

Asylum and Immigration Tribunal

PM and Others (Kabul – Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089

THE IMMIGRATION ACTS

**Heard at Field House
On 11 April 2007**

Determination Promulgated

Before

**SENIOR IMMIGRATION JUDGE MATHER
SENIOR IMMIGRATION JUDGE NICHOLS
MRS E MORTON**

Between

PM and Others

and

Appellants

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the First and Second Appellants: Mr C Jacobs, Counsel instructed by White Ryland
For the Third Appellant: Mr B Lams, Counsel instructed by Lawrence and Co.
Solicitors
For the Respondent: Mr S Kovats, Counsel instructed by the Treasury Solicitor

Those returned from the United Kingdom will not, without more, be at real risk at the airport or after arrival in Kabul.

Those returned from the United Kingdom are not at real risk, without more, of being suspected by the authorities as insurgents

The past of an individual seeking accommodation or work in Kabul, or elsewhere, may be discovered and mentioned to the authorities. Similarly, the authorities may become aware of someone newly arrived in an area. That may result in a person being detained for questioning but there is no satisfactory evidence such questioning gives rise to a real risk of serious harm.

Subject to an individual's personal circumstances, it is unlikely to be unduly harsh (or unreasonable) to expect them to relocate to Kabul if they have established a real risk of serious harm in (and restricted to) areas outside Kabul.

There is no satisfactory evidence that a person who has been associated in the past with Hizb-i-Islami will always be regarded as such.

There is no longer evidence of real risk to individuals said to have possible knowledge of the whereabouts of Gulbuddin Hekmatyar.

DETERMINATION AND REASONS

1. The three appellants are nationals of Afghanistan. Each has some connection to Hizb-i-Islami (also spelt Hezb-e-Islami or Hisb-e-Islami). Each has had his appeal dismissed by an Immigration Judge and errors of law have been found in respect of each of their determinations. Each was found to be a credible witness and the factual basis of their claims is not in dispute. The reconsiderations were heard together in order to enable the Tribunal to give country guidance as to the level of risk that would be faced by persons who are either members of Hizb-i-Islami or associated in some way with such members. Because it is intended that this determination shall form country guidance a list of the background material that was considered by the Tribunal is to be found in a schedule attached to this determination and a summary of our conclusions about the risk to such persons is to be found at paragraph 140 , immediately before we consider the individual appeals.
2. In considering the appeals of the three appellants we have borne in mind that in each case the burden of proof is upon the appellant who has to establish that on, or after return to Afghanistan, he would face a real risk of serious harm. By serious harm, throughout this determination, we mean either persecution within the meaning of the Refugee Convention, serious harm within the meaning of the Refugee and Persons in Need of International Protection Regulations 2007 or inhuman or degrading treatment contrary to Article 3 ECHR.

Immigration History, Established Facts, Reasons for Finding that there was an Error of Law in the Immigration Judge's Determinations.

First Appellant

3. The first appellant gives his date of birth as 1 January 1970. He appears to have entered the United Kingdom illegally on 3 April 2002 and applied for asylum that day, when he was served with illegal entry papers. He was eventually interviewed in July 2004. His application was refused and removal directions issued to Afghanistan on 19 July 2004.
4. His appeal was heard by an Adjudicator, Ms J E Perrett, on 25 October 2004. The respondent was not represented. The Adjudicator found that he was a credible witness. The first appellant was born in Nangarhar and is a Pashtun. His parents lived in Budiala and a paternal uncle in Coma. His eldest brother, who was about five years older than him was already a member of Hizb-i-Islami when the appellant joined aged about 9 or 10 (1979 or 1980). He was still at school at that point but took pictures of people who wanted to join Hizb-i-Islami and gave them to his brother who

issued identity cards. The first appellant said his brother was not influential at that stage although he became so later. The first appellant claims to have been detained in 1986, while still at school, by the Najeeb regime on suspicion of being a member of Hizb-i-Islami, but he was released. He left school in 1989 whereupon he joined in fighting in opposition to the Communist regime of Dr Najibullah. He claims to have fought in Kunar, Parwan, Kabul, Jalalabad and also commanded men in doing so. His eldest brother was killed during this time fighting the Russians. The first appellant claims to have married his cousin in 1992 or 1993 but she remained at her father's house in Coma. He claims that he was paid by Hizb-i-Islami and also owned some agricultural land from which he obtained an income. In 1996, when the Taliban took power, the appellant returned to his uncle's house and helped him in his business, as a carpet and crockery wholesaler. He was arrested in 1997 by the Taliban who wanted him to fight on their behalf because they knew he was trained and knew the area. Whilst not happy, the first appellant fought as a foot-soldier for them for about two years in Kunar. He left Afghanistan because his brother was taken by members of the Northern Alliance at around the beginning of 2002, and he became aware that the Northern Alliance were enquiring of his whereabouts. He claimed to be fearful of returning to Afghanistan because he would be wanted by the Karzai Government because he had fought with the Taliban against them. His wife and uncle remained in Afghanistan. A cousin who is in the same position as him fled to Pakistan but returns occasionally to see his family. When he gave evidence to the Adjudicator the first appellant said his land had been seized by the Karzai Government. He told the Adjudicator that he had fought constantly from leaving school until about 1999. Despite accepting the first appellant's evidence, the Adjudicator found against him. She considered a report from the Danish Fact-Finding Mission and other background material, together with RS (Hezbe Islami – expert evidence) Afghanistan [2004] UKIAT 00278 which considered and accepted evidence from an expert, Dr Lau. She found that he would be at risk in his home area because Dr Lau had identified a risk that members or supporters of Hizb-i-Islami, or followers of Hekmatyar, may be reported, if only for the rewards on offer from the authorities. She then considered whether the appellant could go elsewhere. She noted that he had changed considerably in appearance since he fought in Kabul before 1995. She found that he would not be recognisable now in Kabul and concluded that he could live there safely.

5. The first appellant applied for permission to appeal which was granted by a Senior Immigration Judge. The appeal was treated as a reconsideration and at a hearing on 10 April 2006 the Tribunal (Immigration Judge Blair-Gould, Mrs R M Bray JP and Ms J A Endersby) found that the Immigration Judge had made an error of law. They said:-

- “1. The appellant is a former Hizb-e-Islami fighter and the Adjudicator found that, in effect, he would be in danger of persecution in his home area. However, she went on to consider whether he would be in danger in Kabul, and found that he would not.
2. Permission to appeal was granted in respect of this finding. The appellant particularly relied upon the evidence of Dr Lau reported in RS Afghanistan [2004] UKIAT 00278. The Tribunal reported Dr Lau's written opinion in full, and found him to be an impressive, authoritative, and careful expert witness. However, it did not report the case as a country guidance case and concluded only that on the particular facts of that appellant's case Dr Lau believed that his fear was well-founded.

3. The Adjudicator in the appeal before us said: 'Dr Lau considers relocation to be a problem due to an outsider not fitting in. He appears to be focusing on areas other than Kabul.' It is unclear whether Dr Lau intended to make this distinction or not. It does not appear that either in his written opinion or in his evidence before the Tribunal in RS he adverted to the question of whether Kabul, as the capital of Afghanistan, was a more cosmopolitan place where his other comments about the difficulty of relocation in general might not apply.
4. Another curious aspect of this appeal is the citation of the Danish Fact-Finding Report, which appears to have come to different conclusions in different places. The Adjudicator cites paragraph 6.10.1 (page 275 of the appellant's bundle) as showing that return to Kabul is a possibility, whereas the appellant cites paragraph 5.5 (page 262 of the appellant's bundle) saying that the UNHCR found that an internal flight alternative is not possible in Afghanistan.
5. In truth the Danish Report is somewhat unsatisfactory. It does not provide references for each of its findings, but only a general list of sources at the end, and it is unclear whether any particular finding is based upon one of the listed documents or upon its own investigations. Insofar as the findings are based upon documentary reports, those reports ought to be considered directly when the evidence is being assessed, rather than in the form of a summary in the Danish Report.
6. We did not consider that the Adjudicator had provided sufficiently clear reasons as to why she preferred the interpretation of these sources to the effect that the appellant would be safe in Kabul against that which would appear to show the contrary. We were also unhappy about her reasoning that the appellant would not now be easily recognisable there. This appears to ignore the necessity for anyone in such a society to be able to explain his name, family and history, and to disregard the established case law that a returning asylum seeker cannot be deemed safe on the basis that he can always lie about his identity and background.
7. We had well in mind the comments of the Court of Appeal in R (Iran) & Others v SSHD [2005] EWCA Civ 982 as to complaints of lack of adequate reasoning by Adjudicators. However, having regard to the difficulty of the issues raised we considered that the Adjudicator's determination showed a material error of law in these respects, and that the appeal should be adjourned for reconsideration in respect of the matters raised in the appellant's grounds of appeal to us.
8. We directed that the adjourned hearing should be held at Field House, and the file referred to the convenor of the country group covering Afghanistan for his consideration whether this appeal should be listed for country guidance decision. He will issue further directions for the adjourned hearing in due course.
9. The presenting officer mentioned the possibility of the respondent raising Article 1 F at a reconsideration hearing, having regard to Dr Lau's description of the Hizb-e-Islami as 'without doubt a very dangerous terrorist organisation determined to attack and destroy the current government and to turn Afghanistan into a "pure" Islamic state.'

The Second Appellant

6. The second appellant gives his date of birth as 1 January 1974. He was born and lived in the Charasyab district of Kabul province. Charasyab is about fifteen minutes

drive from Kabul City. The second appellant apparently entered the United Kingdom on 4 September 2002 in a lorry and claimed asylum on arrival. Following the usual investigation procedures, the respondent considered his application which was refused on 9 June 2004. As a result he was refused leave to enter and the respondent indicated that he intended to give directions for his removal to Afghanistan.

7. The second appellant appealed and his appeal was heard by an Adjudicator, Ms L Astle. In a determination promulgated on 13 September 2004 she dismissed his appeal on both asylum and human rights grounds. In doing so she accepted the second appellant as credible. As a result the following facts have been established. He is an ethnic Tajik and lived in the Charasyab district with his parents, five brothers and five sisters. His father had been a member of Hizb-i-Islami since 1978 and his role was to recruit members, distribute leaflets, give talks and hold meetings. The appellant's elder brother joined the party. A cousin, Karim, became a commander and was put in charge of security in the district during the Mujahadeen Government. The second appellant claimed that during the Mujahadeen Government "they" fought against General Dostum. At the hearing he produced a membership card and a number of photographs of himself. He said he had been a member of Hizb-i-Islami since he was 17 (about 1991). In the photographs he and others appear in various locations and are armed. He said that he had about 22 people under his command and claimed that he has been the bodyguard to the Chief of the Afghanistan Commission. He said the Afghanistan Commission was part of Hizb-i-Islami. General Dostum controlled the area adjacent to Charasyab, Balay-e-Hesar. The second appellant said that at that time the Afghan Ministry of Defence was controlled by Ahmed Shah Masoud, whose deputy was General Fahim. General Dostum was one of their commanders and, at the time, a candidate in the forthcoming Presidential election.
8. In 1995 the Taliban took control of the second appellant's area and Hizb-i-Islami did not fight them. One of his cousins was arrested, beaten and tortured by the Taliban, but released when a number of Hizb-i-Islami weapons were handed over. The second appellant's problems started in November 2001 when the Northern Alliance took control of Kabul. The Northern Alliance became involved in heavy conflict with the Taliban in the area. During the course of that, the second appellant's house was destroyed by tank fire killing three brothers and three sisters who were in the house at the time. His brother-in-law's house was also attacked and seven members of that family were killed. The second appellant took his mother away and, on return, found that his father and two of his brothers had been arrested by the Northern Alliance. They had been at a meeting, plotting to attack the Northern Alliance. He told the Adjudicator he still did not know what had happened to his father and those brothers, although a cousin who was also at the meeting was killed. He said some of those arrested were apparently sent to Cuba, but others disappeared. He subsequently heard that the Northern Alliance were looking for him. As a result he went to hide at a relation's house in Charasyab, with his mother. He stayed there until he could find an agent to help him leave, in March 2002. He told the Adjudicator that he feared persecution from the Northern Alliance, as a long-standing member of Hizb-i-Islami; and because his family is well-known for its involvement with that party. He asserted that his cousin was still a high-profile commander, and still fighting in Afghanistan along the Iranian border. He argued that as he was wanted in his home district, and as it is close to Kabul, he would not be safe in Kabul. There is nowhere else he could go in Afghanistan.

9. The Adjudicator accepted the second appellant was a member of Hizb-i-Islami and had fought for them. She noted that he did not say much about his own role and that he had not been included in the meeting to discuss the attack on the Northern Alliance. Adjudicator said:-

“In his interview he refers to his father’s prominence. As to his own role, he was ‘army officer and soldier, when they needed me I would go, otherwise I was a member’. At the hearing the appellant said that he was a bodyguard for someone and commanded 22 men but in the context of his earlier evidence I consider that, although he may have fought for Hizb-i-Islami, he was not a prominent or senior person in the movement. Any prominence that he may have had would have been on account of his family links.”

10. The Adjudicator observed that, although the second appellant’s house and his brother-in-law’s house were demolished, they were both in a war zone. Whilst it was possible they were targeted on account of the family’s links to Hizb-i-Islami, she noted it was also possible they were simply caught up in the fighting.
11. In a passage that was one of the main reasons for the reconsideration, the Adjudicator noted that the second appellant had been hiding in a relative’s house for several months, without problems and in the same district that he had lived in previously. She accepted a submission by the Presenting Officer that, had the Northern Alliance really been seeking the second appellant, they could have found him. We mention the reasons for the finding that there was an error of law in her determination in more detail in paragraph 13 but, in short, the point made was that it is not logical to say that because somebody had not been found, he was not being sought.
12. The Adjudicator concluded that, although she accepted the second appellant’s account, he would not be at risk. She did not mention, because it had not been decided, RS Afghanistan. She concluded that whether it was safe for an individual to return depended on his personal circumstances, and whether he continued to support Hekmatyar. She observed that the second appellant had been out of the country since March 2002 and that even when he was in Afghanistan he did not have a high profile, any prominence coming from family links. She observed that although the second appellant said his cousin was still involved in fighting, the appellant did not claim that any other family members, for example the person with whom he hid or his uncle, have had any problems as a result.
13. The Tribunal (Senior Immigration Judge McKee, Mrs R M Bray JP and Mr T A Jones MBS) considered the grounds and concluded there was an error of law. Their reasons for doing so are as follows:-

“A preliminary issue arose as to whether we had jurisdiction to entertain any of the grounds upon which leave had been sought to appeal to the Immigration Appeal Tribunal. In granting leave on 25th January 2005, Mr Freeman alluded only to the possibility of reconsidering the appeal in the light of RS [2004] UKIAT 278, which was promulgated shortly after the adjudicator’s determination in the instant case. Since then, Lord Justice Brooke has explained in R (Iran) [2005] EWCA Civ 982 that an adjudicator cannot commit an error of law by not taking account of a later Tribunal determination. So we clearly cannot use RS to identify an error of law at the first stage of this reconsideration.

On the other hand, we think that the Vice-President, by focusing on the above 'reported' case, may have regarded it as unnecessary to deal with the other grounds of appeal. He certainly has not refused leave on any of them. Given Mr Justice Collins' comments on rule 62(7) of the Procedure Rules 2005 in *Wani [2005] EWHC 2815 (Admin)*, we think we can interpret the grant of leave as impliedly allowing all the grounds to be argued.

Mr Harding, who settled those grounds, contends that, having accepted most of the appellant's account – that his father had been a member of Hesb-e-Islami since 1978, that his cousin had been a commander, that the appellant himself had fought for Hesb-e-Islami, that the family had fought against the Northern Alliance, who had arrested his father and two brothers in November 2001 – the adjudicator could not rationally have concluded that the appellant would not now be of interest to the authorities. Indeed, he argues that there is a dangerous circularity in the adjudicator's reasoning, at paragraph 31 of his determination, that *'had the Northern Alliance really been seeking the Appellant, they could have found him.'*

We agree that, in logic, the fact that someone has not been found does not mean that he has not been looked for. We note that the Adjudicator ends his survey of the background material by quoting from the Danish report, at paragraph 22 of his determination, that *'it depends on a person's history whether a former Hezb-e-Islami member runs a risk of being persecuted at present in Afghanistan.'* The adjudicator may not have given sufficient weight to this appellant's personal history, including both his own and his family's involvement with Hesb-e-Islami, in finding that the appellant will not be at risk on return.

There is thus a want of sustainable reasoning from the adjudicator's acceptance of the appellant's history of personal and family involvement with Hisb-e-Islami to his rejection of any real risk to the appellant, based largely on the fact that the Northern Alliance did not find the appellant when he went into hiding. This insufficient reasoning is a material error of law, in that it clearly affected the Adjudicator's decision upon the appeal.

The reconsideration will therefore proceed to the 'second stage', so that the current risk to the appellant (if any) can be assessed. Mr Tarlow, for the Secretary of State, agrees that credibility is not an issue, and that the factual matrix should be the history accepted by the Adjudicator. The Tribunal will need to consider up-to-date country background material, as well as the 'reported' cases of *RS* and *WK [2004] UKIAT 280.*"

Third Appellant

14. The third appellant was born on 21 March 1963. He is a Pashtun from Kandahar, who says he has no family in Kabul. He arrived in the United Kingdom on 11 September 1999 and claimed asylum. That application was refused but he was granted exceptional leave to enter on 23 May 2002 until 24 May 2003. He appealed against the refusal of asylum but his appeal was dismissed and an application for permission to appeal to the Immigration Appeal Tribunal was refused. He then applied for further leave to enter on 31 March 2003. That application was refused by the respondent on 1 March 2005 and the third appellant again appealed. His appeal was heard by Immigration Judge Malins on 15 August 2005. In a determination signed on 7 September 2005 the Immigration Judge dismissed the appeal on asylum and human rights grounds.
15. In dismissing his appeal the Immigration Judge followed the earlier Adjudicator's determination having considered it in the light of the guidance in *Devaseelan [2002] UKIAT 00702*. The Immigration Judge concluded that the third appellant was a

credible witness but said the appellant had not been found to have been arrested, detained or tortured in Afghanistan. She said “the appellant does not fall within any one of the risk categories due to his profile in the Hizb-i-Islami party and the fact that he was merely used by the Taliban to provide medical services”. She wrongly concluded that there was no asylum appeal before her, but she did hear evidence. The third appellant told her that he had worked for Hizb-i-Islami when they were fighting against the Russians. He was asked how the members of the then present government (in 2005) would know about his earlier activities and the appellant said:

“because we were all together, the Mujahedin are now separated (divided) – part in the government and part fighting against the government. I am a Pashtun from Kandahar and live there. Whether you are Pashtu or Taliban or Hizb-i-Islami or Al Qaeda, you are the enemy to the government”.

He was also asked how people would know that he had been employed as a nurse in a hospital and had treated Hizb-i-Islami members. When asked to say who it was that he feared in Afghanistan, the appellant gave the names of a former governor of Kandahar province who is now Governor of Jalalabad, a previous head of the secret services and various commanders who have been against Hizb-i-Islami, and members of the Taliban. When asked if he would be safe in Kabul, the third appellant replied that if he went there he would be in danger because of the presence of all the people who worked for the present government who would recognise him straight away. And he asserted, as soon as they knew he was Pashtu they would try to get rid of him. The third appellant said he would not be able to establish to any of the authorities that he is not a member now of Hizb-i-Islami even though he had not been involved with Hizb-i-Islami since shortly before the Taliban came to power. He said that between 1989 and 1999 he had been the owner of a medical store which supplied the Taliban with free medication. He told the Immigration Judge that although he had been given a British travel document to enable him to go to Pakistan to look for his family, he did not know where his wife and six children were.

16. On the basis of those facts the Immigration Judge considered risk on return. She looked at the Danish Fact-Finding Mission report. She drew conclusions about former members of Hizb-i-Islami and then concluded that Hizb-i-Islami no longer existed as a political party but could be characterised as a loose structure of individual warlords. She said that the appellant was not a warlord and the government would not be concerned with the former Hizb-i-Islami organisation noting that many of its earlier members are now involved in the present administration. She concluded that the only targeting of Hizb-i-Islami members was of high-profile activists and as the appellant, prior to 1998 was a nurse and never politically active, he would not be at risk of conduct which would breach his human rights if he were to be returned.
17. When the reconsideration came on before us, there had not been any finding that there was an error of law following the order for reconsideration made by a Senior Immigration Judge in September 2005. The basis of the order for reconsideration was that RS Afghanistan, whilst not being a country guidance case, was a reported case which favoured a conclusion that was different from that to which the Immigration Judge came (at least arguably). The Immigration Judge had not given any reasoning as to why she did not follow or consider the reasoning in RS Afghanistan. The third ground in the application argued that she was wrong to conclude that there was no asylum claim before her.

18. Mr Kovats conceded that there had been an asylum appeal before the Immigration Judge and for that to have been overlooked was a material error of law. We were therefore able to proceed to the second stage of the reconsideration and consider the risk to the appellant on the basis of the facts as accepted by the Immigration Judge, and the Adjudicator before her.
19. By the time that we came to consider the second stage reconsiderations in these three appeals the respondent had served replies, as provided for in Rule 30 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. The replies related to the first and second appellants only. They asserted that the Tribunal should find that those appellants are excluded from the protection of the Refugee Convention because of the provisions of Article 1F(c) which provides:-

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

...

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”
20. The interpretation of Article 1F(c) was considered by the Immigration Appeal Tribunal in Gurung (Exclusion – risk – Maoist) Nepal* [2002] UKIAT 04870 to which we will return.

The Previous Position on Risk and Those Associated with Hizb-i-Islami

21. The immigration Appeal Tribunal last looked at the situation for those associated with Hizb-i-Islami in RS Afghanistan, a decision notified on 30 September 2004. That Tribunal had the benefit of an expert report, and oral evidence, from Dr Lau. They also considered a Danish Fact-Finding report dated June 2004.
22. Dr Lau is a barrister and Head of the Law Department at the School of Oriental and African Studies at the University of London. He gave more personal details in his report and said that he had visited Afghanistan five times in the previous two years. He had done so on behalf of the German Government in January that year in connection with consultations on Afghanistan’s new constitution. In July 2003 he held workshops there on the reform of Afghanistan’s criminal procedure. During the course of various visits to Afghanistan, he had met with many judges, police officers, prosecutors and lawyers, as well as NGOs, UN officials and government officials. He said that the opinions in his report are based on his experience of working on Afghan legal issues and the dynamics of law enforcement.
23. The Tribunal was sufficiently impressed with Dr Lau’s report that they quoted it in full. The appellant in RS Afghanistan had not been found to be wholly credible by the Adjudicator, although it was accepted that he and his brother were Hizb-i-Islami members and that that appellant’s brother was a commander who had a position of prominence. That appellant had been involved in surrendering weapons to the Taliban in October 1996, following which he and his brother abandoned their political activities. That appellant has set up a shop in Jalalabad and his brother went to farm. They had no further problems with the Taliban and led a peaceful life. They did not

leave the party as such, although they described it as breaking up saying it was no longer functional.

24. The decision can be read for the full text of Dr Lau's opinion but he said this at paragraph 11:-

"The war against terrorism in Afghanistan is being fought by numerous agencies and groups. It is fought largely in secret and has so far stayed clear of Afghanistan's legal system. The silence of the objective evidence on the trial of suspected terrorists, of the rate of those arrested as suspected terrorists, indeed the almost complete absence of any information in the public domain on the number of persons arrested because they are accused of being associated with Al Qaeda, the Taliban and Hizb-i-Islami is deceptive. Occasional newspaper reports reveal that arrests and interrogations of suspects take place on a very regular basis. They are carried by Afghan internal security and intelligence agencies, US agencies and even private mercenaries co-operating with members of the Northern Alliance ..."

He later said:-

"13. Secondly, I have been asked whether his continuing fear of return to Afghanistan for the reasons given in his statement are well-founded. In my opinion the most serious risk arises from his association with the Hizb-i-Islami. The group is without doubt a very dangerous terrorist organisation determined to attack and destroy the current government and to turn Afghanistan into a 'pure' Islamic state. Its leader is believed to be in hiding in Afghanistan and despite concerted efforts he has not been apprehended. His group continues to carry out terrorist attacks.

14. In my opinion it is difficult to discount the appellant's fear as irrational only because his own association with the Hizb-i-Islami ceased some time ago. It appears that members of the Northern Alliance think otherwise, as evidenced by his arrest, interrogation and mistreatment [it should be noted that the Adjudicator had not accepted that the appellant had been arrested, interrogated and mistreated]. I am not aware of any public trials of suspected terrorists and thus there is no judicial forum for him to protest his innocence. Given the substantial financial rewards for information leading to the arrest of suspected terrorists promised by the US there is ample motivation to 'test' the knowledge of anyone who is believed to have been close to the Hizb-i-Islami. In my opinion the appellant's fear in this regard is well-founded."

25. Dr Lau did not think that the apparent westernisation of that appellant would cause him to be at particular risk on return but when asked about the option of internal flight he said that in his opinion this was very problematic and went on to say:-

"The country's societal structure is very tribal in nature and it is most problematic for an outsider to fit into an area where he has no family and relatives."

He then said that he did not consider that the legal system as it was at that stage could offer any chance of effective protection and that ISAF does not protect individuals.

26. The Tribunal accepted the appellant's assessment that "once an individual joined a group or party then others considered he was a member 'til the end'" as a credible assertion in the light of Dr Lau's oral evidence.

27. The Tribunal heard argument about the Danish Fact-Finding Mission report but concluded it was not wholly consistent in its assessment of the risk facing those involved with Hizb-i-Islami. At one point it said that supporters did not have problems with the Government if they make it clear that they did not work for Hekmatyar. It observed that some former members occupy high positions in the Government. The report said that whether a former member of Hizb-i-Islami is at risk of persecution depends on his individual history and particularly on the connection of the person concerned with Hekmatyar and the extent to which that person has been in conflict with powerful people in Afghanistan. The report said that those who were at present active for Hizb-i-Islami are considered as being at war against the government and on a par with the Taliban supporters. The Tribunal observed that Afghanistan was a country where “the rule of law has broken down and there is no realistic prospect of an individual establishing his innocence through due process”. That, it said, added to the incentives to detain and ill-treat those suspected of involvement with Hizb-i-Islami in the hope of obtaining information which may lead to senior wanted men and enormous rewards, there was a real risk that not only those who were genuinely active for Hizb-i-Islami but those suspected of such involvement past and present faced similar risks.
28. More recently the Court of Appeal has made some obiter observations on this issue in R (Iran) [2005] Imm AR 535, at paragraph 147. The court quoted from RS Afghanistan and then said:-

“The main conclusion to be drawn from that decision was that an appellant would be at real risk of persecution and ill-treatment on return to Afghanistan if he had a past association with the Hizb-i-Islami, actual or perceived through his family, in the absence of clear evidence before the authorities in Afghanistan that he had disassociated himself with Hizb-i-Islami. There were substantial rewards for information leading to the arrest of suspected terrorists promised by the United States. There was ample motivation to ‘test’ the knowledge of anyone who was believed to have been close the Hizb-i-Islami; the passage of time did not help suspects.”

The court, in drawing its conclusions in paragraph 152, noted the submission by Mr Manjit Gill QC that, although RS Afghanistan had not been formally treated as country guidance because the IAT had remitted the case to the Adjudicator, it had informed all future decisions taken within the Immigration Appellate Authority about the risks facing those formerly associated with Hizb-i-Islami, if returned. One of the matters raised for consideration in this country guidance case was whether the Court of Appeal had broadened the conclusions drawn from Dr Lau’s report beyond those contained in RS Afghanistan.

29. The hearing of this reconsideration has been postponed on a number of occasions to enable Dr Lau, who was said at various times to be visiting Afghanistan, to appear before us as an expert. In the event he did not do so. We heard instead from Dr Antonio Giustozzi who prepared a report and gave oral evidence. No reason or explanation was ever given as to why we had no further report from Dr Lau. We have therefore concluded that we cannot assume that Dr Lau would necessarily still stand by the evidence which he gave in 2004, or that his opinions would now be the same. Whilst we take note of what was said then, by him, we do not regard his then evidence as a starting point upon which we can build. Rather we look at the situation today based on the evidence which is before us and not that which was before the Tribunal in RS Afghanistan.

Dr Giustozzi's Evidence

30. Dr Giustozzi prepared a combined report for the first and second appellants and a separate report for the third appellant. His original reports were produced in January 2007 but he updated them both on 3 April 2007. He helpfully put the extra text in bold in the more recent versions. He told us that there had been no deletions, save that in the section dealing with abuses by Afghan security agencies he had replaced the text. His original text was available in the earlier reports which form part of the evidence submitted to us for these cases. Both sides accepted that Dr Giustozzi was an appropriate expert. Mr Kovats, in the opening words of his submissions, said he accepted that Dr Giustozzi is a "knowledgeable, fair and objective witness and that he (Mr Kovats) did not dispute his evidence insofar as it was factual". Mr Kovats went on to argue that his opinions on the risks to the appellants were speculative both in his report and cross-examination, and we will return to that. In his report Dr Giustozzi explains that he is a Research Fellow at the London School of Economics and Political Science (LSE) in the Development Studies Institute. He has a PhD in International Relations from the LSE that he achieved in 1997. He gives a list of some of his publications, some of which are for the Crisis States Research Centre at the LSE. Others appeared in Jane's Homeland Security and Resilience Monitor, and elsewhere. He also lists a number of current research projects. He says he has given evidence in legal proceedings in the United Kingdom, the Netherlands and Australia and has declined to prepare expert reports where "the account given jarred with my knowledge and understanding of relevant conditions in Afghanistan." He acknowledged his duty to the court.
31. When he gave evidence he was asked about his sources. He explained that since he left his employment with UNAMA (United Nations Assistance Mission to Afghanistan) he has been to Afghanistan approximately three times a year. He last returned to the United Kingdom on 16 March 2007. The introduction to his report given the periods when he has been in Afghanistan. They include: April/May 2003; October 2003 to September 2004 (with UNAMA as Political Affairs Officer in Kunduz and Mazar-i-Sharif); November 2004; March 2005 (to carry out a consultancy project on the provincial administrations of Kandahar, Faryab and Herat provinces); February 2005 (to carry out research on customs and taxation issues in Kabul); May 2005 (to research the relationship between business and politics in Kabul, Mazar and Herat); September to October 2005 (to research local power structures in Herat province); January – February 2006 (to study the security situation and local strong men in Kabul, Kandahar and Jalalabad); May to June 2006 (to study security and the 1980s Jihad movement in Kunduz, Takhar, Baghlan and Kabul); September to October 2006 (to study Jihad and security issues in Kabul and Paktya); and February to March 2007 (in Kabul and Nangarhar, studying the 1980s Jihad). He told us that during those periods he had built up a number of contacts. During his role as Political Affairs Officer in Kunduz and Mazar-i-Sharif his job was to report on the situation in those areas, to mediate between groups where necessary and to advise the local administration in Mazar-i-Sharif. He had to report to UN headquarters in Kabul on the local situation. His sources include expatriates working for the United Nations, and people working for various diplomatic corps. He spoke to others working for NGOs and officers working for the various foreign militia contingents. Whilst with the United Nations he worked for, in particular, the Assistant Mission Head of the Political Section, Chris Alexander. He also dealt with other Political Affairs Officers, of whom the most high-ranking is Talatbek Magadykov. He worked closely with several Embassies, but in particular the Italian, Bulgarian and German missions. He also

used to work with the UK Embassy but most of the people he knew there have been replaced and he does not now know the staff as well. He has contacts among the EU Mission in Kabul and among the Italian, British, Bulgarian and German military contingents (i.e. ISAF). He knows the Head of Political Affairs at the EU Mission (Michael Simple) and two other Political Affairs Officers, although they have recently been replaced. As to the NGOs, he has contacts with the Afghan Research and Evaluation Unit which he regards as very important as it does research into the situation in Afghanistan. He also has contacts at CPOU, the Afghan Research Institute. Asked about the NGOs, he said that he knows various people but does not have permanent contacts. He described them as mostly Afghan NGOs but with some international ones, such as Oxfam and GTZ (a German umbrella organisation for their NGOs). He said there are probably several hundred Afghan NGOs and he makes a point of going to interview people whenever he goes to a new place. Within the Afghan administration he knows Colonel Nekzad of the Ministry of the Interior – he is Head of the Crime Department. He knows several Chiefs of Police in the provinces but observed that they are rotated very frequently. He makes a point of going to see the Police Chief in provinces that he visits, in order to discuss the general situation. He has interviewed approximately 20 to 25 Members of Parliament. Although he now knows some of the Ministers, he has not spoken to them since they have been appointed as Ministers. He has spoken to some Deputy Ministers and some members of the Presidential staff. He has interviewed a number of Hizb-i-Islami people in the last two years. He said some were former commanders, and some were members of the party but no actual fighting members. He has spoken to at least 30 activists.

32. The reports, which are not identical because they deal with issues relevant to each appellant, do have much common material. They start by giving a useful background to Hizb-i-Islami. The name means “Islamic Party”. It was formed in 1979 as one of the factions of what used to be the Muslim Youth Movement. It was one of the main groups in the resistance against the Communist regime and Soviet occupation. It is a party which is largely Pashtun-based although, in the 1980s and 1990s, it had a strong base among Tajiks and Uzbeks. Around 1992 it fought against Jamiat-i-Islami, another faction which had derived from the Muslim Youth Movement. Jamiat was predominantly a Tajik group and controlled most of Kabul. There was fighting between Hizb-i-Islami and Jamiat-i-Islami from 1993, with defections of Hizb-i-Islami commanders so that Hizb-i-Islami became closer to being a Pashtun group than before. The fighting was largely over control of Kabul, but Hizb-i-Islami never managed to take the city from Jamiat. In 1996, Jamiat and Hizb-i-Islami reached an agreement and formed a coalition government in the face of the approaching Taliban. The coalition was forced to flee and, as the Taliban occupied most of Afghanistan, their organisational structure virtually collapsed. That was in part because many Pashtun members joined the Taliban. The reports suggest that not all Pashtun members of Hizb-i-Islami joined the Taliban in 1996, but those who did not had little support and either fled the country or hid in the villages. Dr Giustozzi, simplifying somewhat, said that the activists remained loyal to Hekmatyar even when rank and file members defected to other groups. They did so largely on ethnic divisions, with Tajiks going to Jamiat-i-Islami and Pashtuns to the Taliban. He said that following the fall of the Taliban, at the end of 2001, many former members of Hizb-i-Islami who had joined the Taliban found themselves isolated (especially those in Kabul or in northern and north eastern Afghanistan). In order to avoid retribution, they switched sides once it became apparent the Taliban were going to lose. Many former Hizb-i-Islami commanders joined Jamiat-i-Islami not least because they were in their area.

33. In a section headed "Hizb-i-Islami Today", he said that not all the Hizb-i-Islami members joined Jamiat. Many commanders maintained their independence, or even stayed on the Taliban side, in particular in the south east and east of Afghanistan. The leader of Hizb-i-Islami, Gulbuddin Hekmatyar, is in hiding although he issues periodical declarations of Jihad against the Afghan Government and foreigners. Dr Giustozzi suggests that in early 2006 it was apparent that not many commanders were still following him, although a hard core of activists seem to have remained faithful. It seems that they have allied themselves with the Taliban, against the Afghan Government and the Coalition/ISAF troops. He referred to military activity by Hizb-i-Islami in 2006 in the provinces of Kunar, Laghman and Logar with some smaller scale activity in Kabul, Kapisa, Nangarhar, Paktya, Khost and Paktika. It is thought that the activists in Paktya, Khost and Paktika are mostly people with a Hizb-i-Islami background. NATO considers that Hizb-i-Islami's strength is low with only 300 to 400 fighters during 2006. Dr Giustozzi considers this is too low, given the spread of the party's activity and regards that as an average for active fighters. He feels that a figure of around 1,500 is more realistic to allow for people who are resting, and travelling to and from areas of conflict.
34. Dr Giustozzi said that because of that activity much of the government's counter-insurgency activity is concentrated in the same areas. He said that "individuals linked to Hizb-i-Islami or the Taliban are therefore now particularly likely to be targeted by the security services". He referred to a series of arrests starting in April 2002. He said they had contributed to driving Hizb-i-Islami underground and towards armed opposition. He made reference to the arrest of hundreds of members of the party who had gathered in Kabul for a meeting aimed at reorganising the party, outside Hekmatyar's influence. The arrests followed an accusation that they were in the process of organising a coup. The UN considered the accusation did not stand up to scrutiny, and the reality was that the leaders of Jamiat appeared to have been wary of a new and more credible party emerging to compete for the sympathy of fundamentalist-leaning Afghans. Dr Giustozzi takes issue with a contrary statement in RS Afghanistan (paragraph 23) saying that the arrests also targeted people who had broken up with Hekmatyar. Arrests of activists have continued and Dr Giustozzi cited arrests in Logar province in November 2006. He suggested that there is evidence that remnants of Hizb-i-Islami have re-established a network throughout the country over the past three years, but that the network includes many individuals who no longer openly claim allegiance to the party. He suggested in his report that it is the existence of these underground networks which explains why the security services are interested in people with the first and second appellant's profiles.
35. He referred to a commander, Hazrat Ali, who is the main representative of Jamiat-i-Islami in Nangarhar, Kunar and Laghman. He says that Hazrat Ali earned his position by being the only commander to keep fighting against the Taliban, which he did from the mountains on the border with Kunar and Nuristan. Hazrat Ali was originally a commander of Khalis's group, a splinter from Hizb-i-Islami and switched to Jamiat after the arrival of the Taliban. Hazrat Ali has built solid relations with the American occupation forces which he uses to consolidate his power, despite his reputation for looting and abuses against civilians. After the Taliban collapsed at the end of 2001 he became commander of the local army corps. When that was disbanded in 2004, following the disarmament of the militias, he became commander of the provincial police force. His core power base is represented by the Pashai ethnic group (along the border with Kunar province); his Kabul connections are such

that he has also been able to establish a strong network among Pashtun commanders in Nangarhar and Laghman. Through Jamiat connections, he is able to enlist the support of a network which covers most of the country, including Kabul. Dr Giustozzi suggested that the power structures in Nangarhar are such that Hazrat Ali is striving to consolidate his hold over the province where he sees Hizb-i-Islami as an obstacle, because it is the only party in Nangarhar with some organisational strength and party discipline. As a result, the targeting of members and former members of Hizb-i-Islami has been particularly intense under his control in that region. Dr Giustozzi postulated that the first appellant's father and brother might therefore have fallen victim to Hazrat Ali's attempt to purge his strongholds of Hizb-i-Islami.

36. NATO's commanding officers are said to believe that the Taliban and Hizb-i-Islami, in alliance, will try to cut off Jalalabad from Kabul. In October 2006 it was suggested the Taliban planned to fight through the winter to throttle Kabul, although it has clearly not happened yet. Dr Giustozzi described the areas where these operations are likely to take place and suggested that, as they were Hizb-i-Islami strongholds in the past, Hekmatyar's party would play a major role in that attempt. He described a build-up of insurgent activity over the past year. He said that the increased activity is one of the causes of the growing repression of Hizb-i-Islami by local security forces loyal to Hazrat Ali, and that the search for members of Hizb-i-Islami in the area of Jalalabad is likely to intensify further. He explained that the general increase in the level of violence in Afghanistan during 2006 also happened in the south east, in particular in Paktya, northern Paktika and Khost. These were never Taliban strongholds and it is thought the increase in violence is associated with Hizb-i-Islami activists. Dr Giustozzi said the implication is that the party must have had at least some success in its campaign to recruit old and new members. He suggested that it is logical that the security agencies would assume that the resurgent Hizb-i-Islami and Taliban would target families who had previously been affiliated to the two groups for recruitment.
37. He said that former members of Hizb-i-Islami are also targeted by the Jamiatis who hope to prevent the emergence of potential competitors in the political arena in a number of regions in the country.
38. At paragraph 15 of his report for the first and second appellants there is reference to former members of Hizb-i-Islami who did not want to join Jamiat, drifting towards President Karzai from about 2003. Some were local and national leaders of Hizb-i-Islami. Dr Giustozzi cites Bashir Baghlani and Wahidullah Sabawoon. This realignment started when a rift began to develop between President Karzai and Jamiat and other non-Pashtun factions. This caused some Pashtun activists and commanders to reconsider their options and, by 2004, openly announce their support for Karzai, refusing to acknowledge the leadership of Hekmatyar. Sabawoon had declared his split from Hekmatyar before 2001, but Baghlani has never said so openly. This caused Jamiat's hostility towards Hizb-i-Islami to strengthen. In 2005 a further splinter faction, led by Faruqi and Arghandiwal, was registered as a legal party in Kabul. That faction is negotiating a merger with other splinter factions from Hizb-i-Islami. Dr Giustozzi suggested this may also have caused some alarm in the ranks of Jamiat. The two factions succeeded in having a few Members of Parliament elected in September 2005.

39. There is some evidence that Hizb-i-Islami is active again in Parwan and Kapisa, where it had been thought that all its commanders had joined Jamiat. There have been a number of assassinations and Dr Giustozzi considers that Tajik members of Hizb-i-Islami, like the second appellant, may be particularly at risk as the Jamiat leadership is particularly jealous of its monopoly over the Tajik political representation in the north east, the north and areas around Kabul.
40. Dr Giustozzi's report then moved on to the attitude of the security services towards Hizb-i-Islami. He started by saying that they have limited resources and technology and that information-gathering techniques are limited to the recruitment of informers and the interrogation of suspects. He considers that the first and second appellants, who have come from families with a strong background in Hizb-i-Islami, could be a future target for arrest and interrogation on return to Afghanistan, "the more so given the spread of the insurgency to their home areas of Charasyab and Nangarhar." He suggests that they could be targeted to obtain information about other members of Hizb-i-Islami, or as a result of pre-emptive arrests aimed at preventing the insurgents from establishing permanent bases in Charasyab. Dr Giustozzi referred to an interview he had with Professor Allah Dad of the Jalalabad Pedagogical Institute in February this year. He is the father of a young member of Hizb-i-Islami and told Dr Giustozzi that his son had to flee the country because of harassment by the security forces. The Professor said that similar cases were not infrequent in the area. That interview was the subject of cross-examination by Mr Kovats and we will return to it.
41. Dr Giustozzi said that Jamiat-i-Islami's main power base is concentrated within the Security Directorate (Intelligence) and the Ministry of Interior. As a result there will be no shortage of individuals who are biased against Hizb-i-Islami within those agencies. He observed that none of the security agencies have so far shown much concern for human rights and said there is abundant evidence that Afghan law enforcement agencies have a poor record of sticking to the law. He considered that arbitrary arrest and detention, whilst prohibited by law are both a serious problem, as is access to lawyers and the inconsistently applied use of warrants and bail. Pre-trial detention goes well beyond the limits established by law, and the police have been known to detain prisoners even after they have been found innocent. There is wide evidence of the extraction of bribes to obtain release or to avoid arrest, and of the arrest of relatives to force fugitives to hand themselves in, or prisoners to confess. Dr Giustozzi mentioned that despite thousands of casualties each year, and repeated reports of arrest of insurgents and suspected insurgents, there has as yet been no public trial of any insurgent in the four years from the start of the current conflict. He suggested that while the insurgency is active, and the standards of the rule of law are even lower than elsewhere, suspects are regularly arrested without warrant on a simple suggestion of wrongdoing. That leaves room for abuse, such as informers reporting those whom they do not like as activists. He made reference to the number of complaints received by the Afghan Independent Commission on Human Rights. He said that 37 out of 410 complaints in 2006 were of illegal detention by the authorities, 71 of torture and 11 of extra-judicial killings in Kabul. 396 violations were reported in Nangarhar in 2006 of which 34 were illegal detentions, 44 torture and rape, and 23 extra-judicial killings. He said the data gathered by the commission does not cover the whole of Afghanistan.
42. Dr Giustozzi reported an improvement in policing in Kabul during 2003 and 2004, following the completion of training of a few batches of recruits at the new police

academy. He said that the UN police advisors feel the effectiveness of the training programmes has been diluted because the professionally trained recruits are distributed thinly among existing police units, with the result that they are unable to influence the behaviour of their colleagues. The UN fears that many recruits will adopt the same pattern of corruption and a lack of professionalism that is endemic among the older police officers. The UN has reported a spate of attacks against NGOs in Kabul, some of which were carried out by men in police uniform. He said that in 2005 policing in Kabul deteriorated again following the sacking of officials within the Ministry who were aligned to Jamiat. There is evidence the corruption in the Afghan police is reaching new heights.

43. Dr Giustozzi suggested, in paragraph 23 of the report, that relocation in Kabul would not assist the first or second appellants. He said that is because the security presence in Kabul is heavier than in Charasyab or Nangarhar. Also because it is NATO's belief that the insurgents are targeting the capital with an increase in violence. If anything, the search for individuals with a Hizb-i-Islami background is likely to intensify. Dr Giustozzi postulated that given the arrest of their relatives, the first and second appellants may now be particularly motivated to link up with the opposition.
44. His report dealt with an issue that he later concentrated on in oral evidence. He said that whilst the appellant's may be able to escape detection at Kabul Airport if their name is not on a list of suspects, they would soon need to look for jobs and accommodation. Dr Giustozzi suggested that they would then have to disclose information about their places of origin and their family background. Failure to do so would hamper their chances of finding either work or accommodation. He suggested that lying would not work in the medium or short term, as employers and landlords are able to check information through networks of acquaintances, and regularly do so. He said that whilst it might take weeks to receive the feedback, eventually the background of the individuals would be checked. He also suggests that the settlement of a stranger, even in a neighbourhood in Kabul, attracts some attention, especially so now because the in-flow of returnees from Pakistan has dried up. He said that Kabul is mostly organised in ethnically and tribally homogenous neighbourhoods, which makes tracking down individuals easier. He suggested that if the security services were interested in either of those appellants they would easily be tracked down. Dr Giustozzi did not regard the second appellant's ethnicity as a factor, given that most security service staff are Tajiks themselves. There are no reports of clashes between Tajiks and either Uzbeks, Pashtuns or Hazaras, in Kabul.
45. Dr Giustozzi suggested that finding accommodation or a job would be a problem in Kabul. Unemployment is currently estimated at around 33% of the workforce. Accommodation is not easy to find for a returning refugee, because of the massive return of refugees from Pakistan which led to the population of Kabul doubling in twelve months, and the fact that 65,000 to 70,000 houses were destroyed by the hostilities. He said that rents went up from 2002 to 2004, with four to six-fold increases in rental prices having been reported over the last eighteen months. He suggested that one male labourer's wages may be able to pay for the rent of a house, but it can take more. Even in remote parts of Kabul a two-room apartment could cost two and a half times the salary of a civil servant in May 2003. It is now suggested that even finding a place in a ruin is becoming impossible. On average, houses and flats accommodate more than three times as many people as they were designed for.

46. In paragraph 26 of this report Dr Giustozzi disagreed with one of the conclusions by Dr Lau in his report for RS. He agrees that the Americans have offered high rewards for the capture of the leading figures of Hizb-i-Islami and accepted that could lead some individuals in the security forces to try and seize members of Hizb-i-Islami for the purpose of information-gathering. However, he did not think that risk need concern either the first or second appellant because it has become clear that very few people know the whereabouts of Hekmatyar or the other top leaders of Hizb-i-Islami. Furthermore, it is considered that those who do know must be located around Kunar, where it is thought that Hekmatyar is based. Neither of those two appellants would be anywhere near to either Hekmatyar or Kunar and would not be of interest to anybody seeking information about the top leaders. He summarised by saying:-

26. ... The risk to both Mr PM and Mr SS would arise from the fact that in the current conflict situation the security forces will be looking out for individuals with personal or family links to the insurgent groups (Taliban and Hizb-i-Islami). The fact that both of them had relatives arrested by the security forces contributes to strengthen their profiles as potential recruits for the insurgency. In the case of Mr Sadat two factors compound his personal risk. The first one is that being one of the limited number of Tajik activists in the ranks of Hizb-i-Islami, his value to both Hizb-i-Islami and the security service is highlighted as the former tries to expand its activities into Tajik territory. Since the security service are still largely staffed by Jamiatis who see Afghan is Tajik in the north east and around Kabul as their own political monopoly, there will be an additional incentive for them to target somebody with Mr Sadat's profile. The second factor of risk derived from the fact that Mr Sadat is from Charasyab, a district which the insurgents started infiltrating very recently and that is one of the gates to Kabul. The security force services must as a consequence redouble their effort to round up suspect individuals from this district.

27. In the case of Mr PM, a factor compounding his situation is that he hails from Nangarhar province, where a local warlord Hazrat Ali has for some time been busy trying to root out Hizb-i-Islami in order to prevent the expansion of the insurgency in the area. As despite all there are signs (sic) that the insurgency is slowing spreading anyway, it is unlikely that there will be any let up in such efforts. It is worth noting that Hazrat Ali is well networked in Kabul, through his Jamiati connection."

47. In his report for the third appellant the general background evidence is the same. At paragraph 9 he referred to the position in Kandahar where he said Hizb-i-Islami had a number of commanders during the Jihad against the Soviets. Whilst the commanders were the most active in the area, their tribal base was narrow and the commanders were largely wiped out by the Taliban when they occupied the region in 1994. He said that at present there is no record of activity of Hizb-i-Islami in Kandahar. He speculated however, that it is likely that former members of Hizb-i-Islami are serving under the Taliban flag in the area. The Ghilzais, the tribe from which Hizb-i-Islami drew its commanders, are said to be one of the core tribes within the Taliban ranks. Kandahar has become much more affected by violence in 2006, it having been relatively quiet in 2005. There were reports in 2006 of Taliban attempts to recruit within Kandahar City, including from the ranks of health staff. This was apparently with the intention of establishing health services in areas under their control and attending to their own wounded. Dr Giustozzi said much the same about the third appellant's situation not improving by relocating to Kabul as he did in his report for the first and second appellants. He again did not think the ethnicity of the third appellant is a risk factor, given that 40% of the population of Kabul is Pashtun.

He said his Kandahari accent “if he has one” might attract some attention because the Taliban are expected to attempt to infiltrate the capital, but he did not think that would get him into difficulty with the security services. He would have the same difficulty in obtaining accommodation and work as the other two. The same view applies about there being no significant risk of the authorities believing that the third appellant may know the whereabouts of Hekmatyar or of other Hizb-i-Islami figures.

Dr Giustozzi’s Oral Evidence

Evidence-in-Chief – Mr Jacobs for the First and Second Appellants

48. Dr Giustozzi was asked about the Danish Fact-Finding Mission report of 2 December 2004. It cited a range of sources to the effect that former members of Hizb-i-Islami, including commanders would not have a problem with the Afghan Government, if they made it clear they are no longer working with Hekmatyar. Although this would depend on the person’s connection with Hekmatyar, and the extent to which the person is still in conflict with powerful people in Afghanistan. He said that, in principle, being a former member of Hizb-i-Islami is not against the law. The difficulty is that current members do not normally admit that they are members, and the organisation is carrying out military and terrorist activities against the Government. Dr Giustozzi suggested that unless somebody was caught red-handed they would not normally admit their involvement. He thought the distinction between former and current members is difficult to make and one cannot tell by talking to them. He felt that making a distinction was an arbitrary act and that the security forces would assume that former members may still be active. Asked what had changed since the 2004 report, he said that attempts by Hizb-i-Islami to organise politically had intensified. Some former members had been elected, although they were largely people with a background of co-operating with other groups, and are almost certainly people who spoke for Hizb-i-Islami many years ago. These people had a track record of having split with Hekmatyar and it is public knowledge that they have difficult relations with him. Otherwise, he said the violence has intensified since 2004, and 2006 has been the most violent year for some time. Until 2004 the violence had been mostly in the remote areas but as 2006 approached there was a shift from guerrilla warfare to terrorist activities. Suicide attacks became quite large scale in 2006. There are now attacks in the cities and this has had an impact on the behaviour of the security agencies. They are now more concerned than they were before to prevent infiltration into the cities. He said that the means used to identify potential activists may be different now from those that were used in 2005. Then, they were be looking for armed people roaming about the countryside, now they are looking for people with more sophisticated infiltration techniques. The infiltrators they seek in urban areas are closer to the profile of a Hizb-i-Islami supporter. In part that is because the Taliban is largely composed of rural people with no strong networks in the cities. Now, there is a need to rely on people from the cities and former members of Hizb-i-Islami are valuable. Hizb-i-Islami has always had a strong membership of educated people. The Taliban look for people rooted in the urban areas because they are seen as possible recruits as infiltrators.
49. Dr Giustozzi was then asked about his view that on return the appellants would not be at risk as a result of people seeking rewards for information relating to Hekmatyar. He said that it now seems to be assumed that Hekmatyar is hiding in Kunar province, a very mountainous area near Pakistan and a former stronghold of Hizb-i-Islami. It has become obvious that his whereabouts are not common knowledge among

members of Hizb-i-Islami. Therefore, in seeking Hekmatyar the authorities' only interest will be in high-ranking members from Kunar province.

50. Asked about the assertion in paragraph 23 of Mr Kovats' skeleton argument that the evidence shows that former members of Hizb-i-Islami would not be at risk unless they are perceived to be currently supporting the Hekmatyar faction and that it would generally take more than the fact of past membership to create such a perception, Dr Giustozzi said that nobody would say in public that they are current members of Hizb-i-Islami although it is not against the law to be so. He said that former members, who can demonstrate by their record that they have split from Hekmatyar, or fought against the Hekmatyar faction, are safe to the extent that they have in some instances become active in politics. If they cannot demonstrate that they have distanced themselves, people are at risk of at least harassment. He explained that the Afghan security agencies are not very sophisticated. They do not have any electronics or modern equipment. One major key to dealing with an insurgency is to gather information. The way in which they gather information is to round people up and put them under pressure. They attempt to turn them into informers, and may jail people for long periods. Informers could lead to family members who are current or former members. He said there is a range of ways of putting on pressure. It can take the form of repeat visits to homes, threats, arrests and interrogation. Such a consistent pattern of threats and harassment can be applied particularly to young males who are seen as the best possible recruits for Hizb-i-Islami. He did not think that, in terms of information gathering, it made much difference whether a person had a family with a tradition of support for Hizb-i-Islami. The authorities look, not for culprits but for those who can provide information on the movement and whereabouts of members of the insurgency. He said that family members can be targeted, as can anyone who has access to the insurgents. He said that recruitment into Hizb-i-Islami tends to happen at clan and family level and therefore it is not unreasonable for the authorities to assume that clan or family will know what is going on in a particular area where the population effectively belongs to one pool of people.
51. He said that Hizb-i-Islami are having some difficulty in recruiting. This is partly because they do not have the same level of funding as the Taliban, but also because their support used to be among the educated. Education in Afghanistan has virtually stopped over the last twenty years, and very many people who were educated are no longer in Afghanistan. The typical Hizb-i-Islami member was somebody who had been recruited in the 70s and 80s and was educated. It is among their families where there is the best chance of recruiting new members. He said it is becoming difficult to find people who are willing to fight and to recruit people competent to undertake guerrilla warfare, where tactics and strategy can be complicated.
52. Asked whether the authorities know that people who belong to the formal traditional families are at the forefront of recruitment into Hizb-i-Islami, Dr Giustozzi said that the educated people in the intelligence services have been fighting against Hizb-i-Islami for 30 years. Some were in the intelligence services under the Communist regime in the 80s. Many of the staff of the security services are from Jamiat-i-Islami and they are familiar with Hizb-i-Islami. Asked whether the Afghan authorities would have any interest in someone who has been in the United Kingdom for several years, and not in contact with Hizb-i-Islami, Dr Giustozzi said that certainly such an individual would not likely be suspected as an insurgent, at least not when he returns. He said the authorities main interest is to get a database and information about as many people as possible. They can then be used to track down the insurgents. Once a returnee

has settled down he will inevitably build a network of relationships. Even if he is not recruited, such a person will come to know about other people from the same village or area. They may well have fought together in the past. He would become suspected as a person who is part of a pool with considerable knowledge of what is going on among the insurgents. He may become aware of the networks, even in Kabul, because insurgents need such things as safe houses and weapons piles. It should not be forgotten that information-gathering is important to both sides. He suggested that a returnee may come under pressure from the security services intent on scaring him and by threatening him with a view to converting him to help. They may do this for a while to see whether he gives way. Depending on the result, they may let him go, or upgrade the pressure. Asked about the risk of ill-treatment, Dr Giustozzi said he could not say what happens when somebody is in custody. The background evidence mentions abuses, even torture and illegal detention but to say who would be tortured or killed is not easy. The treatment can vary a great deal. Some people report they have been beaten, others that they have simply been verbally interrogated. Much depends on what the authorities think they can get out of the detainee, and whether they think that they are in with a chance of doing so.

53. Dr Giustozzi was referred to paragraph 26 of Mr Kovats' skeleton argument where it is said that none of the background material (the US State Department report 2005, Human Rights Watch report 2005, Amnesty International Report 2005, Freedom House Report 2005, Foreign and Commonwealth Office Human Rights Report 2005) refers to any risk for former Hizb-i-Islami members. He was asked whether the position has changed. Dr Giustozzi said those reports dealt with 2004, and said again that between 2005 and 2006 the character of the insurgency has changed.
54. He was then asked about the reintegration programme. He said that re-integration was not an appropriate expression. People are not reintegrated into society, there is no amnesty. What happens is that people are offered a certificate if they are prepared to declare their support for the Government and to say that they will not carry out activities against the Government. The Peace Strengthening Commission states in the certificate that, unless a person is found to be acting against the statement he has made, he should be left alone by the establishment. He said the scheme falls short of an amnesty, and is no help in finding a job or accommodation. About 4,000 people have applied since 2005, and most have obtained certificates. Dr Giustozzi said that he interviewed some of the directors of the Commission in Kandahar and Paktika provinces, to find out what sort of people were signing up. They did not give him a list of names although some of the most important names were mentioned to him. When he checked those names he found that the majority were former old Taliban Government personnel who had not been known to be active since 2001. The Political Affairs Officer in Jalalabad had looked into the Commission for himself, but all he was able to do was to obtain a visit to a centre where people were processed. He found only eight individuals, all of whom had returned from Pakistan and all of whom denied ever acting in the insurgency. He said they claimed to be small shopkeepers who were applying for certificates because they hoped it would help them to set up their businesses again on return.
55. He said there was little evidence that ex-insurgents sign up for certificates because the guarantees are not very strong. It would not be difficult for the authorities to pretend that somebody had done something wrong in order to be able to arrest them. Because there is no rule of law the certificate would offer no protection if that were to happen. Asked whether a former commander, or a relative of a senior commander,

could re-integrate, Dr Giustozzi said that in order to get the certificate there has to be an admission of activity but it would not be difficult to lie in order to obtain a certificate and resettle more easily. Some people are reluctant to put on record that they have previously been active against the Government because it may be thought they could become so again.

56. Asked about the three Hizb-i-Islami factions, Dr Giustozzi said that in fact there are more than three. He was only asked about the main three. The Hekmatyar faction opposes President Karzai and appears to support Al Qaeda and the Taliban.
57. He said the Khalis faction may no longer exist because Khalis was very old and died recently. He did not agree that Khalis had been killed, he thought he had died a natural death. The faction does not exist as an organised party. The people in it all come from the same tribe or network. It existed in Nangarhar and was very local. He suggested the networks probably still remain, but that nobody operates under the banner of the Khalis faction. Mr Khalis' son claimed to be his father's successor. He is reliant on Taliban support and the older members do not recognise him as their leader. In reality he is probably the local leader of the Taliban.
58. The Farooqi faction has an office in Kabul which Dr Giustozzi has visited. He met their senior people. They have a number of Members of Parliament.
59. Mr Jacobs asked about the risks to the first and second appellants in Kabul. Dr Giustozzi said that cities in general were increasingly being targeted and, as a result, the security services react. He said the more terrorist attacks there are, the more the security services mobilise to prevent infiltration, and to gather information on recruits and potential recruits. Asked about a reference at paragraph 7 of his report, to Hizb-i-Islami action in Kabul, Dr Giustozzi said he meant the province of Kabul, not the city. He said there has been extensive infiltration in the south of the province with some attacks on foreign troops. Insurgents had been spotted in the villages and one local NGO had suspended its surveys of villages in the province because of the presence of insurgents. He thinks that they are trying to improve and identify support. They are looking for safe houses to enable them to increase their activity. ISAF believes they want to infiltrate Kabul City once they have stockpiled enough supplies.
60. Asked if there were arrests of Hizb-i-Islami members, Dr Giustozzi said the police tend to report to the press when they make arrests, but the army does not. Even when the police do mention arrests, it is not usually specified who it was. Any reference is usually to insurgents. As the Taliban are a much bigger organisation it is safe to assume that the majority of arrests are of Taliban members but much depends on who is strong in the area in question. He was unable to say how many arrests there have been in Kabul city because they are mostly by the intelligence services, who do not report them. The police tend to be more active in the rural areas. He said that information will occasionally circulate in the city, for example when arrests were made at the university. If people are taken from their homes, it is less likely to get into the public domain. There are no published figures for arrests.
61. In paragraph 8 of his report, Dr Giustozzi said that there is evidence that remnants of Hizb-i-Islami have re-established a network throughout the country over the past three years. He was asked how much detail is known about this. He said that in

Kunduz province reports were received that Hizb-i-Islami were recruiting in the region. It is an area that supported the Jihad against the Russians.

62. Asked about Hazrat Ali (in relation to Mr Mohammadi, the first appellant) Dr Giustozzi said that he now controls Nangarhar and there is some evidence that he sees Hizb-i-Islami as a threat. Asked whether the First Appellant, having been here for a number of years, albeit that he was a former commander, would be at risk from Hazrat Ali, Dr Giustozzi said that if he were to go back to Nangarhar he would need a place to stay and a job. He would therefore have to rely on his old network. He said that his presence would become known quickly in Nangarhar, although it would take longer in Kabul because it was a big city.
63. Asked about the anticipated attack on Kabul, which it was said was going to happen during the winter of 2006, and when it might now be expected, Dr Giustozzi said there is normally a gap of a month between the end of the winter and the start of fighting, largely as a result of the length of the supply chain that needs to be established. It was the view of ISAF that there was to be an attempt to separate Jalalabad and Kabul. It was pointed out to Dr Giustozzi that the footnote referred to in his report said the anticipated attack was going to be through the winter, and therefore the delay after winter would not be relevant. He said that each year there is a decline in fighting through the winter with a peak in July and August, but the Taliban want to eliminate the gap between winter and summer fighting.
64. As to the rule of law, Dr Giustozzi said there is still no sign of any public trials of arrested insurgents. If there are any trials they are held in secret. He said there are now attempts to reform the judicial system and introduce defence lawyers. Under the old regime there were no defence lawyers and, as a result there are no trained defence lawyers. There are plans to train them at the university. Previous training was only for the judges. The few active lawyers that there are, have studied abroad. He said there are still signs of corruption in the police and the judiciary, but it is not simply corruption that is the problem. For example, in Nangarhar the police are controlled by various factions and reports to them of harassment by the intelligence services are unlikely to produce a sympathetic response because of that.

Evidence-in-chief – Mr Lams – For the Third Appellant

65. Dr Giustozzi said that he had travelled to Kandahar in January/February 2006, and had previously been there in March 2005. Asked about how Kandahar was, in terms of the intensity of the insurgency, Dr Giustozzi said that as a region in the south it is probably the most violent after Helmand and Oruzgen. They are the three worst provinces out of the 34 in Afghanistan. As a result, the counter-insurgency is also at its strongest in those provinces. Asked what he meant in his report when he referred to pre-emptive arrests, Dr Giustozzi said there is evidence that the Taliban are making significant efforts in the area to recruit medical personnel and establish field hospitals. In southern Afghanistan it is difficult for them to treat their injured fighters because they are operating in rural and mountainous areas. He said that as they traditionally recruit among the uneducated from the villages and they have no doctors in their ranks they try to get round the problem by offering higher salaries than State hospitals but that is not very successful due to the risks and the lifestyle involved. They have been known to kidnap doctors and nurses, but they find they have problems with practitioners who are not happy to be forced to work with them. As a result, the majority of the medical staff in the area have fled and are not available for

kidnap. The Taliban find recruiting is difficult because of the ideological allegiances required and therefore they need Hizb-i-Islami on side. As a result they are closer to Hizb-i-Islami than to other groups. The security forces are aware of the kidnappings and which are also reported in the press. They are also aware of the Taliban attempts to establish hospitals. If the authorities see somebody with the skills required by the Taliban they would regard them as a potential for recruitment by the Taliban, and keep an eye on them. They could be taken into custody to strengthen the message that the Taliban are trying to recruit people. The third appellant would be part of a group of potential recruits that the security forces may therefore be interested in. Asked where the third appellant was, on the scale of education, Dr Giustozzi said that he is typical of the type that you do not generally find among the Taliban but which is needed by them. They also have a need for engineers, for example because they have been acquiring anti-aircraft equipment but cannot use it. The Taliban do not generally have natural sympathisers among the educated.

66. Dr Giustozzi was asked about the third appellant's possible problems in Kabul. He again referred to Hizb-i-Islami developing networks and how the insurgents are recruiting in cities, not just to carry out attacks but also to build networks. He referred to the recent arrests at universities, saying he did not know what particular allegiances those people had, but the university had always been a recruiting ground for Hizb-i-Islami. The arrests he referred to were in 2003, after riots among students but he said there have been more recent arrests of students accused of preparing terrorist attacks. He said the rioting was not of the same quality of activity as the more recent arrests implied. The recent arrests seemed to be in relation to the preparation of explosives. Although he did not know the allegiance of the people who were arrested, they were probably not Taliban.

Cross-Examination – Mr Kovats

67. Asked by Mr Kovats how he had become interested in Afghanistan, Dr Giustozzi said he did his doctorate on Afghanistan, finishing in 1997. He used to use Russian sources because in the 1990s he was unable to go to Afghanistan. He speaks Russian, but not Pashtu, although he can read Dari. Asked why he had interviewed more than 30 people who were past and present members of Hizb-i-Islami, he said it was in the context of research that he is still carrying out on the Jihad against the Soviets, and because Hizb-i-Islami is not a very well-researched topic. He said one interview had been specifically about returning refugees, but the others were focused on his research into the earlier Jihad. He said that during the course of all his discussions, the issue of returning refugees may have surfaced from time to time. The one interview that was focused on returning refugees was with Professor Allah Dad at the Pedagogical Institution in Jalalabad. He was asked why he had wished to interview him. Dr Giustozzi said another person had mentioned issues of harassment and arrest, and when he asked who would be able to tell him more about that, the Professor was mentioned. It was the professor who said that his own son had been forced to flee the country. He originally came from a village, and his son had remained there. He was harassed by the security forces and accused by the authorities of being involved with the Hekmatyar faction. In the end the professor, under pressure from his wife, told their son to leave the country. He left in 2006. Dr Giustozzi conceded that this was nothing to do with returning to Afghanistan, but leaving it. Asked how this threw any light on the position of those who left in 1999 or 2002, Dr Giustozzi said it showed the harassment of people who are accused of having connections with Hizb-i-Islami, and that it was happening in that region.

Asked about the form of harassment the professor's son had suffered, Dr Giustozzi said the professor had spoken of repeated visits by security agents to the house. They had not found his son, but put pressure on his wife to say where their son was and report back to the police. This happened more than once. Mr Kovats asked whether the fact that somebody was repeatedly not in when the security forces called may itself be ground for suspicion. Dr Giustozzi agreed. He said that was exacerbated by the fact that he did not go to the police. He said that was not surprising in view of the rumours about mistreatment.

68. He agreed that no organisation has listed Hizb-i-Islami members as being in a risk category. He also accepted that none of the three appellants had fought against the current government. Asked whether not fighting the Taliban would give any indication as to how the appellants may be viewed by the security forces now, Dr Giustozzi said that not fighting could go against them as it may indicate that they were not hostile to them. Asked whether the Hekmatyar faction came into existence after the Taliban took over, Dr Giustozzi said that was true in a way although Hekmatyar had always been regarded as the Hizb-i-Islami leader and that others had defected from Hizb-i-Islami. Hekmatyar had been unable to talk to the Taliban from his position in exile, but others who remained had to find an accommodation either with the Taliban, or the opposition. He agreed that the Hekmatyar faction only allied itself with Al Qaeda after the fall of the Taliban. Asked why anybody now would think the appellants had any connection with Hekmatyar, or the Taliban, as all three left before the Taliban fell and in fact opposed them, Dr Giustozzi said that some of Hekmatyar's people support the Taliban but the core of the party left the country and the majority of leaders now oppose the Taliban. He said he did not regard being connected with the Taliban as a relevant factor.
69. Mr Kovats asked why, when various groups including Hizb-i-Islami, go back many years, and people have been fighting for them for many years, the authorities would think people who have been in the United Kingdom for years would have any information to give. Dr Giustozzi said that there have already been a lot of arrests although it is not known who, but mostly of people presumed to have information, such as people staying in villages, with networks, who have relations or friends known to be in the service of Hizb-i-Islami. The appellants would have to re-establish their connections in order to find jobs. He accepted that on return they would be people with few connections, but in the following month or so they would need to make those connections. There is no possibility of financial support otherwise than from old friends and relations. That would also mean they would have to mix back into the community. Mr Kovats suggested that any risk to the appellants is entirely speculative and asked Dr Giustozzi to comment on three issues. First, he asserted the risk is speculative because nobody has any evidence that returning refugees from similar backgrounds have been mistreated. Dr Giustozzi acknowledged that there was no such evidence but he said that no one is monitoring returning refugees, except for Sikhs who are monitoring themselves for disappearances and mistreatment. He accepted that in the absence of monitoring it is difficult to say what is happening. He said the number of returns is not very high, but he acknowledged that a proportion of those returning would be from Hizb-i-Islami. He accepted there had been large numbers of voluntary returns from Pakistan, but said they were not political people.
70. Mr Kovats' second point was that there is no body of evidence that the Afghan security forces would regard those who have been out of the country for years as a

more promising source of information that those in Afghanistan. Dr Giustozzi agreed that they would not inevitably be a source of information but it was necessary to consider the longer term. Because returnees would re-establish their networks of family and friends, it would only be a matter of months before they would be in the same position as those who had been there longer.

71. Mr Kovats' third point was that Afghanistan is in the international spotlight. The fact that no organisation has listed people like the appellants, who had not fought for many years, and that no one has said that they are at real risk, are strong arguments against their being considered at real risk. Dr Giustozzi said that the reports that Mr Kovats was referring to dealt with 2004/2005 when the role of Hizb-i-Islami was minimal. He said there may be other reports. Mr Kovats put it to him that there are more up-to-date reports, up to February 2007, and none suggest any risk. Dr Giustozzi said that he had mentioned reports in the Afghan press that dealt with killings and arrests, but lower level cases of harassment would not be reported as they are not headline issues. He said that until June 2001 Hizb-i-Islami did not have a separate identity from other insurgents who were all lumped together. Dr Giustozzi agreed with Mr Kovats that the fact the insurgency has got worse since 2004, and that the appellants had been away from before that time, showed there would be no interest in the short term. However, he again said that in the longer term that would cease to be the case. Finally, Dr Giustozzi agreed with Mr Kovats that there was a strong element of speculation in suggesting that when questioned, if they were questioned, the appellants would be mistreated. Dr Giustozzi suggested that somebody with a high profile may have an easier time because of that high profile. The majority, including the appellants, would be arrested with no profile to protect them. He also accepted that on arrival there was a good chance the appellants would be of no interest for some time but, in time, a month or longer, the likelihood of them being subjected to harassment or worse would increase proportionately with the length of their stay. Asked whether all three cases were similar Dr Giustozzi said that Jalalabad and Nangarhar are high risk, Nangarhar the more so. There is less risk in Kandahar because Hazrat Ali was not there. Asked whether Hazrat Ali would be concerned about things that happened many years ago, even accepting that he is interested in stopping political rivals, Dr Giustozzi said that he was a Pashai which was a small minority living on the border. He had not been influential in the past but now he is the only one fighting the Taliban. His power has magnified, even though his political power base is small. He is vulnerable to an organised challenge, for example from the Pashtu, which is the only group that probably could make a challenge to him. That is why he is trying to avoid them, by remaining in Nangarhar. He gets most of his revenue from there and wants to keep the Pashtun divided as between the different tribes. Dr Giustozzi was not suggesting he would target the first appellant as such but said he controls the police and the security forces. That, together with directions he receives from Kabul, gives him a very strong interest in motivating his own men to prevent Hizb-i-Islami disrupting his networks. Asked whether the first appellant, if at risk in Nangarhar, could avoid that by going elsewhere, Dr Giustozzi said that it depended where. Hazrat Ali is an MP and has influence in Kabul. There are parts of Afghanistan where he is not in charge of the security services, for example in the north west and the central highlands, but there it would be difficult for a Pashtu to settle. A Pashtu would not normally go to settle among Uzbeks. He would incur local hostility and find difficulty in obtaining work.

Re-examination by Mr Jacobs

72. Mr Jacobs referred to the evidence that the first and second appellants would not be at immediate risk on arrival in Kabul but in order to survive there with no financial assistance they would need to interact with people in the community and in doing so would disclose factors that would put them at risk. He asked whether they would be safe if they got out of Kabul before their identities became known. Dr Giustozzi said that for Pashtu people to live in areas where they had no network or contacts and no friends, and no one to help, would be difficult. They would need such contacts for example to approach money lenders. He said that Afghanistan is not a place where you can live without family or networks. Areas occupied by Uzbeks and Tajiks would be difficult for Pashtuns, because Pashtuns had taken land from Uzbeks and Tajiks. There have been attacks on Pashtuns as a result. Those areas would be relatively hostile territory for a Pashtun. He emphasised that social networks are particularly important where there is no rule of law, as everything is based on trust. Obtaining jobs is based on networks, businesses will be staffed by relatives, the judiciary cannot be relied upon, there is no law enforcement. They would be asked about their past, information given would be checked and if the information could not be obtained one would not get a job. Information given to employers and landlords would be passed on. The second appellant who is from the Kabul area would not be able to hide his identity there. He might find a safe house to start with, but would need to give information to individuals. A Tajik from Kabul would still need networks if he were to go to Nangarhar where there are more Tajiks. He would not come across ethnic issues but the area comes under the control of Hazrat Ali who is opposed to Hizb-i-Islami. The area near Kabul where the second appellant comes from is a very small place, no more than a big village. His arrival there would be noticed immediately.

Re-examination – Mr Lams

73. Dr Giustozzi said that it would be difficult for the third appellant, from Kandahar, to relocate to Nangarhar. He would be unable to conceal his identity in Kabul. Dr Giustozzi confirmed that he would regard the third appellant as an educated man and there are not many around. He said that 70% of the population is illiterate. Of the 30% who are literate, only a very small minority are educated to degree level. He would stand out if he went to Nangarhar as a professional, although if he went with an NGO, and was introduced by the organisation, that would be different although many NGOs have left and, as a result, the professionals are relocating.
74. Earlier in his evidence Dr Giustozzi had said, in answer to Mr Kovats, that although contacts are needed to obtain jobs, when the UN were looking for people who were skilled in IT, or other technology, they tended not to enquire into the background of those that they found, because of the need for staff.
75. The Tribunal asked a number of questions. Dr Giustozzi was asked what he had in mind when he said that the tension may vary from area to area but it was particularly the case for young males. He said those fit enough to be able to run and fight are mostly at risk. Generally Afghans in their forties would not be fit enough, because they tend to age quickly, bearing in mind that the average life span is 47 years. Asked whether the security forces would therefore target young men, he said that their main concern is to prevent terrorist attacks and indeed their careers are at risk if they fail to prevent them.

76. He was then asked about the reintegration programme and why the appellants could not get around their difficulties by signing the forms and obtaining certificates. Dr Giustozzi said first that the instigation of the programme was a political act by politicians who are trying to diminish the appeal of the insurgency. He said that the most likely applicants are former Taliban as they fear being arrested and the scheme is there to reassure people. He said that the people who run the scheme do not see “eye-to-eye with the Government” about it. They do not like the idea of former insurgents going free. They make the point that it is easy to say one has stopped opposing and anybody could pretend to be innocent. They see that as concerning as the war goes on, and there is a need to look for potential terrorists. Asked whether he had taken any evidence from anyone who had chosen either to, or not to, sign up, Dr Giustozzi said there have been interviews in the press of those from Pakistan who are tired of fighting and are afraid.
77. Asked about whether there is anything in common between the factions of Hizb-i-Islami, he said there were two theories. The first is that those people who are now co-operating with the Government are in fact only a front for the Hekmatyar Party. It is suggested that they are preparing the ground for a political deal, or alternatively using their faction to infiltrate government with a view to subverting it one day. The other theory is that the majority of Hizb-i-Islami’s supporters believe that Hekmatyar does not know what he is doing, having failed to take any position in government, and they have abandoned him. It is said they have joined the government because that is where the jobs are because they need to feed their families and are getting older. Those people do not regard fighting as a serious option and do not trust the Taliban, but do not feel that Hekmatyar can compete with the Taliban. It may well be that when they feel the time has come to organise a coup, it will be easier to secure power because they are in there. He said the difference between the two theories is a tactical one. None of the MPs will acknowledge any contact with Hekmatyar, but all say that he is a good leader. The infiltration theory was regarded by Dr Giustozzi as the more attractive one. He said it is generally thought that Pakistan would back Hizb-i-Islami, and drop any support for the Taliban, if Hekmatyar were able to get power.
78. Dr Giustozzi was asked what is meant by a commander within Hizb-i-Islami, and what he meant when he used the expression. He said that Hizb-i-Islami is not structured like an army and there are no formal ranks, although that may be changing. He said a person in charge of between 20 and 100 men would be regarded as a group commander. Those in charge of a few hundred to about 1,000 would be district commander, above which would be the provincial and regional commanders, the latter being based in Pakistan. Any commander would be a core member of the party and the problems which could be faced by a former commander would depend on the level of command that they had.
79. He was asked about what was happening at the time when the appellants each left Afghanistan. He said that, when the third appellant left in 1999 there was some fighting but not a great deal of involvement by Hizb-i-Islami. The fighting was largely in Kunar and a few were fighting the Taliban. When the first appellant left in 2001, the Taliban Government had fallen so there was some fighting and resistance to the Taliban. When the second appellant left in March 2002 there was very little fighting going on, except near the Pakistan border and that was mostly by Arabs. The insurgency started during 2002. He reminded us that in 1996 the Taliban occupied all areas that had previously been occupied by Hizb-i-Islami and, by October 1996, it

had eliminated Hizb-i-Islami as a fighting force. After that there was only minimal fighting and odd clashes in the mountains with those unwilling to surrender to the Taliban.

Submissions and Background Material

Mr Kovats' for the Respondent

80. Mr Kovats started his submissions by making four points. First, he accepted that Dr Giustozzi was a knowledgeable, fair and objective witness. He did not dispute his evidence insofar as it was factual, but submitted that his opinion on risk to the three appellants was speculative, both in his report and in cross-examination. His evidence was not supported by any other objective evidence, and his anecdotal evidence did not make out a real risk. The one interview he carried out, in February this year, after the original reports, contained nothing concrete. He spoke to a man whose son left in 2006 because he was being harassed. It was not clear whether that man was a current member of Hizb-i-Islami. In any event, it did not form any evidential basis for saying that a former member of Hizb-i-Islami would be at real risk on return.
81. Second, it was the respondent's case that none of the three appellants are at risk anywhere in Afghanistan, nor will they be required to conceal their identity. Dr Giustozzi accepted that none would be suspected of being an insurgent, and he accepted that none is likely to be thought to know Hekmatyar's whereabouts. He said that what Dr Giustozzi did was to apparently identify a risk of being considered a potential source of information for the security services. But, he argued, even that thesis did not stand up. Mr Kovats said that they have been absent from Afghanistan for some time and were absent during the recent significant events. They have been absent since the Taliban fell, since Hizb-i-Islami allied itself with Al Qaeda, and since before the increase in the insurgency. They simply were not there when those interesting activities happened. He argued that it is contrary to common sense to think that any of the three would be a more promising example of someone who would know what is going to happen, than an Afghan who has been there all along. Allied to that, he said there was no reason why they should not sign up for the reintegration programme. Dr Giustozzi himself had said that the certificate would mean that the security services would leave them alone. He did not say in evidence that does not happen in practice.
82. Third, even if the appellants are of any interest to the security services they do not face a real risk of persecution. What Dr Giustozzi said, and he was repeatedly pressed, did not show that he knew what the risk was. He referred to visits, threats and financial incentives but, Mr Kovats argued, that was all speculative. He did not say at any time that there is a real risk that they would be tortured. Mr Kovats accepted that in the voluminous amount of evidence there are plenty of references to abuse by the security services. He said that Dr Giustozzi, at paragraph 19 of his report, referred to the number of complaints made about mistreatment. Mr Kovats argued that it was not right to equate the number of complaints to the number of incidents. He said there was no evidence to show that the security forces are interested in mistreating returnees. They may be interested in insurgents and their aims, but that does not cover these three appellants. He argued that if there was any established evidence of mistreatment of returnees it would be in the objective evidence and it simply is not there.

83. Fourth, Mr Kovats argued that even if he was wrong, and any of the appellants would be at risk in their home areas, they could go to other parts of Afghanistan. He noted that the first appellant is said to be at risk from Hazrat Ali in Nangarhar where he has his power base, and also from him in Kabul. He pointed out that Dr Giustozzi said that Hazrat Ali's power base is a modest one.
84. As to the second appellant, who is Tajik, Dr Giustozzi said he would have no ethnic problems in Nangarhar or Mazar-i-Sharif or in Kabul. He does not have a political profile that would give rise to any problems.
85. As to the third appellant, he is a Pashtun, in common with 40% of the population of Afghanistan. It is the largest ethnic group. He comes from Kandahar, near the Pakistan border. There is no reason why he should not relocate to other parts of Afghanistan, including Kabul.
86. As to Article 1F(C) of the Refugee Convention Mr Kovats accepted that, in the light of what Dr Giustozzi had said about commanders, we may not feel that it is an Article 1F case. He argued that the first and second appellants cannot have it both ways. If they have a sufficient history to put them at risk on return to Afghanistan, that would only be because either or both was a war criminal. He referred to page 210 of the COI report which has a brief extract about Hizb-i-Islami and the Hekmatyar faction. It describes how it was founded in the 1970s and reached the height of its power in 1992 when the Soviet-backed Government of President Najibullah fell to a coalition of Mujahideen factions including Hizb-i-Islami. Hekmatyar served as Prime Minister in 1995. He was designated a terrorist by the US State Department in February 2003 for participation in, and support for, terrorist acts committed by Al Qaeda and the Taliban. He is currently in hiding.

Submissions – Mr Jacobs for the First and Second Appellant

87. Mr Jacobs started by emphasising the quality of Dr Giustozzi as an expert witness and referred to his wide-ranging sources. He argued that we should attach considerable weight to his evidence as he was able to give considerable assistance, as had Dr Lau. He reminded us that in his report Dr Giustozzi had referred to the counter-insurgency operations and acknowledged that, whilst Dr Lau's report had been focused on the whereabouts of the leadership of Hizb-i-Islami, the interest is now in the whereabouts of anyone connected with insurgency. Anyone linked to the Taliban or Hizb-i-Islami are likely to be targeted. He acknowledged that the first appellant had not been involved with Hizb-i-Islami since 1997 or the second since 1995. He reminded us that Dr Giustozzi had said that Hizb-i-Islami has now established networks including individuals who do not claim any link to the organisation. He reminded us that the first appellant had commanded 30 to 35 men. His brother, who was a more senior commander, had been taken in 2001. The second appellant was a local commander in the Kabul area, and his cousin a senior commander. He said the Immigration Judge had found that the second appellant's cousin is still active; and that his father and brothers were arrested by the authorities in 2001. He said the resurgence of Hizb-i-Islami is very relevant. In 1996, after defeat by the Taliban, they were said not to be an effective force but are now becoming more serious in non-Taliban areas and are re-recruiting old members. He acknowledged that they have difficulty in attracting the older members who were more educated such as engineers. He said there is no new recruiting ground. The authorities are aware that Hizb-i-Islami would therefore go back to the families who

traditionally supported them. He reminded us that Dr Giustozzi had said that 1,500 fight for Hizb-i-Islami, 400 at any one time, that there is a plan to cut off Kabul, and that they have core support in the neighbouring provinces. Dr Giustozzi said in cross-examination that thousands of people had been arrested, because they were perceived to have information about the insurgency. He acknowledged that evidence about arrests is not freely available and only gets into the public domain occasionally, for example the arrests at the university. He said the risks are through personal family links to insurgent groups, and because of relations that had been arrested. In the case of the second Appellant, his risk is increased by having been a member of a limited number of Tajik activists in the ranks of Hizb-i-Islami. Dr Giustozzi said his value, to both Hizb-i-Islami and the security forces, would be highlighted because Hizb-i-Islami is trying to expand its activities into Tajik territory. He also said that the security services are still largely staffed by Jamiatis who see the Afghans, and Tajik, in the north east, and around Kabul, as their own political monopoly. There is thus additional incentive for them to target somebody such as the second appellant. The second risk factor for the second appellant is that he comes from Charasyab, only fifteen minutes from Kabul. That is a district where the insurgents have started to infiltrate recently, as it is one of the gates to Kabul.

88. He said the risk factors for the first appellant are contained in paragraph 27 of Dr Giustozzi's report. He comes from Nangarhar, where a local warlord, Hazrat Ali, has for some time been busy trying root out Hizb-i-Islami in order to prevent the expansion of the insurgency in his area. As it seems the insurgency is spreading, it is unlikely there will be any let up in such efforts. Hazrat Ali is also well-networked in Kabul. He asked us not to underestimate the influence of powerful warlords.
89. He suggested that the assertion by Mr Kovats, that Dr Giustozzi was speculating, is not supported by the objective evidence. He started by quoting the current COI report which contains an extract of Dr Giustozzi's input to a conference. He quoted para 11.94 of the October 2006 COIR:-

"Notes on Afghanistan, presented on 28 June 2006 at a Country of Origin Information Conference by Dr Antonio Giustozzi, an expert on Afghanistan, stated that Hizb-i-Islami, like most Afghan political groups, were known to recruit by way of family connections:

'Current activists will approach former members, perhaps right up to the age of 45 – 50 years, with a view to asking them to collaborate with political or terrorist activities. The security services (NSD) are aware of this policy and try to keep track of their progress. The NSD have stated their ambition is to have an informant in every village, but this remains an ambition due to budget constraints and due to the difficulty of recruiting in areas of the country where the population is hostile.

The security services in Communist times enjoyed significant resources and strong intelligence, but now have to rely more exclusively on more basic methods. Physical beatings are common to try and obtain information, both within the NSD and the police. Occasionally deaths in custody are reported. Those formerly associated with the Hizb are singled out for harassment, either to obtain intelligence or simply to intimidate them into avoiding future associations – the message being sent is that "we are with the government, we can hurt you."

Mr Jacobs referred particularly to the harassment and risk of persecution demonstrated in that article. He argued that the respondent's own evidence shows that what Dr Giustozzi was saying is not speculative and he had been quoted with

approval. Mr Kovats reminded us, at the end of submissions, of the introduction to the COI report which says:-

“The report is compiled wholly from material produced by a wide range of recognised external information sources and does not contain any Home Office opinion or policy.”

90. Mr Jacobs then turned to the US State Department report on Human Rights Practices 2005 which, under the heading ‘Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment’ refers to reports of abuses despite the law prohibiting such practices. The report refers to the authorities in Herat, Helmand and other locations which continue to routinely torture and abuse detainees. Torture and abuse are said to consist of pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation and sodomy. It also says that NGOs reported that security forces continue to use excessive force during their fight against the Taliban and Al Qaeda remnants, including looting, beating and torturing of civilians. In Balkh province, residents alleged that local commanders are running private prisons to extort money and that abuse generally consisted of beatings resulting in some cases in death. On the subject of mistreatment he then turned to the current COI report. It mentions the Danish Fact-Finding Mission of 2004 which said the Lawyers Union of Afghanistan stated that, in regions governed by warlords, it is common that people in custody are beaten up until they confess the crime of which they are being accused; and that the punishment depends on the crime and the captive’s relationship with the commander. It also said that the police force’s use of torture in Kabul is less widespread because of the presence of journalists and Western organisations but even now the police can behave roughly. The Human Rights Watch report is also quoted. This was dated September 2004 and said that local military and police forces, even in Kabul, are involved in arbitrary arrests, kidnapping and extortion, and torture and extra-judicial killings of criminal suspects. Outside Kabul, commanders and their troops in many areas are implicated in widespread rape of women and girls, rape of boys, murder, illegal detention and forced displacement.
91. The Amnesty International 2005 Afghanistan Annual report reported, in a report to the UN that it had emerged that the US forces had tortured and ill-treated detainees during the war on terror in Afghanistan in 2004. The UNHCR and ECRE guidelines on those who may require protection includes:-

“Others who fear that they would be victims of violence, in a situation in which there is no law or order, on the basis of a settling of old scores.”

Mr Jacobs suggested that a Jamiat-i-Islami warlord, with a grudge, would be particularly interested in seeking out members of Hizb-i-Islami. He said that was in the nature of a conflict which had been going on for 24 or 25 years, when the sides are based on tribal and political groupings. He then turned to Dr Lau’s earlier evidence which formed the basis for the finding in RS Afghanistan. He said that experts are often called in country guidance cases because other evidence does not cover the points raised. In that case his evidence was not covered by other objective material. In particular he pointed to paragraph 11 of Dr Lau’s then report which is quoted in full in paragraph 12 of RS Afghanistan. There he said that:-

“The war against terrorism in Afghanistan is being fought by numerous agencies and groups. It is fought largely in secret and has so far stayed clear of Afghanistan’s legal system. The silence of the objective evidence on the trial of suspected terrorists, of the

rate of those arrested as suspected terrorists, indeed the almost complete absence of any information in the public domain on the number of persons arrested because they are accused of being associated with Al Qaeda, the Taliban and Hezb-i-Islami is deceptive. Occasional newspaper reports reveal that arrests and interrogations of suspects take place on a very regular basis. They are carried by Afghan internal security and intelligence agencies, US agencies and even private mercenaries co-operating with members of the Northern Alliance.”

Later, at paragraph 14 of his report, Dr Lau said:-

“In my opinion it is difficult to discount the appellant's fear as irrational only because his own association with the Hezb-i-Islami ceased some time ago. It appears that members of the Northern Alliance think otherwise.”

Mr Jacobs argued that Dr Giustozzi had said there were no public trials and he said much the same as Dr Lau about regular arrests. He said there is reference to silence about arrests in the background evidence. He said that so far as paragraph 14 is concerned, for ‘the Northern Alliance’ now read ‘the Government’. The Tribunal, in RS Afghanistan, accepted that a history of involvement does not mean no interest. At paragraph 16 of his old report, Dr Lau commented on internal flight and said that society in Afghanistan is tribal in nature and it is problematic for an outsider to fit into an area where he has no family or relatives. He also emphasised that ISAF does not protect individuals. Challenged about the fact that Dr Lau was not in court to say that he stood by his original opinion, Mr Jacobs argued that he had been accepted in 2004 and that Dr Giustozzi updates the report. Mr Jacobs argued that Dr Lau’s report was based on a historic knowledge of Hizb-i-Islami and was not simply a snapshot as at the date of the report. He argued that, at paragraph 18 of the Tribunal’s decision in RS Afghanistan, it was accepted that Afghanistan was a country where the rule of law had broken down and there was no realistic prospect of an individual establishing his innocence through due process. He said that Dr Giustozzi showed that was still the case. He said that Tribunal had accepted that Dr Lau had reached his conclusions through proper reasoning, and an informed assessment of country conditions, and that similarly there have been no challenges to the reasoning of Dr Giustozzi. He argued that we should find that Dr Giustozzi has made an informed assessment of country conditions, especially with regard to connections. He said that any suggestion that the situation has moved on since RS Afghanistan may well be true, but in reality the situation has deteriorated, not improved.

92. As to Mr Kovats’ second point, that the appellants had not been in Afghanistan when matters that would cause interest took place, he referred to the 400 – 1,500 active insurgents loyal to Hizb-i-Islami. He said they are close to Kabul and that it is impossible to survive economically without a network. For appellants who have relations as commanders, whether that be cousin or brother, they would be deemed to hold evidence relating to counter-insurgency despite having been outside Afghanistan. There are some who think that Hizb-i-Islami is run from outside Afghanistan.
93. He argued that using the reintegration programme is not a realistic option. Dr Giustozzi had said that some people consider it too great a risk to admit previous connections to the agency running the programme which, paradoxically, is opposed to the programme itself.

94. As to Mr Kovats' third point, that even if the appellants were of interest, there is no real risk of persecution, Mr Jacobs argued that he had demonstrated by references to the COIR, US State Department report and the other background material that there is such a risk. He turned to the assertion that the UNHCR guidelines do not refer to Hizb-i-Islami members as being at risk and referred us to paragraph 6.73 in the Country of Origin Information Report on Afghanistan April 2006. There it is said that the UNHCR paper identified them as people who may have protection needs,

“Afghans associated with the Taliban or other groups opposed to the current transitional process.”

He argued that 'other groups' would clearly include Hizb-i-Islami, Hekmatyar faction. It is the main group, other than the Taliban. Al Qaeda is not an Afghan group.

95. He then turned to Mr Kovats' argument that the number of reports and complaints of mistreatment does not equate with the actual level of abuse. He argued that many will be reluctant to make a complaint, because the rule of law has broken down. He argued that in reality the number of victims will be far greater than the number of complaints. Turning to Mr Kovats' argument that there is no evidence that the security forces have no interest in returning refugees, he argued that it was accepted in RS Afghanistan that whether a former member of Hizb-i-Islami is at risk depends on his individual history, which depends on the connection of the person concerned with Hekmatyar, and the extent to which that person has been in conflict with powerful people. He accepted the argument, that people would be at risk because of the desire of others to gain financially by reporting them, no longer has weight. He reminded us that Dr Giustozzi had said there was no evidence that returnees are monitored.
96. He returned to Mr Kovats' fourth point, which was that even if he had been wrong and there was a risk in their local areas, then the appellants could relocate without reasonable hardship. He reminded us of what he described as the guidance by Lord Bingham in Januzi [2005] UKHL 5 where it was said that the test was whether or not that person can lead a relatively normal life in their place of relocation. (In fact Lord Bingham was quoting UNHCR guidelines on International Protection of 23 July, as he developed his findings.) Mr Jacobs argued that AG IG and NM [2007] EWCA Civ 297 in the Court of Appeal had considered this issue further. He argued that neither of the first two appellants could relocate to Kabul. That is because Dr Giustozzi had said that whilst they would not immediately be apprehended, if they tried to establish themselves with accommodation or work, they would need to give information about themselves and it would only be a matter of time before the authorities learnt of them. He reminded us that in IK (Returnees – Records – IFA) Turkey [2004] UKIAT 00312 the Tribunal said it was not reasonable to expect a returning failed asylum seeker to lie. It therefore followed that the appellants' risk would accrue on a daily basis to the extent that after a month or so the authorities would know their backgrounds. He argued that, even if the appellants were able to transit through Kabul, and leave before they were found out, it is unreasonable to expect them to go somewhere else where they have no connections. Dr Giustozzi had spoken of the relative hostility and suspicion that would attach to someone relocating in an area where they are not known. He reminded us that they would need a social network, that there is no rule of law and so everything relies on trust. Previous family connections with Hizb-i-Islami would come out and that would contribute to the accrued risk. He said that does not point to them being able to lead

a relatively normal life. He again mentioned that the Second Appellant, who is a Tajik would be in difficulty because the Tajik areas in the north are controlled by Jamiat and the local commander of Jamiat is interested in rooting out Hizb-i-Islami. He accepted that there would be no ethnic hostility, but said there would be political hostility, therefore he cannot relocate. The first appellant is from the Kabul area.

97. He turned to the UNHCR guidelines on internal flight, quoted at paragraph 6.190 in the April 2006 COIR report. He quoted the following parts:-

“Even in a city like Kabul, which is divided into neighbourhoods (Gozars) where people tend to know each other, the risk remains, as news about a person arriving from elsewhere in the country travels fast ...

The protection provided by families, extended families and tribes is limited to areas where family or community links exist and without them, a relatively normal life without undue hardship at another location than one’s place of origin or residence is unlikely. As documented in studies on urban vulnerability, the household and the extended family remains the basic social network in Afghanistan and there are indications that existing traditional systems of sharing and redistribution function less in the extended urban family. It would therefore, in UNHCR’s view, be unreasonable to expect any Afghan to relocate to an area to which he or she has no effective links, including in urban areas of the country.”

He argued that if any of the appellants were at risk in their home areas they could not relocate without undue hardship.

98. Mr Jacobs then referred to a number of pieces of background evidence acknowledging that these are largely the ones set out in Mr Lam’s skeleton. The first was a report from the US Centre of Excellence and Disaster Management dated 28 March 2007 which reported a suicide bomb attack in Kabul, which killed at least five. At page G8, paragraph 31 the same report says that ISAF has, over the past few months, detected an increase in security incidents in the provinces of Paktika and Khost of 70% and 50% respectively. There is reference, at paragraph 34 of the report, to UNAMA whose work was strongly praised. It is UNAMA for which Dr Giustozzi worked in the past.
99. The Human Rights Watch World Report 2007 (reporting on 2006) refers to ISAF extending its reach across the entire country and confronting the insurgency in the south and south east of Afghanistan where it had escalated into open warfare. In other parts of the country, Afghans are routinely subject to abuses and oppression by regional warlords and militias, most of them ostensibly allied with the Government. There is reference to the Taliban, and other anti-Government forces, carrying out more than 80 suicide bombings. A different Human Rights Watch report (dated 18 January 2006) makes reference to Taliban and other anti-Government forces, some allied with Hekmatyar, significantly expanding their insurgency in the predominantly Pashtun areas in southern Afghanistan during 2005.
100. Chapter 8 of the US Department of State Country Report on Terrorism 2005 (issued in April 2006) has a piece on ‘Hizb-i-Islami Gulbuddin’ (the Hekmatyar faction). It describes it as a faction of the Hizb-i-Islami Party and refers to links with Bin Laden. It also refers to Hekmatyar’s regular statements on the need for Afghans to reject the international community’s presence in their country and says that he has staged small attacks in an attempt to force the international community to withdraw, to

overthrow the Afghan Government and to establish an Islamic fundamentalist State. It reports regular encounters with the US forces in Kunar where Hekmatyar is most active. Chapter 5 of the report also makes reference to the Programme for Strengthening Peace. It says that the programme is to reconcile former Taliban and Hizb-i-Islami Gulbuddin members. It says that six regional offices were founded and, as of December 2005, more than 600 former fighters had joined the programme. 63,000 former combatants had been processed through the Disarmament, Demobilisation and Reintegration Programme and its next phase will be to make efforts to disband the most notorious illegal armed groups on a province-by-province basis, and to identify and remove Government officials with links to those groups.

101. A UNAMA press briefing by Chris Alexander is reported in a document dated 8 January 2007. He is the United Nations Deputy SRSG in Afghanistan (Special Representative of the Secretary General) and is one of Dr Giustozzi's sources. In particular, Mr Jacobs referred to an answer to a question in which he said that both the Afghan and international partners have very good information on how the Taliban, Hizb-i-Islami, and Hekmatyar are operating. It is their challenge, and priority, in 2007 to make those responsible for initiating violence accountable for that violence and for what they are doing. The United Nations High Commissioner for Human Rights reported on Afghanistan in a report dated 5 March 2007. Mr Jacobs referred to paragraphs 24 and 25 under the heading "Armed Conflict and Violence". There it was said that violence, linked with armed conflict, in 2006 was the worst since the fall of the Taliban in 2001. He said that, although centred in the four southern provinces, it occurs over large areas from Kunar in the east to Farah in the west. Parts of the southern central highlands are also becoming destabilised. It said there has been an increase in insurgent-related attacks, from less than 300 a month at the end of March 2006 to over 600 by the end of September 2006. The average in 2005 was about 130 per month. Suicide attacks have risen dramatically. There were 17 in 2005, 123 in 2006.

102. His next reference was to the US House of Representatives Committee on Foreign Affairs hearing "On Afghanistan", published on 15 February 2007. At page 12 (of 29) there is a report of the testimony of a retired US General who said:-

"In looking at the nature of the threats inside Afghanistan, I often drew out a diagram of interlocking circles characterised as the 'three walls of Afghanistan'. This diagram outlined not only the activities US and Coalition forces were involved with daily, but also highlighted the interrelated aspects of Afghanistan's challenges. It neatly defines in graphic form many of the sources of instability in Afghanistan as well. The first circle reflects the war against the senior leadership of Al Qaeda, the Taliban and the Hizb-i-Islami Gulbuddin (HIG) – the three primary enemy organisations, all affiliated with each other in a marriage of convenience. Senior leadership of these organisations includes Osama Bin Laden, Al Zawahiri, Mullah Omar and Hekmatyar as well as their most senior lieutenants – the brain power of each terrorist group."

At page 17 of 29, the testimony of an academic from John Hopkins University is recorded as saying that part of the resurgence of the Taliban can be summarised in the word Pakistan. It suggested that, among others, Hekmatyar is based there and that some, including the leader of the Taliban, never leave Pakistan. A little later, at page 25 of 29, there is reference to HIG sanctuaries in Pakistan, and to the areas they operate in within Afghanistan, having increased four-fold between 2005 and 2006.

103. The US State Department report on Afghanistan 2006 (published in March 2007) refers in its opening section to:

“The Taliban and anti-Government elements continue to be responsible for threatening, robbing, attacking and killing villagers, Government officials, foreigners and non-governmental organisation workers. Whilst the Government expanded its authority over provincial centres, a few areas remained under the control of regional commanders or the Taliban following insurgent offences. During the year, over 1,400 civilians died as a result of terrorist activities, including suicide attacks, roadside bombs and gun assassinations. There continue to be instances in which security and factional forces committed extra-judicial killings and torture. Human rights problems included: extra-judicial killings; torture; poor prison conditions; official impunity; prolonged pre-trial detention; abuse of authority by regional commanders; restriction on freedoms of press, religion, movement, and association; violence and societal discrimination against women, religious converts, and minorities; trafficking in persons; abuse of worker rights; and child labour.”

On the following page there is reference to increased violence involving terrorists and insurgents including HIG, all of whom had killed more civilians than in the previous year.

104. He then moved on to a report by the United Nations on the situation in Afghanistan and its implications for peace and security dated 11 September 2006. At paragraph 6, the report identifies five distinct leadership centres of the insurgency which it suggests act in a loose co-ordination with each other and benefit from financial and operational links with the drug trafficking networks. This includes Hekmatyar in Kunar province and neighbouring areas. It refers to the Peace Strengthening Programme having had some success with mid-level Taliban commanders but said it has not attempted to attract senior commanders. At paragraph 11 it is said that the trend towards instability has not been restricted to areas affected by the insurgency. A sense of volatility has gripped Kabul over the past few months, triggered by violent riots on 29 May following a serious road traffic incident. There are a few paragraphs concerning attempts at improving the rule of law, starting at paragraph 51. In paragraph 76 there is reference to Afghanistan finding itself in the midst of a new crisis, with a third of the country racked by violent insurgency. It said:-

“The situation in the south, south east and east is unlikely to improve in the near future and the prospect of further deterioration cannot be excluded. While the rest of the country remains relatively secure, Afghans everywhere understand the insurgency poses a grave threat to the political transition nationwide.”

Referring to the Commission, the report said at paragraph 81:-

“The programme to disband illegal armed groups addresses one of the clearest and most consistently expressed demands of the Afghan people, the compliance to date has been disappointing.”

And at paragraph 82:-

“Corruption and the narcotics industry continue to threaten Afghanistan’s transition and must be dealt with as matters of priority by the Government and the international community.”

105. Freedom House, reporting on 6 September 2006, referred to 2005 as being the bloodiest year since the fall of the Taliban in 2001, with nearly 1,600 civilians, law enforcement personnel, officials and foreign aid workers killed and injured during the year. It expressed concerns about widespread corruption, nepotism and cronyism which were growing. There is reference to there being no functioning nationwide legal system, and that justice in many places is administered on the basis of a mixture of legal codes by judges with minimal training. It refers to outside influences over the judiciary remaining strong and their judges and lawyers are frequently unable to act independently because of threats from local power brokers or armed groups, with bribery widespread.
106. He then turned again to the Country of Origin Information Report, published in April 2006. There are several references to lack of a functioning nationwide legal system and the fact that individuals held in Government-controlled prisons are frequently held for months without being charged. The UN-appointed independent expert on the Commission on Human Rights added that, persons who are charged are held for extended periods of time, without being tried; and that pre-trial detentions exceed the sentence for the crimes. Individuals who may be innocent are held in detention with hardened criminals and children. Juveniles are commonly held in the same cells as violent adult criminals. Corruption throughout the system is rampant. A similar point was made by the US State Department report in 2005.
107. In a section headed "Warlords and Commanders" at 5.63 of COIR the UN-appointed independent expert for the Commission on Human Rights is reported as saying how ethnic allegiances and the prolonged absence of a legitimate centralised State, means all local and regional power within Afghanistan is subject to the authority exercised by a variety of armed actors, commonly referred to as warlords. Their local commanders wield authority through a combination of arms, mutually supportive relationships with other armed actors, safe networks and ethnic allegiances. The UNHCR is reported, at 5.68, as saying, in June 2005, that these commanders continue to pose a threat to national security and human rights especially in the light of their involvement in what is regarded as a rapidly expanding drug trade.
108. The state of the police is referred to from paragraph 5.102. The UN Secretary General reported that the national police has limited ability to project itself outside Kabul. Attempts are being made to introduce more training. Prison conditions are discussed from paragraph 5.111 onwards. Amnesty said, in 2004, that conditions in Kabul have seen an improvement, but there is an urgent need for rehabilitation and reconstruction elsewhere. By March 2006 the US State Department report was reporting that prison conditions remain poor with severe overcrowding and the UN Secretary General at the same time said that the human rights situation regarding imprisonment in Afghanistan remains critical. There is some evidence of torture in prisons. In its overview, the COIR report, looking at human rights, quotes a 2004 report from a UN-appointed expert on human rights who said that most human rights violations occur at the hands of warlords, local commanders, drug traffickers and other actors who wield a power of force.
109. There is reference to the security situation in Kabul from paragraph 6.23. In May 2004, the ECRE said:-

“The Afghan Government continues to lack effective control over Kabul, and efforts to create a new national army and police force and to reform the judicial system throughout the country remain at an embryonic stage.”

As to torture this is dealt with from paragraph 6.55. The 2004 Danish Fact-Finding Mission had said that the Lawyers Union of Afghanistan report that people in custody are beaten up until they confess. Human Rights Watch, in September 2004, reported that local military and police forces even in Kabul are involved in arbitrary arrests, kidnapping and extortion, the torture and extra-judicial killings of criminal suspects. Outside Kabul commanders, and their troops, in many areas are implicated in the widespread rape and murder. Amnesty, in 2005, reported evidence emerging that US forces had tortured and ill-treated detainees.

110. At paragraph 6.484 there is reference to the Danish Fact-Finding Mission which reported that if the security forces believe that a person is connected to Hizb-i-Islami's Hekmatyar faction there is a risk of arrest as there is a risk that people will accuse others of having connections with Hekmatyar for personal motives. This, however, is the 2004 report that was dealt in by RS Afghanistan.

111. Mr Jacobs then moved on to Article 1F, reminding us that Mr Kovats had said that we might feel that this was not an exclusion case in the light of the evidence given. He reminded us that the second appellant stopped fighting in 1995, and the first appellant in 1997, both before Hekmatyar's decision to start a Jihad on the international forces in Afghanistan. He suggested the activities conducted by the two appellants were not criminal, they were engaged in inter-tribal conflict of a guerrilla nature, typical of life in Afghanistan. They were in mountainous regions firing mortars and shells at another group in a similar situation. They were doing no more than defending their own region from another tribal group. He reminded us of the terms of Gurung [2002] UKIAT 04870. Their actions were not to facilitate terrorism and that if these two were to be excluded then the majority of asylum seekers from Afghanistan would be excluded without any serious evidence of criminal conduct on their part. He referred us particularly to paragraph 31 of Gurung where the Tribunal had said that Article 1F is only concerned with serious criminality, but not necessarily restricted to those committed in the context of war and armed conflict. In paragraph 36 of Gurung there is reference to a Canadian case which referred to international criminals on all sides of conflicts rightly being unable to claim refugee status. In paragraph 39, to the principle of the need for a holistic approach. He accepted there was a similar restriction in relation to the grant of humanitarian protection, but he reminded us that in any event Article 3 was an absolute right which contained no such exclusion clause.

Mr Lams' Submissions of Background Evidence for the third appellant

112. Mr Lams adopted Mr Jacobs' submissions, and went on to look at the profile of the third appellant. He left Afghanistan earlier, although his association with Hizb-i-Islami goes back a long way. He had spent two years helping the Mujahideen and Hizb-i-Islami against the Communist regime. At that time Jamiat and Hizb-i-Islami were fighting together against the Communists. The third appellant was then allied to Jamiat and, as a result, he is known to the Jamiat people which, he argued, strengthens his profile on return. It has been accepted that both his father and his brother were Hizb-i-Islami members who were arrested by the Taliban. So, not only does the third appellant have family connections with Hizb-i-Islami, but he has worked

with Jamiat-i-Islami. Furthermore, the third appellant is educated. His family had a pharmacy in Kandahar and he, and his family, would be recognised if they were to return. Dr Giustozzi reckoned this would only take a number of days.

113. He argued that, in Kabul, Jamiat are highly placed in the security structure. The Minister of Interior is a Jamiat man, and they are the party that do the enforcing. That affects the extent to which the appellant would come to their attention in Kabul and in Kandahar. He reminded us that there was an earlier report by Dr Lau about the third appellant which was before the first Adjudicator. It is dated 8 September 2003. It is a short report, which at paragraph 11 describes Hizb-i-Islami as:

“a most radical and violent group which has been implicated in numerous attacks on individual members of the interim administration, bomb attacks in Kabul and other cities, attacks on ISAF troops with rockets and more recently by employing a suicide attack and attacks on Coalition troops operating in Afghanistan”.

At paragraph 40, Dr Lau said that he had been asked to comment upon whether the third appellant’s continued fear of return to Afghanistan was well-founded. He considered that it was. He said:

“I think that his membership in the Hizb-i-Islami exposes him to a significant risk from both the Northern Alliance and in fact the current Government.”

He said that, unlike the Lau report in RS Afghanistan, in the third appellant’s case weight was not put on factors which were subsequently disagreed with by Dr Giustozzi i.e. financial rewards for identifying Hekmatyar’s whereabouts. He argued that Dr Giustozzi’s report supports the position from 2003. He asked, rhetorically, what had changed since then. He said the situation had deteriorated. He said the factor in 2003 was Hizb-i-Islami’s involvement in terrorism. The level of insurgency increased since then, especially during 2006 and 2007. Both reports use a similar pattern of reasoning. He argued that, although the amount of actual recorded arrests may be lower than expected, this appears to be because of a lack of reporting, because of the lack of rule of law. The inference is that those who are arrested, are connected with the insurgency. This is a chain of reasoning both in RS Afghanistan and Dr Giustozzi’s report. The Danish Fact-Finding report has been called into query by Dr Lau although the report was contradictory in places, it did say that Hizb-i-Islami membership gives rise to a risk. Dr Giustozzi specifically referred to the appellant’s educated status and to pre-emptive arrests to avoid recruitment by Hizb-i-Islami or the Taliban. He argued that the risk of pre-emptive arrest was an additional factor. Mr Lams was asked whether this could not be seen as an element of State protection. He argued that would depend on what happened after the arrest, because the prison conditions were extremely poor and a person could be held in custody indefinitely. He urged us to look at evidence about the prisons, and ask how long that detention may continue.

114. He said that Dr Giustozzi spoke of harassment and then referred to a range of treatment which could include arrest, ill-treatment, and beatings to make people informers. He suggested this opened up a whole net of possible scenarios and, although it was possible to say that is all speculative, the other side of the argument is that it is in the background material and does give rise to a real risk. The key question is, are you going to be targeted or arrested? He said that Mr Kovats had argued that the third appellant was “only a nurse”, and not an active member of an

organisation, but Mr Lams said that is not the appellant's case. He referred us to the grounds, at paragraph 5.3 when it is argued that the third appellant has been a full member of Hizb-i-Islami since 1988. He had produced his membership card, and an invitation to attend the visit of the leader of the party in 1995. The first Adjudicator had accepted that. Whereas the appellant is characterised by Mr Kovats as a nurse, his nursing activities were in aid of a war effort, and he has been to party meetings.

115. He then referred more extensively to the bundle that had been before the Adjudicator on the last occasion. He referred to a BBC news report dated 13 April 2004. That referred to Hizb-i-Islami as being suspected of carrying out many attacks on foreign and Afghan forces over the previous year. It said Hizb-i-Islami was seen as a serious threat, along with the Taliban, and was blamed for much of the violence in Afghanistan over the past eighteen months. At that stage there were fears that Hizb-i-Islami may be planning more violence in the run-up to the then forthcoming elections.
116. At pages A13 and 14 of the bundle there was an article sourced from the 'Eurasianet.org' website. It said that, following the explosion of a bomb in a Kabul market, the President accused Pakistan of sheltering Hekmatyar, saying that intelligence led them to believe that is where he was hiding. The Christian Science Monitor reported in December 2003 that the US authorities derided Hekmatyar as a warlord without a portfolio, and made reference to operations against Hekmatyar troops. There were references to activities by Hizb-i-Islami in the Pakistan Tribune, published on its website on 20 March 2004, and to arrests in Kabul of men believed to have been linked with Al Qaeda and Hekmatyar in April 2004 (Daily Afghan Report website). At page A38 of that bundle, the Wahdat newspaper (published in Pehawar on 25 July 2004) referred to a list of people given to Pakistan by the Afghan Government as wanted. It said that the majority would belong to Hizb-i-Islami.
117. Turning to internal flight, he noted that Dr Giustozzi said that somebody from Kandahar would stand out in Nangarhar. He would be a Pashtun in a Tajik area and it would be unduly harsh because he could not pursue a normal life there. He said that it was Kabul that was identified in earlier skeleton arguments as the place where the third appellant may be able to relocate to and the expert report was based on internal flight to Kabul. He argued that it was too late for the Secretary of State now to widen the field, because his expert had not dealt with internal flight to other areas. He said, if we were not with him on that argument, we have Dr Giustozzi's evidence about the other areas. He asked us also to look at the UNHCR material, and the other documents referred to in his supplementary skeleton argument. He said that the position in Kabul had been extensively dealt with. Finally he referred to part of the US State Department report to be found at page 217 of the bundle. There, there was reference to human rights abuses by the Taliban which he said was another area of risk.
118. We raised with counsel the question of whether there was any evidence at all about what, if any, family the appellants still had in Afghanistan. The third appellant was said to have been accepted as credible by the earlier Adjudicators and had said he had no contact with his family, and did not know their whereabouts. Mr Jacobs said there were no helpful findings at all in relation to either the first or Second Appellant, although it was said in relation to the second appellant that his house had been destroyed in 2001.

119. Mr Kovats raised issues which had not been dealt with previously. He asked us to put no weight on the earlier Lau opinion because we did not know why there was no update and the whole political situation has changed. Dr Lau was speaking of the threat by the Northern Alliance and, at paragraph 18 of his earlier report, had made reference to financial hardships on return. Mr Lams reiterated that in paragraph 14 of the report Dr Lau referred to risk from the Northern Alliance 'and the current Government'. He reminded us that President Karzai had been sworn in, in 2001.

Findings and Conclusions

120. We start by saying that we do not regard the first and second appellants as people who should be excluded from the benefit of the Refugee Convention because of their conduct when they were in Afghanistan. The burden of showing that a person seeking the protection of the Refugee Convention should be excluded lies on the respondent. He has to show that there are serious reasons for believing that the person has committed any of the criminal acts specified in Article 1F. (Gurung (Refugee exclusion clauses especially 1F (b)) Nepal CG * [2002] UKIAT 04870). Although the first and second appellants have been described as commanders, they were at the lowest level of command and in a position which, in a formal army may be somewhat akin to a corporal. They were not in any significant way leaders. There is no satisfactory evidence of any serious criminal conduct, and it seems when they were in Afghanistan they were in all probability fighting to protect their own area rather than as aggressors. They were also involved in fighting of the nature that has been going on in the country for generations and as such as cannot be said to fall within the criminal acts specified in Article 1F.

121. We have been referred to a great deal of background material. There was a great deal to which we were not referred, but we had indicated at the beginning of the hearing that we expected to be referred expressly to such material as was relied on by the parties, either in their skeleton arguments or in submissions. Much of the material provided pre-dated RS Afghanistan and the report of Dr Lau. Whilst it is arguable that gives the case some historical context, it was of little value in assessing the risk on return now.

122. We put very little weight on either of Dr Lau's earlier reports inasmuch as they purport to assess risk. That was partly because the situation has changed considerably since his reports, but more because we do not have any evidence that Dr Lau still supports the position he took when he reported in 2003 and 2004. The hearing was adjourned on several occasions because the Tribunal was told that Dr Lau was in Afghanistan and we were asked to wait for his return so that he could give evidence. The Tribunal was encouraged by that, and willingly acceded to the requests on the basis that it would be very helpful to have evidence from an expert who had recently been to Afghanistan. No new report by Dr Lau has ever been submitted and the last adjournment was caused by Dr Giustozzi's reports being produced at the last moment and too late for the respondent to consider them in appropriate detail. There has been no explanation for Dr Lau's reports not appearing and his not being called, when it clearly had been expected. Of course, this does not mean he was unable to support the appellants, but we do conclude that we cannot assume either that he would have supported the appellants, or that his earlier reports still represent his views today.

123. We have had extremely helpful evidence from Dr Giustozzi. He has also spent a considerable amount of time in Afghanistan and has only recently returned from there. Both sides accepted that factually he was an extremely helpful and reliable witness. We were impressed by the quality of the sources that he has drawn on.
124. In approaching the question of risk today we obviously bear in mind all the general background material but that is exactly what it is, general. Dr Giustozzi's evidence is specific to the appellants and draws on a wide variety of sources. He indicated in his reports that he has in the past declined to write reports for appellants whose accounts do not fit in with his understanding of events in Afghanistan. He is therefore more than just a "hired gun". He has demonstrated his independence.
125. In relation to the general background situation it is clear, and we accept, that the insurgency has been increasing. The evidence is that it appears to be moving nearer to the cities. We also accept that the historical recruiting base for the Taliban is in rural areas with the consequence that their supporters and members are drawn from the uneducated and the unsophisticated. The Taliban have an increasing need for more skilled assistance. The evidence is that the Hizb-i-Islami Party recruited more successfully from the educated and more sophisticated members of society. As a result, Dr Giustozzi says there is greater pressure on families of former Hizb-i-Islami members and supporters to become involved in the insurgency, in the hope that they can provide medical, technological and engineering support which the Taliban are lacking. The evidence is that the Hekmatyar faction of Hizb-i-Islami is co-operating with the Taliban in the insurgency.
126. We find that, although it seems that the insurgency is still at its highest in the south and south east, the background material suggests that it is becoming more generalised. There is evidence of increased activity in the cities and the consequence of that is that there is greater counter-terrorism activity by the authorities.
127. Dr Giustozzi described how insurgents are attempting to set up networks involving safe houses and arms dumps. At the same time he described counter-terrorism activities involving greater searching among people who may be able to give assistance by disclosing what is going on, as they learn from their friends and families.
128. The background evidence also makes it clear that, as yet, there is little in the way of an effective rule of law. There are almost no defence lawyers, and the judiciary is not reliably independent. The background evidence indicates there have been quite large numbers of arrests and detentions of people suspected of being involved with the insurgency, but there have been no reports of trials of those people. The background evidence suggests that although the police may make details of their arrests public, they do not say much, if anything, about the allegiance of those arrested. The security services do not announce arrests and they only become known if they occur in a public place such as those at Kabul University.
129. The background material also makes it clear that, perhaps unsurprisingly, there is a degree of impunity and that in general terms, there are risks of torture and serious mistreatment of detainees both in the prison system and during interrogation. There is some evidence that complaints have been made to the authorities but the numbers are low. Mr Jacobs was probably not unrealistic when he suggested that the actual

numbers of people being mistreated will exceed the number of complaints by some margin.

130. We accept that those who fall into the hands of the Taliban, unless considered friendly to them, are likely to be ill-treated.
131. We find that the situation in Kabul does not appear to be as bad as elsewhere. This is because there is a degree of international oversight and the police and other authorities are beginning to be trained in a way which is not happening in the provincial areas.
132. These three appellants, all of whom have been out of Afghanistan for a considerable length of time, will be returned to Kabul (as we understand to be the case with returnees generally). We acknowledge that questions of internal flight, or internal relocation only arise if an appellant has established that he is at real risk of serious harm in his home area. For the purposes of this determination we start by considering whether they would be at real risk of serious harm in Kabul and, bearing in the mind that none of them come from Kabul City, whether it would be unduly harsh to expect them to stay there. Paragraph 339O of HC395 refers to the question of whether a person can reasonably be expected to stay in any part of his country and provides that regard should be had to the general circumstances prevailing in that part of the country and to that person's personal circumstances. We bear in mind the tests in Januzi [2006] UKHL 5 and AH IG and NM, and that it is only when basic (non-derogable) human rights are at real risk that unreasonableness arises. Whilst the general background material paints a fairly gloomy picture about human rights abuses, and the struggle between the Afghan Government and the insurgency, it is only a generalised description. We find that the background evidence does not establish that any of these appellants would be at a real risk of serious harm, although clearly there is a possibility that they would come to harm. In order to assess the individuals' situations we need to consider the specific expert evidence that has been put forward. We need to interpret the evidence by Dr Giustozzi and decide whether his conclusions are, as Mr Kovats argues, speculative or not. Mr Jacobs argued that his evidence was not speculative because he is quoted in the COI reports. We do not accept that was a sound submission. As Mr Kovats said, the quoted material is not endorsed or confirmed by the compilers of the report.
133. Dr Giustozzi accepts, and we find, that there is no longer a risk arising from people suggesting that individuals may know the whereabouts of Gulbuddin Hekmatyar, in order to win themselves a reward from the United States authorities. It is now accepted that Hekmatyar is most likely in a distant and mountainous area and that only senior members of Hizb-i-Islami might know where he is. That risk was largely the basis upon which RS Afghanistan was founded and it is clear that that case should therefore no longer be followed. We also find, as Dr Giustozzi accepted, that those returning from the United Kingdom, and who have been away for a considerable time, would not be suspected of being insurgents when they arrive back in Afghanistan. There was no evidence from him that suggests they would be at risk at the airport, or immediately on arrival in Kabul. It may be different for someone who has only recently left Afghanistan, and who may be suspected of knowing what is currently going on. There is no question that any of these three appellants would have any idea. There have been a number of major political developments since they left and the passage of time alone would indicate that they would not know what is happening now.

134. The risk, according to Dr Giustozzi, would arise after a period following their return. He argues that it is in the nature of Afghanistan society that relationships are based on trust and that for the appellants to obtain work or accommodation they would need to reveal something about themselves to their prospective employer or landlord. He said that would give rise to checks being made into their background. He said that is easier now, with the advent of mobile phones and other communications, and that their pasts would become apparent. It would not thereafter take long for the people and therefore the authorities to hear about them. Not only would the authorities hear about them, through their sources, but it could be assumed that after a relatively short number of weeks or months they would have re-established themselves and become part of informal networks of family and friends. Dr Giustozzi said that the security forces may well then think that they are worth interrogating, because of knowledge they may pick up from those family or friends.
135. If that is correct, and we accept that it is, the appellants would be no different from those members of society who have been in Afghanistan all along. We have not heard evidence to the effect that all those who are in Afghanistan are at real risk as a result of having networks that may be considered of interest to the authorities. Some of the general population will no doubt have some past involvement in conflict. We have heard evidence of arrests but not in the sort of numbers that would create a real risk to these appellants. We have not heard what happened to those arrested. It has been suggested that someone who has been involved with Hizb-i-Islami will always be regarded as a member. There is no satisfactory evidence to that effect. There is evidence to the contrary as illustrated by the MPs who are ex-Hizb-i-Islami. The fact that the appellants have been out of the country for so long suggests, on a common sense basis and in the light of the above, that their past conduct, without more, will not cause them serious difficulty.
136. Dr Giustozzi was specifically asked, a number of times, about the way in which the security forces may approach those who they suspect could have information of use to them in their counter-insurgency activities. He initially described it as harassment. He said it may take the form of visits to their home and of the asking of questions. He did not volunteer the suggestion that people may be seriously mistreated. When he was asked about the position of returning failed asylum seekers, the only example he could give us was of a young man who it was said had been forced to leave Afghanistan. He was the son of a professor, but when pressed it became clear that he was not a returnee, but a young man who had lived in a village in Afghanistan all along. We did not learn anything from that evidence about what may happen to the appellants on return. In summary, we have concluded that it has not been demonstrated that returnees such as the appellants would be at real risk in Kabul. It is possible, but no more, that after they have been there for a period, their existence would become known to the security forces. The evidence is that they would not be suspected of directly knowing anything about what is going on in the insurgency although after a period, in common with all others, they may be asked questions about what they know from their relatives and friends and their own personal networks. There is no satisfactory specific evidence about the way in which they are likely to be treated such as to establish that there is a reasonable likelihood that they would be subjected to serious mistreatment. We accept that if a person falls into the hands of the authorities as a suspect it is possible that they may be seriously mistreated but we do not find there is a real risk of that on the basis of the facts in these cases. Clearly, if such a returnee elects to become active for Hizb-i-Islami the

situation may be different, but these appellants are not being returned on the basis that that is what they will do. After all, they came here to avoid that.

137. If the appellants show that they have a well founded fear in their home areas it is reasonable to expect them to live in Kabul. Kabul is a functioning city. It has a government and some security forces. We acknowledge that it is not the role of ISAF to protect individuals, but there is an Afghan army and a police force and security forces. Kabul is not an entirely lawless place. There are houses to rent, at a price; and despite a fairly high level of unemployment, there is work. The three appellants have spent a considerable time in the United Kingdom, they are all relatively educated and may well be in a good position to obtain work with the authorities or an NGO or similar. There is no satisfactory evidence that suggests that it would be unreasonable to expect them to live there, or that they would lead other than a relatively normal life. Insofar as Article 3 is concerned there is no satisfactory evidence that they would be subject to inhuman or degrading treatment or that they would be at real risk of a breach of any of their fundamental human rights in Kabul. It follows from all that we have said that in general returning failed asylum seekers, without more, are able to relocate to Kabul, if they cannot return safely to their home areas.

138. There are a few general points that we should make from the evidence in these reconsiderations. First, the description of a person as a commander in Hizb-i-Islami needs to be treated with some circumspection. It is apparent from what we have said in paragraph 77 that this can be anything from a local commander in charge of twenty or so men to a regional commander based in Pakistan.

139. It is the Gulbuddin Hekmatyar faction of Hizb-i-Islami that is allied to the Taliban and Al Qaeda and is therefore in part responsible for the current insurgency. It is that faction which is of interest to the authorities. Of the other two major factions one (the Khalis faction) has effectively cease to exist, because of the death of its leader. It matters not whether he died a natural death or was killed. His son has not been accepted as his replacement and is effectively a local leader for the Taliban. Although that faction has effectively ceased to exist, its members have not formally disbanded. The Farooqi faction has distanced itself from Hekmatyar and, whatever Dr Giustozzi's theories about its motives, has a number of Members of Parliament and is effectively in government. It does not appear to be regarded by the authorities as any form of threat.

Summary of general conclusions relating to Kabul

140. The following is a summary of our general conclusions. It is not intended as the authoritative view and the determination should be read in full for our detailed reasoning.

- (i) Those returned from the United Kingdom will not, without more, be at real risk at the airport or after arrival in Kabul.
- (ii) Those returned from the United Kingdom are not at real risk, without more, of being suspected by the authorities as insurgents.
- (iii) The past of an individual seeking accommodation or work in Kabul, or elsewhere, may be discovered and mentioned to the authorities. Similarly, the authorities may become aware of someone newly arrived in an area. That may result in a person being detained for questioning but

- there is no satisfactory evidence such questioning gives rise to a real risk of serious harm.
- (iv) Subject to an individual's personal circumstances, it is unlikely to be unduly harsh (or unreasonable) to expect them to relocate to Kabul if they have established a real risk of serious harm in (and restricted to) areas outside Kabul.
 - (v) There is no satisfactory evidence that a person who has been associated in the past with Hizb-i-Islami will always be regarded as such.
 - (vi) There is no longer evidence of real risk to individuals said to have possible knowledge of the whereabouts of Gulbuddin Hekmatyar (RS Afghanistan [2004] UKIAT 00278 should no longer be followed).

The appellants' individual appeals

141. As to the appellants' individual appeals, we find as follows:-

The first appellant is a Pashtun from Nangarhar. It is said that he would be at risk as a result of Nangarhar being under the control of Hazrat Ali, who is a member of Jamiat-Islami. He has a powerbase, albeit a narrow one, in Nangarhar and in particular Mazar-i-Sharif. He is also involved in government in Kabul. As a member of Jamiat he would be interested in weeding out Hizb-i-Islami supporters although it is said that he does not have any difficulty with Pashtuns as such. The evidence was that if the first appellant were to return to Nangarhar he would not have any difficulty because of his ethnicity. He may have some difficulty arising out of his past political allegiance although we note that the powerbase of Hazrat Ali is very narrow and, in our view, it has not been made out that without more, returning to Nangarhar would cause the first appellant real difficulties. We acknowledge that there, as in Kabul, he would need to establish himself with networks and his presence would become known to the security authorities. There is perhaps rather more risk for him there than there would be in Kabul because it is a smaller place. However, if he felt he cannot return to his home area, then he can safely relocate to Kabul where it would not be unduly harsh for him to live and he would be able to live a reasonably normal life. Our primary finding is that the first appellant has not shown that he is at real risk of serious harm in his home area.

142. The second appellant is a Tajik from Kabul province. His home area is some fifteen minutes from Kabul City and it is argued that because it is a small place his presence would quickly be noticed and he would come to the attention of the authorities. We acknowledge that may happen more quickly in a small place, than in the city. Being a small place, it is more difficult to avoid anyone who is suspicious of one. On the other hand it is where his roots and earlier networks are based. In the unlikely event that the second appellant is regarded as somebody who would know anything at all about the insurgency, then it is likely he will come to the attention of the authorities more promptly but that is not to say that there is any evidence of real risk to him as a result. If he does not feel comfortable returning to his home area, he could relocate to the city of Kabul where, for the reasons we have set out, it would not be unduly harsh to expect him to go and he could live a reasonably normal life. It has been suggested that he could relocate to the Tajik areas of Afghanistan, but we have not considered that as he would be safe in Kabul. Our primary finding is that he has not shown that he would be at real risk of serious harm in his home area.

143. As to the third appellant, he is a Pashtun from Kandahar. Kandahar is currently experiencing high levels of insurgency but we observe that insofar as the insurgency is concerned there is no reason to suggest that the appellant would be a target for them. Now that Hizb-i-Islami and the Taliban are in some form of loose alliance his past would not make him someone that they would regard as being in opposition.
144. It is not clear how efficient the authorities are in Kandahar. We acknowledge that if the level of insurgency is higher there then the activities of the authorities will be greater, and there is a greater risk that he may be picked up for questioning. There is, however, no satisfactory evidence that that would lead to mistreatment although we acknowledge that in Kandahar, the police and the authorities are likely to be less well-trained and the degree of impunity is probably greater. If the third appellant does not wish to return to Kandahar there is, for the same reasons that we have given in relation to the other two appellants, no reason why he should not relocate to Kabul, where it would not be unduly harsh and where it would not be unreasonable to expect him to live a relatively normal life in common with 70% of the population he is Pashtun. Our primary finding is that he would not be at real risk of serious harm in his home area.

General

145. At the beginning of this determination we explained that we were using the words serious harm to denote 'persecution', serious harm in the context of the Refugee and Person in Need of International Protection Regulations (and para 339 Of HC 395) and inhuman and degrading treatment. Although we have not considered the three protection regimes separately, we have concluded that none of the appellants are at real risk of serious harm and that applies equally to all three regimes. Had we found that there was a real risk of serious harm, in the context of these reconsiderations it would have been for a Refugee Convention reason, namely their actual or imputed political opinion.
146. Although RS (Hezbe Islami – expert evidence) Afghanistan [2004] UKIAT 00278 is not a country guidance case it has been widely followed. This case supercedes RS Afghanistan, which should no longer be followed.

Conclusions

147. There is no real risk of serious harm and, the Tribunal having made errors of law on the occasion that each of these appeals were heard, the following decisions are substituted.
148. The three appeals are dismissed on refugee, humanitarian protection and human rights grounds.

Signed

Date

Senior Immigration Judge Mather

Objective material referred to

Eurasianet Ron Synovitz article 02/09/03
The Christian Science Monitor Ann Tyson article 22/12/2003
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Amnesty International Report 2005
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