paragraphs 41-51 above).

57. Second, the applicant argued that whilst the difficulties faced by persons with disabilities in Afghanistan may not engage Article 3 if they had family support available to them, a person, like the applicant, without close family connections would suffer the full consequences of the discrimination against, and ignorance surrounding, persons with disabilities (see the AIHRC report at paragraph 47 above). He argued that, in the struggle for scarce accommodation and given the length of time that he had been outside of Afghanistan, there was a real risk he would be left seriously disadvantaged and in conditions analogous to those set out in *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 263, 21 January 2011. Thus he contended that he would be left living in the street, without resources or access to sanitary facilities, and without any means of providing for his essential needs. He submitted that the domestic authorities had failed to properly consider that, as a victim of an armed conflict without family members, he was plainly a member of a particularly underprivileged and vulnerable population group in need of special protection (see *M.S.S*, cited above, § 251). In that regard, he asserted that the Immigration Judge's statement that he "would have certain disadvantages greater than others by reason of his disability" but that "he would not be alone" because persons with such disadvantages were continuing to exist in Afghanistan (see paragraph 19 above) did not begin to properly consider the issue of his vulnerability.

58. The applicant further argued that his case could be distinguished from *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008 because it did not involve a naturally occurring illness or merely the consequences of a serious medical condition and the lack of sufficient treatment available for it in Afghanistan. He submitted that the shortages of accommodation and welfare arrangements in Afghanistan were not part of the vicissitudes of life but were the legacy of the armed conflicts that had long affected the country.

59. In that regard, he stated that one of the effects of the lengthy conflict was the rise in the number of persons with disabilities in Afghanistan. He also argued that the armed conflict was deteriorating; that there had been a 20% increase in civilian casualties; and that Nangarhar province, from where the applicant originated, had become a major recipient of internally displaced persons (see the United States 2011 Country Report on Human Rights Practices - Afghanistan at paragraph 49 above). In light of those facts, he argued that there were serious grounds for believing that, as a disabled man, he would be involved in a competition for scarce resources within which he would be ill-equipped to succeed. He argued that, unlike many returnees, due to his disabilities, there was no real chance that he

would find work in light of the evidence that the unemployment rate among people with disabilities was extremely high (see the Landmine and Cluster Munition Monitor report at paragraph 50 above).

60. Furthermore, the applicant argued that if the obligations to respect the inherent dignity of disabled persons which were set out in the Convention on the Rights of Persons with Disabilities (see paragraphs 36-40 above) were interpreted to inform the scope of Article 3 of the Convention, there was a real risk that he would face inhuman or degrading treatment upon return to Afghanistan. He submitted that the Afghan Government were unable to ensure access to services for the disabled and that a seminar in which UNHCR had participated had recommended that persons with physically disabilities who lacked family members were one class of person who should be eligible for protection outside the scope of the 1951 Refugee Convention (see paragraph 51 above). Additionally, he argued that UNHCR had confirmed in their December 2010 UNHCR Guidelines that Afghans would not be able to lead a life without undue hardship in areas without social support or family networks (see paragraph 44 above).

61. Finally, the applicant argued that the Secretary of State's failure to wait for a medical report about the applicant's injuries when making the first instance decision on the applicant's asylum claim in September 2010 (see paragraph 13 above), amounted to a breach of the obligation under Article 3 to conduct a rigorous scrutiny of an individual's claim that his deportation to a third country would expose that individual to treatment prohibited by Article 3 (see, *mutatis mutandis*, *R.C. v. Sweden*, no. 41827/07, 9 March 2010 and *Jabari v. Turkey*, no. 40035/98, § 39, ECHR 2000-VIII).

**(b) The Government's submissions**

62. The Government argued that the applicant had not provided any evidence to support his assertion that, by reason of his disabilities, there were substantial grounds to believe that there was a real risk that he would be subjected to treatment contrary to Article 3 in the event of his return to Afghanistan.

63. In that regard, they contended that there was no support to be found in any of the country guidance cases (see paragraphs 27-32 above) or the most recent background evidence from UNHCR and UNAMA (see paragraphs 41-45 above) to suggest that disabled persons were at an enhanced risk of ill-treatment from indiscriminate violence.

64. They further argued that, whilst in the country guidance case of *GS* (see paragraphs 28-29 above) the AIT had speculatively contemplated the possibility that there might be a sufficient threat to disabled persons to engage the provisions of the Qualification Direction (see paragraphs 33-34 above), there was in reality no support for the suggestion that disabled persons were more likely to be killed or wounded by a suicide bomber if

they were less able than others to run away from such an attacker. Furthermore, they submitted that there was no evidence that snipers were targeting civilians; that disabled person were less likely to be able to evade such attacks; or that disabled persons were being killed by reason of any relative inability to avoid the effects of violence.

65. In response to the applicant's claim (see paragraph 57 above) that the conditions that he would face in Afghanistan were analogous to those set out in *M.S.S v. Belgium and Greece*, cited above, the Government argued that the case had no relevance to the present application. They asserted that, critical to the Court's conclusions in *M.S.S.* had been the failure of the Greek authorities to make available the required conditions for the reception of an asylum seeker. The Court's findings had been based on the positive obligations (derived from the European Reception Directive and their own legislation) of the Greek authorities to provide accommodation and decent material conditions to impoverished asylum seekers and, in that regard, the Court had attached considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. To the contrary, the Government argued that, so far as the applicant relied upon the general provision made for persons with disabilities in Afghanistan and the difficulties faced by those without family support there, the applicable standard was analogous to that applied in *N. v. the United Kingdom*, cited above. They therefore argued that, where the feared consequences of return were as a result of claimed deficiencies in health and social care, very exceptional circumstances would need to be established.

66. The Government refuted the applicant's submission (see paragraph 55 above) that the Immigration Judge had accepted that the applicant had no contact with his family members in Afghanistan. They noted that the Immigration Judge had explicitly accepted that the applicant was an Afghan national who had come from Nangarhar province and had spent the early years of his life as a farmer; that he was single; and that he had suffered severe injuries. However, the Immigration Judge had stated that he could not be satisfied as to any other details of the applicant's case (see paragraph 17 above) and whilst the Government were prepared to accept that both of the applicant's parents were now deceased, they were not prepared to accept that he was not in contact with his remaining family members in Afghanistan. In that regard, the Government noted that the applicant had failed to submit any evidence to support that claim. In any event, there was no reason why he could not make contact with his sisters upon his return to Afghanistan.

67. The Government reiterated the Immigration Judge's findings (see paragraphs 19-20 above) that there was no reason why the applicant would not continue to receive the assistance in Afghanistan that he had apparently

received for three to four years there after he had incurred his injuries and before he had travelled to the United Kingdom. Furthermore, in view of the numbers of disabled people in Afghanistan and the lack of supporting evidence demonstrating that those people were living in a state of extreme degrading or inhuman conditions by virtue of government inaction, they argued that there remained no substantial grounds to believe that the applicant would be at real risk of treatment contrary to Article 3 of the Convention, particularly in light of the fact that the applicant had family in Afghanistan.

68. Finally, in response to the applicant's claims regarding the consideration of his asylum claim in the absence of a medical report on his injuries (see paragraph 61 above), the Government pointed out that no medical report had ever been produced by the applicant at any stage throughout the proceedings whether on appeal before the First-tier Tribunal or in the course of the present application before the Court. The Government further noted that the claimed relevance of such a medical report was to establish whether or not the applicant's injuries were consistent with his account of how he had received them and that, in any event, the Immigration Judge at the First-tier Tribunal had accepted the applicant's claims in that regard without a medical report. The Government therefore argued that the applicant had failed to explain what further relevance a medical report might have had to the applicant's claims.

*2. The Court's assessment*

**(a) General principles regarding Article 3 and expulsion**

69. It is well-established that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion (*Saadi v. Italy* [GC], no. 37201/06, §§ 125 and 138, ECHR 2008-...).

70. The assessment whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Owing

to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

71. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *Collins and Akasiebie v. Sweden* (dec.), no. 23944/05, 8 March 2007 and *R.C. v. Sweden*, no. 41827/07, 9 March 2010).

72. In order to determine whether there is a real risk of ill-treatment in this case, the Court must examine the foreseeable consequences of sending the applicant to Afghanistan, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108 *in fine*, Series A no. 215). If an applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy*, cited above, § 133). A full and *ex nunc* assessment is called for as the situation in a country of destination may change over the course of time. Even though the historical position is of interest insofar as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light since the final decision taken by the domestic authorities (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007).

73. The Court has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others v. the United Kingdom*, cited above, § 111, and *Saadi v. Italy*, cited above, § 131) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by

other evidence (see *Mamatkulov and Askarov v. Turkey*, cited above, § 73; and *Saadi v. Italy,* cited above, § 131). The Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *NA. v. the United Kingdom*, no. 25904/07, § 115, 17 July 2008, and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 218 and § 248, 28 June 2011).

**(b) The Court's case-law in respect of Article 3 and humanitarian conditions**

74. In *Salah Sheekh v. the Netherlands*, cited above, the Court held that socio-economic and humanitarian conditions in a country of return did not necessarily have a bearing, and certainly not a decisive bearing, on the question of whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3 in those areas (§ 141).

75. However, in *N. v. the United Kingdom*, cited above, the Court held that although the Convention was essentially directed at the protection of civil and political rights, the fundamental importance of Article 3 meant that it was necessary for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases. Noting that Article 3 did not place an obligation on Contracting States to alleviate disparities in the availability of medical treatment in different States through the provision of free and unlimited health care to all aliens without a right to stay within their jurisdictions, the Court nevertheless held that humanitarian conditions would give rise to a breach of Article 3 of the Convention in very exceptional cases where the humanitarian grounds against removal were compelling (§ 42).

76. In *M.S.S. v. Belgium and Greece*, cited above, the Court stated that it had not excluded the possibility that the responsibility of the State under Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on State support, found himself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity (§ 253). In that case, the applicant, an asylum seeker, and as such "a member of a particularly underprivileged and vulnerable population group in need of special protection" had spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that, the Court noted the applicant's ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving (§ 254). It held that the conditions in which the applicant was living reached the Article 3 threshold and found Greece to be responsible for the breach of that Article due to the inaction of

the Greek authorities despite their positive obligations under both the European Reception Directive and domestic legislation regarding the provision of accommodation and decent material conditions to asylum seekers (§ 264). The Court also found Belgium to be in breach of Article 3 because, *inter alia*, it had transferred the applicant to Greece and thus knowingly exposed him to living conditions which amounted to degrading treatment (§ 367).

77. In *Sufi and Elmi v. the United Kingdom*, cited above, the Court, in considering, *inter alia*, whether or not the applicants would be at risk of ill-treatment on account of the dire humanitarian conditions in refugee camps in southern and central Somalia, applied the test adopted in *M.S.S*, which required it to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame (§§ 282-283). In coming to that decision, the Court had regard to the fact that the humanitarian crisis in Somalia was predominately due to the direct and indirect actions of the parties of the conflict; noted that all of the evidence indicated that the parties to the conflict had employed indiscriminate methods of warfare in densely populated urban areas with no regard to the safety of the civilian population; and considered that the crisis had been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control, despite the fact that between a third and a half of all Somalis were living in a situation of serious deprivation.

**(c) Application to the facts of the case**

78. The Court observes at the outset that, although the applicant applied for, and was refused, asylum in the United Kingdom, he has not complained before the Court that his removal to Afghanistan would put him at risk of deliberate ill-treatment from any party, either on account of his past activities with Hizb-i-Islami or for any other reason.

79. The Court further observes that the applicant has not claimed that the levels of violence in Afghanistan are such that any removal there would necessarily breach Article 3 of the Convention. Indeed, the applicant did not dispute the findings of the AIT's previous country guidance determination *GS* (set out at paragraphs 28-29 above) that there was not in Afghanistan such a high level of indiscriminate violence that substantial grounds existed for believing that a civilian would, solely by being present there, face a real risk which threatened the civilian's life or person.

80. Instead the applicant alleged that he would be at risk in Afghanistan on two grounds linked to his disabilities. First, he asserted that he would be particularly vulnerable to violence and at increased risk of further injury or death in the ongoing armed conflict in Afghanistan. Second, he contended that, due to his lack of family support in Afghanistan, he would face living

conditions and discrimination there which would breach Article 3 of the Convention.

81. Before examining these grounds, it is necessary both to address the applicant's complaints regarding the domestic authorities' failure to wait for a medical report (see paragraph 61 above) and to clarify the factual basis for his complaint.

82. First, in respect of his complaint that the domestic authorities failed to await a medical report, the Court is unable to find that, in the circumstances of the present case, such a failure demonstrates a breach of Article 3 of the Convention. In that regard, besides the applicant's failure to have ever submitted a medical report in any event, the Court notes that, during the domestic proceedings, the First-tier Tribunal accepted both the extent of the applicant's injuries and the manner in which the applicant claimed that they had been caused (see paragraph 17 above). Thus, a medical report was not required in his case for the domestic authorities to have complied with their duty to ascertain all relevant facts in the applicant's case (see *R.C. v. Sweden*, no. 41827/07, § 53, 9 March 2010). Second, in respect of the facts of the applicant's claim, the Court notes that it is not disputed that the applicant is disabled and that his lower right leg and penis have been amputated and that his left leg and right hand have been seriously injured. Furthermore, the parties agreed that the applicant is a single man of Pashtun ethnicity, that both of his parents are deceased, that he had two sisters in Afghanistan and that he spent the early years of his life as a farmer in Nangarhar province.

83. However, the parties disputed whether any support would be available to the applicant in Afghanistan. The Government maintained that the applicant's claim not to have any contact with his sisters in Afghanistan had been implicitly rejected by the Immigration Judge and that he had failed to submit any evidence to support that claim. In any event, he had not provided any reason why he could not make contact with his sisters upon his return to Afghanistan. By contrast, the applicant did not accept that this part of his claim had been rejected by the Immigration Judge. He continued to claim, as he had done the domestic proceedings, that there was no one available to care for him in Afghanistan and that, although he had two sisters in the country, they were both married and living with their own families. In any event, he no longer had any contact with either of them.

The Court considers it unnecessary to determine what the Immigration Judge's findings in respect of the applicant's sisters were and, in particular, whether or not the Immigration Judge implicitly rejected the applicant's assertions in this regard. The fact is that, neither before the national authorities nor before the Court, has the applicant given any reason why, if he is returned to Afghanistan, he would not be able to make contact with them and seek their support.

84. The Court will therefore examine each of the applicant's grounds of complaint on the basis that he will be returning, as a disabled man with an amputated lower right leg and a false limb, to Afghanistan, where members of his family continue to reside.

*i. Enhanced risk of violence*

85. In relation to the applicant's first ground that he would be at greater risk of violence in Afghanistan due to his disability, the Court notes that the applicant has relied significantly upon the brief comments made by the AIT in *GS* (set out at paragraphs 28-29 above). In that case, the AIT, when explaining that there may be categories of people who may be able to establish an enhanced risk of indiscriminate violence in Afghanistan, gave as possible examples both those who would be perceived to be "collaborators" and disabled persons. However, the Court does not agree that the AIT's comments alone can give substantive support to the applicant's claim. Indeed, the AIT clarified in the same paragraph of that determination that they were unable to give a list of risk categories or to state that any particular occupation or status would put a person into such a category in view of the "paucity of the evidence" before them. To the contrary, the AIT merely recorded that there "may be such categories" dependent upon the evidence available. The AIT emphasised that their comments should not be taken to indicate that the disabled were members of enhanced risk groups, without proof to that effect

86. The Court considers it to be significant that the applicant has failed to adduce any additional substantive evidence to support his claim that disabled persons are *per se* at greater risk of violence, as opposed to other difficulties such as discrimination and poor humanitarian conditions, than the general Afghan population. The evidence from, *inter alia*, UNHCR, UNAMA, the UNCESCR, the AIHRC, and the United States of America State Department (see paragraphs 41-49 above) makes no reference to disabled persons being at greater risk of violence, ill-treatment or attacks in Afghanistan.

87. In the absence of any contrary evidence, the Court therefore concludes that this claim has to be considered to be to a large extent speculative and does not accept that the applicant has demonstrated that, as a result of his disabilities, he would be subjected to an enhanced risk of indiscriminate violence in Afghanistan such as to engage Article 3 of the Convention.

*ii. Living conditions*

88. The applicant argued that the circumstances that he will face in Afghanistan will amount to a breach of Article 3 of the Convention as a result of the poor provision for and ignorance surrounding persons with disabilities there. He argued that his case could be distinguished from

*N. v. the United Kingdom*, cited above, because it did not involve a naturally occurring illness or merely the consequences of the lack of sufficient treatment available in Afghanistan. He argued that the Court should consider his case in light of *M.S.S. v. Belgium and Greece*, cited above, and his inability to cater for his basic needs to Afghanistan.

89. The Court finds that the principles of *N. v. the United Kingdom* should apply to the circumstances of the present case for the following reasons. First, the Court recalls that *N.* concerned the removal of an HIV-positive applicant to Uganda, where her lifespan was likely to be reduced on account of the fact that the treatment facilities there were inferior to those available in the United Kingdom. In reaching its conclusions, the Court noted that the alleged future harm would emanate not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. The Court also stated that Article 3 did not place an obligation on the Contracting State to alleviate disparities in the availability of medical treatment between the Contracting State and the country of origin through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction (ibid, § 44). The Court acknowledges that, in the present case, the applicant's disability cannot be considered to be a "naturally" occurring illness and does not require medical treatment. Nevertheless, it is considered to be significant that in both scenarios the future harm would emanate from a lack of sufficient resources to provide either medical treatment or welfare provision rather than the intentional acts or omissions of the authorities of the receiving State.

90. Second, the Court considers that the present case can be distinguished from *M.S.S.* In that case, a fellow Contracting State, Greece, was found to be in violation of Article 3 of the Convention through its own inaction and its failure to comply with its positive obligations under both European and domestic legislation to provide reception facilities to asylum seekers. Central to the Court's conclusion was its finding that the destitution of which the applicant in that case complained was linked to his status as an asylum seeker and to the fact that his asylum application had not yet been examined by the Greek authorities. The Court was also of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering. (see paragraph 262 of the judgment). By contrast, the present application concerns the living conditions and humanitarian situation in Afghanistan, a non-Contracting State, which has no such similar positive obligations under European legislation and cannot be held accountable under the Convention for failures to provide adequate welfare assistance to persons with disabilities. In that regard, it is recalled that the Convention does not purport to be a means of requiring Contracting States to impose Convention

standards on other States (see, as a recent authority, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 141, 7 July 2011).

91. Third, although in *Sufi and Elmi v. the United* Kingdom, cited above, the Court followed the approach set out in *M.S.S.*, this was because of the exceptional and extreme conditions prevailing in south and central Somalia. In particular, there was clear and extensive evidence before the Court that the humanitarian crisis in Somalia was predominately due to the direct and indirect actions of all parties to the conflict who had employed indiscriminate methods of warfare and had refused to permit international aid agencies to operate ( paragraph 282 of the *Sufi and Elmi* judgment). On the current evidence available, the Court is not able to conclude that the situation in Afghanistan, albeit very serious as a result of ongoing conflict, is comparable to that of south and central Somalia. First, unlike Somalia, which has been without a functioning central Government since 1991, Afghanistan has a functioning central Government and functioning infrastructures remain in place. Second, Afghanistan, and in particular Kabul to where the applicant will be returned, remains under Government control, unlike the majority of south and central Somalia, which, since 2008, has been under the control of Islamic insurgents. Third, although UNHCR has observed that the humanitarian space in Afghanistan is declining in some areas as a result of the continuing instability (see paragraph 43 above), there remains a significant presence of international aid agencies in Afghanistan, unlike in Somalia where international aid agencies were refused permission to operate in multiple areas. Fourth, even though the difficulties and inadequacies in the provision for persons with disabilities in Afghanistan cannot be understated, it cannot be said that such problems are as a result of the deliberate actions or omissions of the Afghan authorities rather than attributable to a lack of resources. Indeed, the evidence suggests that the Afghan authorities are taking, albeit small, steps to improve provision for disabled persons by, for example, the National Disability Action Plan 2008-2011 (see paragraph 48 above), and the provision of financial support by the Ministry of Labour, Social Affairs, Martyrs, and the Disabled to 80,000 disabled persons in Afghanistan (see paragraph 49 above). The Court does not accept that the report of the Austrian Centre for Country of Origin and Asylum Research and Documentation (see above at paragraph 51) lends support to the applicant's claim because that report was published in 2007 and the later December 2010 UNHCR Guidelines make no similar recommendations in relation to the return of disabled persons to Afghanistan.

92. The Court therefore considers that, in the circumstances of the present case where the problems facing the applicant would be largely as a result of inadequate social provisions through a want of resources, the approach adopted by the Court in *N. v. the United Kingdom,* cited above, is more appropriate. The Court will therefore need to determine whether or not

the applicant's case is a very exceptional one where the humanitarian grounds against removal are compelling.

93. Whilst full account must be taken of the significant hardship facing persons with disabilities in Afghanistan, including discrimination, a lack of employment opportunities and a scarcity of services (see paragraphs 45-51 above), it is of some relevance that the present applicant has family members who continue to live in Afghanistan. The applicant himself acknowledged in his submissions to the Court (see paragraph 57 above) that the difficulties facing persons with disabilities in Afghanistan might not engage Article 3 if they had family support available to them. For the reasons set out above at paragraphs 83-84 the Court is unable to conclude that the applicant would not be able to contact his family members upon return to Afghanistan or that they would not provide him with some level of support or assistance upon arrival. In this regard, the Court is not therefore able to accept the applicant's claim that he will be returning to Afghanistan and left destitute by reason of a total lack of support in that country.

It is, in any event, of greater importance to the Court's consideration of the applicant's Article 3 complaint that the applicant remained in Afghanistan after he received his injuries in 2006 for four years until 2010 and was supported throughout that period, during which he also received medical treatment for his injuries. On the evidence before it, the Court is unable to conclude that the applicant's disabilities have worsened since his departure from Afghanistan. Nor, on the general information before the Court, can it be found that the circumstances that would confront the applicant on return to Afghanistan would, to a determinative degree, be worse than those which he faced during that four-year period. Likewise, although the quality of the applicant's life, already severely diminished by his disabled condition, will undoubtedly be negatively affected if he is removed from the United Kingdom to Afghanistan, that fact alone cannot be decisive (see *N. v. the United Kingdom,* cited above, §§ 50 and 51).

94. Finally, in addressing the applicant's submission that, in circumstances such as those in the present case, the United Nations Convention of the Rights of Persons with Disabilities has to be read as informing the scope to be given to Article 3, the Court is mindful of the principle that the Convention does not apply in a vacuum but must be interpreted in harmony with the general principles of international law (see, *mutatis mutandis*, *inter alia, Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, §§ 131-132, ECHR 2010). Nevertheless, for the foregoing reasons, even interpreting Article 3 of the Convention in harmony with the United Nations Convention of the Rights of Persons with Disabilities, the Court is unable to conclude that the high threshold set by Article 3 has been met in the applicant's case.

95. In conclusion, the applicant's case does not disclose very exceptional circumstances as referred to in the applicable case-law (*N. v. the United*

*Kingdom*, cited above). Accordingly, the implementation of the decision to remove him to Afghanistan would not give rise to a violation of Article 3 of the Convention.

## II. RULE 39 OF THE RULES OF COURT

96. In accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

97. The Court considers it appropriate that the indication made to the Government under Rule 39 of the Rules of Court (see above § 4) should continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention.

# FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* by four votes to three that there would be no violation of Article 3 of the Convention in the event of the applicant's removal to Afghanistan; and

3. *Decides* unanimously to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to remove the applicant until such time as the present judgment becomes final or further order.

Done in English, and notified in writing on 29 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Fatoş Aracı | Ineta Ziemele |
| Deputy Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Ziemele, David Thór Björgvinsson and De Gaetano is annexed to this judgment.

I.Z.
F.A.

# JOINT DISSENTING OPINION OF JUDGES ZIEMELE, DAVID THÓR BJÖRGVINSSON AND DE GAETANO

1. We regret that we are unable to join the majority under operative head no. 2 of the judgment in this case. While it is true that adverse credibility findings were made by the Secretary of State (§ 10) and by the First-tier Tribunal (§ 17) with regard to the applicant's and his father's alleged links with Hizb-i-Islami, the central and critical issue in this case was the applicant's severe disability (amputated lower right leg and penis, and serious injury to his left leg and right hand) and the consequences that would follow from that disability in the event of his deportation to Afghanistan. This was, in reality, the crux of his application for asylum, as well as of his application before this Court (§§ 56-60, and 78-80). Neither these injuries nor their severity has ever been challenged by the domestic authorities, unlike the other side issue relating to his allegation that in Afghanistan he effectively had no family or relatives to return to.

2. In the majority judgment some weight is given to the fact that the applicant has two sisters in Afghanistan, who are both married (§§ 83-84 and 93). They are repeatedly referred to as family members who he may, as is implied, be able to contact upon return to that country and from whom he may be able to get some level of support or assistance. In this regard we point out in the first place that it is somewhat contradictory to suggest as relevant possible limited "familial ties" with his married sisters in Afghanistan, since such ties would not be accepted as relevant "familial ties" under Article 8 of the Convention had his sisters been living in the United Kingdom. In addition, the implication that he may be able to seek help and support from them is highly speculative as there is nothing in the case file indicating that they would be able or willing to provide him with any relevant help and support that might alleviate in a meaningful way the obvious severe hardship the applicant, as a very seriously disabled person, would face upon return to Afghanistan.

3. Nevertheless, the central question is whether the nature of the applicant's disability coupled with the concrete situation back in Afghanistan engages Article 3. In this respect the instant case does not fall, strictly speaking, within the line of case-law represented by the judgment in *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008. Nor does it fall exclusively within the framework of the *Salah Sheekh v. the Netherlands*, no. 1948/04, 11 January 2007 and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011 line of case-law. The facts of the instant case fall somewhere in between these lines of the Court's case-law and thus raise a new issue before the Court.

4. In our view, there is no doubt that a disability *per se*, similar to a serious illness *per se*, would not automatically raise an issue under, or engage, Article 3. Nevertheless, the Court must look into the character of

the disability within the context of the specific facts of a given case. It also needs to assess, given the general situation in the country of origin, how the person with a specific kind of disability might or might not re-settle (see, *mutatis mutandis*, *Salah Sheekh*, cited above, § 141).

5. In this regard, we note that the UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers (December 2007) highlighted the fact that there may be persons who will not qualify for asylum but "for whom UNHCR urges States, for humanitarian reasons, to exercise caution when considering their forced return". Among the "vulnerable", UNHCR lists persons with medical illness or disability (physical or mental). It specifies that: "Ill or disabled persons who cannot work or live on their own in Afghanistan should not return unless they have effective family and/or community support. ... [T]here are Afghans for which UNHCR strongly advises that, at least temporarily, solutions be identified in countries of asylum and that exemptions to obligations to return are made on humanitarian grounds" (see pp. 78–79 of the Document). The 2009 Eligibility Guidelines continue to note that: "The traditional family and community structures of the Afghan social and tribal system constitute the main protection and coping mechanism for returning Afghan refugees... Those who may face particular difficulties upon return include ... physically and mentally disabled persons..." (see p. 61). The 2009 UK Border Agency Report on Afghanistan in fact refers back to the UNHCR's 2007 report inviting States to seriously consider the need to return a person with disability to Afghanistan. The 2010 Eligibility Guidelines (§ 41), while they do not specifically discuss difficulties faced by persons with disabilities, note a general worsening of the security situation and the increase of generalised violence in parts of Afghanistan and emphasise the importance of family and community structures for personal safety (§ 44). We also note that these Guidelines do not suggest a different approach to persons with disabilities since they do not seem to address the issue.

6. In a recent study provided for UNHCR and entitled "Vulnerable or invisible? Asylum seekers with disabilities in Europe" (2010) it is noted that: "The specific barriers that persons with disabilities face to accessing protection and assistance when seeking asylum are yet to be recognized. With the exception of provisions for access to social security (Article 24(1)(b)), the 1951 Refugee Convention and its *travaux préparatoires* (UN Ad Hoc Committee 1950) provide little guidance on a disability-sensitive interpretation of refugee law and there are currently no official guidelines on this matter" (see Research Paper No. 194). We would submit that in light of the Convention on the Rights of Persons with Disabilities, which the United Kingdom ratified in 2009 (§ 36), the assessment of whether return to Afghanistan of the applicant in the instant case complies with Article 3 of the Convention required a

disability-sensitive interpretation of the facts and of the application of the Court's case-law to those facts.

7. To sum up, the applicant's submission was not that all persons with disabilities should not be returned to Afghanistan. His claim was that Article 3 would, if returned, be engaged in his specific case in view of the nature of his disability and the lack of family or social infrastructure for him in Afghanistan (§ 57). We cannot agree that the Immigration Judge examined properly this claim (§§ 19 and 20). The Judge drew crucial inferences from the applicant's prior stay in Afghanistan and his ability to make a journey to the United Kingdom. It is not clear why these negative inferences were drawn since there can also be many other different explanations as to the applicant's initial stay in Afghanistan (following the injuries) and his decision to leave the country. These could be linked to his precarious state of health. In our view, and precisely because the applicant's disability and the facts surrounding it were not examined in sufficient detail, we are left to speculate on the questions that should have been properly dealt with at a national level taking into consideration the need to adopt a disability-sensitive approach in such cases.