



Upper Tribunal
(Immigration and Asylum Chamber)

AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
on 28 October 2010 and 23 May 2011

Determination Promulgated

Before

MR JUSTICE OWEN
UPPER TRIBUNAL JUDGE JARVIS

Between

AA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

The AIRE Centre

Interested Party

Representation:

28 October 2011

For the Appellant: Ms S Motz of Counsel, instructed by Braitch RB Solicitors
For the Respondent: Ms Monica Tanner, Home Office Presenting Officer

23 May 2011

For the Appellant: Ms K Cronin of Counsel and Ms S Motz of Counsel,
instructed by Braitch Solicitors
For the Respondent: Mr D Blundell of Counsel instructed by Treasury Solicitor
For the Interested Party: Mr Adam Weiss of the AIRE Centre

- (1) *The evidence before the Tribunal does not alter the position as described in HK and Others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC), namely that when considering the question of whether children are disproportionately affected by the consequences of the armed conflict in Afghanistan, a distinction has to be drawn between children who were living with a family and those who are not. That distinction has been reinforced by the additional material before this Tribunal. Whilst it is recognised that there are some risks to which children who will have the protection of the family are nevertheless subject, in particular the risk of landmines and the risks of being trafficked, they are not of such a level as to lead to the conclusion that all children would qualify for international protection. In arriving at this conclusion, account has been taken of the necessity to have regard to the best interests of children.*
- (2) *However, the background evidence demonstrates that unattached children returned to Afghanistan, depending upon their individual circumstances and the location to which they are returned, may be exposed to risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection. Such risks will have to be taken into account when addressing the question of whether a return is in the child's best interests, a primary consideration when determining a claim to humanitarian protection.*

DETERMINATION AND REASONS

Introduction and History of the Case

1. The appellant is a citizen of Afghanistan from Kabul Province, whose date of birth is accepted as being 1 January 1994 and who is therefore now 17 years of age. He arrived in the United Kingdom as an unaccompanied child on 7 May 2009 and sought asylum on the basis that he would be at real risk of being persecuted on return to Kabul as a separated child, and/or by reason of political opinion imputed to him by virtue of his being a son of a man who was an informer for the government, and the brother of a man who was an army commander who had been killed by the Taliban, and that he himself had been among a group who sang an anti-Taliban song at a public gathering on Teacher's Day, at which the deaths of foreign military personnel were mourned. He attended a screening interview on 13 May 2009 and underwent a substantive interview with regard to his application on 5 October 2009.
2. On 21 October 2009 the respondent refused the application for recognition as a refugee and grant of status, but granted the appellant discretionary leave to remain in the United Kingdom outside the rules until 1 July 2011 in accordance with her policy relating to unaccompanied children, the Home Office Asylum Policy Instruction on Discretionary Leave.
3. The appellant appealed against the decision, and on 29 January 2010 his appeal under section 83 of the Nationality Immigration and Asylum Act 2002 (an 'up-grade

appeal') came before Immigration Judge Naphine, who dismissed the appeal rejecting the appellant's claim as lacking credibility.

4. The appellant's application for permission to appeal against the determination by the immigration judge came before Upper Tribunal Judge Jarvis on 10 March 2010 when she reached the provisional decision that the determination disclosed an error of law; that it should be set aside, and the appeal be referred to the Upper Tribunal for re-decision. On 7 May 2010 Upper Tribunal Judge Jarvis ruled, under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, without a hearing, that the decision of the immigration judge contained an error of law, namely that that judge failed to take into account evidence relating to unaccompanied or separated children, and failed to assess the evidence on the basis that the appellant was a child, and that it should be set aside and re-made by the Upper Tribunal.

The Hearing of 28 October 2010

5. The appeal came before us on 28 October 2010, when the appellant was represented by Ms S Motz of counsel, the respondent by Ms Monica Tanner, a Home Officer presenting officer. It was common ground that the issues before us were the appellant's claim to recognition as a refugee, and, in the light of the decision of the Court of Appeal in FA (Iraq) v SSHD [2010] EWCA Civ 696 handed down on 18 June 2010, his claim to humanitarian protection (the parties in FA having reached a settlement following the judgment of the UKSC (FA (Iraq) (FC) (Respondent) v SSHD (Appellant) [2011] UKSC 22). We heard evidence from the appellant and submissions on behalf of the parties. But Ms Tanner had indicated at the outset of the hearing that the respondent had not appreciated that the appellant was raising challenges to GS (Article 15(c): Indiscriminate Violence) Afghanistan CG [2009] UKAIT 0044, and was not therefore in a position to respond as to the construction and application of Article 15(c) of the Qualification Directive.
6. We therefore reserved our decision and gave directions as to the service of further submissions by the respondent, and in response on behalf of the appellant.
7. On 23 November 2010 and 3 December 2010 Upper Tribunal Judge Jarvis gave further directions identifying the issues to be addressed at a restored hearing to take account, inter alia, of the country guidance given by the Upper Tribunal ("UT") in HK and Others (minors-indiscriminate violence-forced recruitment by Taliban-contact with family members) Afghanistan CG [2010] UKUT 378 (IAC).

The Hearing of 18 March 2011

8. In January 2011 the restored hearing was fixed for 18 March with the agreement of the parties. But on 1 February 2011 the Supreme Court handed down its judgment in ZH (Tanzania) v SSHD [2011] UKSC 4, in which it addressed, inter alia, the construction and application of s.55 of the Borders, Citizenship and Immigration Act 2009 (the '2009 Act'), the assessment of the best interests of a child in the context of an application for asylum.
9. On 1 March 2011 a letter was sent to the parties notifying them that the UT Country Guidance Convener had decided that the appellant's case was likely to be used as

country guidance. As a result the parties sought further time in which to prepare their respective cases; and the hearing on 18 March was treated as an oral case management hearing at which both parties were represented.

10. On 18 March an order for anonymity was made; and it was further ordered that the AIRE Centre be joined as an interested party subject to any further submission from the appellant or respondent by no later than 1 April 2011. The order joining the AIRE Centre was confirmed on 14 April, and on 6 May further directions were given by Upper Tribunal Judge Jarvis as to the issues to be addressed at the restored hearing.

The Hearing of 23 May 2011

11. It is appropriate to express our appreciation of the considerable efforts made by all parties to ensure that the hearing of 23 May would be effective, and in particular of their co-operation in the preparation of agreed bundles of relevant documentary material and case law, which reflected the onus on the parties to co-operate in cases involving children articulated by the Court of Appeal in DS (Afghanistan) [2011] EWCA Civ 305 handed down on 22 March 2011. The documentary material before the Tribunal is listed in Appendix A and relevant extracts are found at Appendix B. The index to the bundle of authorities is at Appendix C and to the appellant's personal evidence at Appendix D. Following oral submissions we reserved our decision, subject to receipt of written submissions. We subsequently received the appellant's Reply to submissions dated 31 May 2011; the respondent's Rejoinder dated 1 June 2011, and the appellant's Reply dated 9 June 2011, to new points raised in the respondent's Rejoinder.

The Issues

12. The appeal gives rise to the following issues:
 1. the proper approach to an application for asylum and/ or humanitarian protection by a child,
 2. the application of s55 of the Borders, Citizenship and Immigration Act 2009,
 3. whether in relation to children cases the country guidance contained in GS and HK remains valid in the light of the up-to-date background material and expert evidence,
 4. whether the appellant is entitled to recognition as a refugee,
 5. whether the appellant is entitled to humanitarian protection,

Two further issues were addressed by the parties, namely,

6. whether the appellant is a victim of trafficking and/or debt bondage,
7. whether there has been failure to conduct family tracing enquiries.

The Legal Framework

13. A person is a refugee and, therefore, entitled to asylum pursuant to Directive 2004/83/EC, (the Qualification Directive) if, (in the words of Article 1A of the Geneva Convention relating to the Status of Refugees) owing to well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, he is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country
14. A person not entitled to refugee status may nevertheless be eligible for 'subsidiary' protection pursuant to Article 2 of the Qualification Directive.
15. Article 15 defines the serious harm as follows:

"Serious harm consists of:

- a. Death penalty or execution; or*
- b. Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or*
- c. Serious and individual threat to a civilian life or person by reason of indiscriminate violence in situations of international or internal armed conflict."*

16. The following recitals to the Qualification Directive are relevant to the interpretation of Article 15(c):

"(12) The 'best interests of the child' should be of primary consideration of Member States when implementing this Directive.

(20) It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.

(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to refugee protection enshrined in the Geneva Convention.

(25) It is necessary to introduce criteria on the basis of which applicants for which international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm."

17. Article 15(c) is given effect in domestic law by paragraph 339C of the Immigration Rules, which provides as follows:

“339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

- i. he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;*
- ii. he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;*
- iii. substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and*
- iv. he is not excluded from a grant of humanitarian protection.*

Serious harm consists of:

- a. the death penalty or execution;*
- b. unlawful killing;*
- c. torture or inhuman or degrading treatment or punishment of a person in the country of return; or*
- d. serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”*

Internal relocation

18. Article 8 of the Qualification Directive provides that:

- “(1) As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm then the applicant can reasonably be expected to stay in that part of the country.*
- 2. In examining whether a part of the country of origin is in accordance with paragraph 1, member states shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.*
- 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.”*

19. Article 9 of the Qualification Directive, which defines ‘Acts of Persecution’, reflects recital 20 in providing at Article 9(2) that acts of persecution as qualified in paragraph 1, can, inter alia, take the form of “acts of a gender-specific or child-specific nature”.

20. Given the requirement articulated in recital 20 to the Qualification Directive, it is relevant to consider the provisions of the Convention on the Rights of the Child (the 'CRC'). Furthermore as Munby J observed in R (on the application of Howard League for Penal Reform) v Secretary of State for the Home Department & Anor [2002] EWHC 2497 (Admin):

"51. The European Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. Neither the UN Convention [on the Rights of the Child] nor the European Charter is at present legally binding in our domestic law and they are therefore not sources of law in the strict sense. But both can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention."

21. The UKBA Asylum Policy Guidance on Processing an Asylum Application from a Child. states that:

"The UK is a signatory to the UN Convention on the Rights of the Child and its text includes key commitments that UKBA has to meet when handling asylum applications from children."

22. The UN Committee on the Rights of the Child ('UNHCR') which is the treaty-monitoring body for the CRC, has identified articles 9, 19, 24, 37 and 38 of the CRC as of particular relevance to a child-specific definition of persecution in its December 2009 Guidelines on Child Asylum Claims, and has given further guidance on a child-specific approach to the refugee definition in its General Comment No. 6 at paragraph 74 namely:

"...the refugee definition... must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures."

Welfare and best interests of the child

23. Council Directive 2003/9/EC (the 'Reception Directive') sets out "minimum standards for the reception of asylum seekers". Chapter IV deals with "Provisions for Persons with Special Needs". Article 18 (1) provides that:

"The best interest of the child shall be a primary consideration for Member States when implementing the provisions of the Directive that involve minors".

Provision for the treatment of unaccompanied minors is made in Article 19. Article 19(3) provides that:

“Member states, protecting the unaccompanied minor’s or best interest, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity to the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.”

24. The Reception Directive is given effect in domestic law by the Asylum Seekers (Reception Conditions) Regulations 2005 (the ‘2005 Regulations’). Tracing family members of unaccompanied minors is dealt with in regulation 6:

“(1) So as to protect an unaccompanied minor’s best interest, the Secretary of State shall endeavour to trace the members of the minor’s family as soon as possible after the minor makes his claim for asylum.

(2) In cases where there may be a threat to the life or integrity of the minor or the minor’s close family, the Secretary of State shall take care to ensure the collection, process and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or their safety.

(3) For the purposes of this regulation

“(a) An unaccompanied minor means a person below the age of 18 who arrives in the United Kingdom unaccompanied by an adult responsible for him whether by law or custom and makes a claim for asylum;

(b) A person shall be unaccompanied minor until he is taken into the care of such an adult or until he reaches the age of 18 whichever is the earlier;

(c) An unaccompanied minor also includes a minor who is left unaccompanied after he arrives in or enters the United Kingdom but before he makes his claim for asylum.”

25. Section 55 of the Borders, Citizenship and Immigration Act 2009 (‘the 2009 Act’) provides, so far as is relevant that:

“(1) The Secretary of State must make arrangements for ensuring that –

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are –

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

- (b) *any function conferred by or by virtue of the Immigration Acts on an immigration officer;*
 - (c) *any general customs function of the Secretary of State;*
 - (d) *any customs function conferred on a designated customs official.*
- (3) *A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).*

[...]

- (6) *In this section –*

“children” means persons who are under the age of 18;

[...]

26. The proper approach to an application for asylum or for humanitarian protection by a child was addressed by the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4, [2011] 2 WLR 148. It held that international law placed a binding obligation upon public bodies, including the immigration authorities and the Secretary of State, to discharge their functions having regard to the need to safeguard and promote the welfare of children; that the obligation applied not only to how children were looked after in the United Kingdom but also to decisions made about asylum, deportation and removal from the United Kingdom; that any such decision which was taken without having regard to the need to safeguard and promote the welfare of any child involved would not be “in accordance with law” for the purposes of Article 8.2 of the Convention; that, further, in all decisions directly or indirectly affecting a child’s upbringing national authorities were required to treat the best interest of the child as a primary consideration, by first identifying what the best interest of the child required and then assessing whether the strength of any other considerations, or the accumulative effect of other considerations, outweighed the child’s best interests. The principal judgment of the court was given by Baroness Hale of Richmond JSC with whom Lord Hope, Lord Kerr, Lord Brown and Lord Mance agreed. The court addressed a number of international instruments in respect of which it had sought submissions from the parties. It considered in particular Article 8 of the ECHR, section 55 of the 2009 Act, the United Nations Convention on the Rights of the Child 1989 (the UNCRC), the United Nations Declaration on the Rights of the Child 1959 (the UNDRC), Article 24 of the European Union(s) Charter of Fundamental Rights, (the UNHCR Guidelines on Determining the Best Interests of the Child and General Comment N06 of the United Nations Committee on the rights of the child (2005) on the treatment of Unaccompanied and Separated Children Outside their Country of Origin.
27. The principal judgment was given by Baroness Hale. The following paragraphs are of particular relevance to the issues to which this appeal gives rise.

“23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in Article 3.1 of the UNCRC: ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be of primary consideration’. This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the borders, citizenship and immigration act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions ‘are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom’.

24. Miss Carrs-Frisk acknowledges that this duty applies not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be ‘in accordance with the law’ for the purpose of Article 8.2. Both the Secretary of State and the Tribunal will therefore have to address this in their decisions.

25. Further it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply Article 3.1 of the UNCRC and to treat the best interests of a child as ‘a primary consideration’. Of course, despite the looseness with which these terms are sometimes used, ‘a primary consideration’ is not the same as ‘the primary consideration’, still as ‘the paramount consideration’. ...

However questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly at para. 1.1:

“The term ‘best interest’ broadly describes the well-being of a child, ... the CRC neither offers a precise definition, nor explicitly outlines, factors of the best interest of the child, but stipulates that: the best interest must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from parents against their will: (Article 9): the best interest must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies see: Article 3.”

This seems to me accurately to distinguish between decisions which directly affect the child’s upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of the UNCRC, for example,

draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation from a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.

26...this did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of other considerations outweigh them. The important thing, therefore, is to consider those best interests first. ..."

28. Lord Kerr summarised the position concisely at paragraph 46.

"It is a universal theme of the various international and domestic instruments to which Baroness Hale JSC has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interest. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. When the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force to dispose them. It is not necessary to express this in terms of a presumption that the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

29. ZH was considered by the Court of Appeal in AD Lee v SSHD [2011] EWCA Civ 348, in which the appellant had argued that the judgment of Lord Kerr carried 'a different emphasis' to that of Lady Hale. The Court of Appeal disagreed, per Sedley LJ at paragraph 15:

"It seems to us that Lord Kerr is expressing the same view as Lady Hale in different language; but if we are mistaken about this, the majority of opinion is that expressed by Lady Hale and this is to be followed."

30. In DS (Afghanistan) v SSHD [2011] EWCA Civ 305, the Court of Appeal considered the application of section 55 of the 2009 Act and the tracing obligation under regulation 5 of the 2005 regulations. As in this case, the Secretary of State's decision to refuse asylum had been made before coming into force of section 55 on 2 November 2009 but was in force by the time of the reconsideration of the appeal by the AIT. At paragraph 71 Lloyd LJ said:

"This provision did not apply directly to the appellant's case at the time it came into force, because no function referred to in sub-section (2) remained to be performed by the Secretary of State or an immigration officer as regards the appeal. What remained to be done was the hearing and determination of the reconsideration of the appeal by the AIT. Nevertheless it seems to me that the AIT ought to have borne this obligation in mind when deciding the appeal, because of the Tribunal's role as decision-maker: see R (Razgar) v SSHD [2004] UKHL 27, [2004] 1AC368 at paragraph 15. The position

might have been different if the role of the Tribunal were not that of being a part of the decision-making process. If its function were equivalent to that of deciding a conventional appeal or a conventional judicial review application, then the process might be limited by reference to material which had been before the decision maker and to the law as it stood at the time of the decision. But it has long been clear that the role of the AIT, now the first-tier Tribunal or the Upper Tribunal, as the case may be, is not constrained in this way: see Macdonald's Immigration Law and Practice, 8th Ed, paragraph 19.22."

31. There is an issue between the parties as to whether the duty that arises under section 55 is procedural, as the respondent contends, or applies to the substantive decision. In our judgment it is implicit in the judgment of Lady Hale in ZH (see paragraph 24 of her judgment at paragraph 24 above) and in the judgments of the Court of Appeal in DS (see in particular Lloyd LJ at paragraphs 82 and 83 and Rimmer LJ at paragraph 88), that section 55 is applicable to the substantive decision. At paragraph 88 Rimmer LJ gives the example that in the case of DS, "no steps have been taken by the Secretary of State towards enquiring as to the availability of adequate reception facilities for the appellant in Afghanistan", an example that is plainly directed at a substantive decision.
32. But there are elements of a claim to refugee status or to humanitarian protection in relation to which section 55 can have no application. In the case of a refugee, the first question is whether the individual is outside the country of origin. That is a simple question of fact to which the best interests of the child are irrelevant. Similarly the child's best interests have no part to play in determining the answer to the question of whether he or she is unable to avail themselves of their state's protection. Either the child is able to seek protection from his or her state of origin or is not. As to the situation where the child wants to go back - is willing to go back - and try to seek protection from the state authorities, but objectively that is not in his or her best interests in the light of the other primary facts including background evidence that show a real risk of prohibited harm to the child; in those circumstances, it would indicate that a question as to best interests arises and the section 55 duty is engaged. Further there is the matter of the 1989 UNCRC and a children's rights based analysis to the determination of the refugee status of a child. Although that is quite a separate, additional approach to be applied, the statutory guidance Every Child Matters, does make clear the relevance of the UNCRC even to the s55 duty.
33. Thus in our judgment it is not helpful to attempt to analyse the duty imposed by section 55 as being either procedural or substantive in its effect. It applies to the procedures involved in the decision-making process; but will also apply to those aspects of the substantive decision to which it is relevant. In remaking the decision we must therefore consider the best interests of the appellant, and treat his best interests as "a primary consideration" per Lady Hale in ZH.
34. In DS the Court of Appeal also addressed the issue of 'Family Tracing and Reunification'. At paragraph 68 Lloyd LJ observed that:

"68. The obligation to endeavour to trace under regulation 6 applies when a child has made an asylum application, but the application is to be determined on its merits, whether or not any steps have been taken pursuant to the obligation. To that extent, I

would accept the submission of Mr Waite for the respondent that the obligation to endeavour to trace is distinct from the issues that arise from an application for asylum. If steps have been taken pursuant to the obligation under regulation 6, the results, if any, maybe relevant to the determination of the asylum application, depending on what the issues are on that application. In fact no attempt to trace was made by UKBA in the present case. All that was done was draw to the attention of the appellant or his foster-carer the facilities of the Red Cross, with a view to his attempting to trace his relatives through that agency. There is a question as to whether the use made of these facilities by or on behalf of the appellant was appropriate, but nothing was done pursuant to regulation 6. It seems to me that the failure is not by itself, relevant to the determination of the appellant's asylum application. ..."

Article 15(c)

35. The starting point in a consideration of the claim to humanitarian protection is the decision of the ECJ in *Elgafaji* (Case C-465/07); [2009] 1WLR 2100. After reviewing the three types of 'serious harm' defined in Article 15, the judgment continued in the following terms:

- "35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a member state to which a decision refusing such an application is referred, reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.*
36. *That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the pre-amble to the Directive, according to which 'risks to which a population or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.*
37. *While that recital implies that the objective finding alone of a risk linked to the general situation in the country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the directive have been met in respect of a specific person, its wording nevertheless allows by the use of the word 'normally' for the possibility of an exceptional situation which would be categorised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.*
38. *The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm to find in (a) and (b) of that Article requires a clear degree of individualisation. Whilst it is admittedly true that collective factors play a significant role in the application of Article (C) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations in international or internal armed conflict, it*

is nevertheless the case that the provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore cover to be interpreted by close reference to that individualisation.

39. *In that regard the more the applicant is able to show that he is specifically affected by reason of fact as particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.*

...

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

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

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

Relevant country guidance

36. In HK and Others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC) the Upper Tribunal addressed the objective evidence as to the level of indiscriminate violence in Afghanistan, with particular reference to the position of children, holding that:

- “1. *Children are not disproportionately affected by the problems and conflict currently being experienced in Afghanistan. Roadside blasts, air-strikes, crossfire, suicide attacks and other war-related incidents do not impact more upon children than (sic) upon adult civilians.*
2. *While forcible recruitment by the Taliban cannot be discounted as a risk, particularly in areas of high militant activity or militant control, evidence is required to show that it is a real risk for the particular child concerned and not a mere possibility.*
3. *Where a child has close relatives in Afghanistan who have assisted him in leaving the country, any assertion that such family members are uncontactable or are unable to meet the child in Kabul and care for him on return, should be supported*

by credible evidence of efforts to contact those family members and their inability to meet and care for the child in the event of return."

37. HK drew on the earlier country guidance given in GS (Article 15(c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044, which held that:

"There is not in Afghanistan such a high level of indiscriminate violence that substantial grounds exist for believing that a civilian would, solely by being present there, face a real risk which threatens the civilian's life or person, such as to entitle that person to the grant of humanitarian protection pursuant to Article 15(c) of the Qualification Directive. GS (Existence of internal armed conflict) Afghanistan CG [2009] UKAIT 00010 is not longer to be treated as extant country guidance."

Assessment of credibility

38. Article 4(3) of the Qualification Directive requires that the assessment of an application for international protection is to be carried out on an individual basis, and that includes taking into account:

"...

(c) the individual position and circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm".

39. Paragraphs 350-352X of HC 395 concern unaccompanied children, and paragraph 351 provides that:

"A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 334 [dealing with Grant of Asylum] applied to all cases. However, account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation. An asylum application made on behalf the child should not be refused only because the child is too young to understand the situation or have formed a well-founded fear of persecution. Close attention should be given to the welfare of the child at all times."

40. In this context it is also relevant to bear in mind the respondent's Asylum Policy Guidance (APG) which contains the following principles to be applied in the determination of a claim to asylum by a child:

"(1) more weight must be given to objective indications of risk than to the child's state of mind;

(2) other factors to consider might include: documentary evidence, objective country evidence, evidence from people with knowledge of the child - including post arrival in the UK;

- (3) *a case owner must not draw an adverse credibility interference from omissions in the child's knowledge if it is likely that their age or maturity is a factor or if there are logical or other reasons for those omissions;*
- (4) *the benefit of the doubt will need to be applied more generously when dealing with a child particularly where a child is unable to provide detail on a particular element of their claim."*

41. Such guidance reflects the UNHCR Guidelines issued by the UN High Commissioner for refugees in 2009 "Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1A(2) and 1(F) of the 2951 Convention and/or 1967 Protocol relating to the Status of Refugees, which provide that:

"[65] Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims. The general measures outlined below set out minimum standards for the treatment of children during the asylum procedure. They do not preclude the application of the detailed guidance provided, for example, in the Action for the Rights of Children Resources Pack, the Inter-Agency Guiding Principles on Unaccompanied and Separated Children and in national guidelines.

[68] For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members. There will be exceptions, however, to these priorities where information becomes available suggesting that tracing or reunification could put the parents or other family members in danger, that the child has been subjected to abuse or neglect, and/or where parents or family members may be implicated or have been involved in their persecution."

[73] Although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied. If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt. Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim."

42. In this context see also the UNHCR Refugee Children Guidelines on Protection and Care, 1994 which at page 101 state that:

"(e) The problem of "proof" is great in every refugee status determination. It is compounded in the case of children. For this reason, the decision on a child's refugee status calls for a liberal application of the principle of the benefit of the doubt. This means that should there be some hesitation regarding the credibility of the child's story, the burden is not on the child to provide proof, but the child should be given the benefit of the doubt."

General situation for children

43. In GS (Article 15(c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044, the AIT found on the basis of background and expert materials for the period to May 2009, that the violence in Afghanistan had not then reached such a high level that the adult civilian population were generally at risk. In HK and Ors the Upper Tribunal considered the claims to humanitarian protection by three Afghan children, and addressed background and expert evidence dated no later than April 2010 with specific reference to the position of children. Its conclusions are set out at paragraph 36 above.
44. The questions that arise in relation to this aspect of the appeal are therefore whether the conclusions at which the Tribunal arrived in HK and Ors with regard to the position of children in Afghanistan hold good in the light of the up to date country evidence, and secondly whether there are in any event features of the appellant's case that affect his entitlement to humanitarian protection.
45. Appendix B contains a summary of the country material before us, almost all of which post-dates GS and HK and Ors. Such material can conveniently be addressed under the following heads:

Indiscriminate violence

Child specific risks which are addressed under a number of sub-heads namely –
displacement of population
sufficiency of protection
forced recruitment
absence of protection
sexual violence
landmines

46. Before addressing such material, it is to be noted that in HM Iraq the Upper Tribunal gave guidance as to the approach to be adopted in assessing risk in the context of Article 15(c), namely:

- a. An approach which seeks to distinguish between targeted and incidental killing [as employed by the tribunal in GS (Afghanistan) is “not a helpful exercise in the context of Article 15(c) nor does it reflect the purposes of the Directive” (HM (Iraq), at [73]) and it fails to take into account common problems such as underreporting.” (HM (Iraq), at [75])*
- b. General criminality causing harm of the necessary degree of seriousness can have a sufficient causal nexus with the conflict where “normal law and order provisions are significantly disrupted” so as to “permit anarchy and criminality occasioning serious harm” (HM (Iraq), at [79]-[80]); and GS (Afghanistan), at [65]);*
- c. Individuals may be at greater risk, for instance, because “they are more likely to be in or near places where attacks are made: churches, mosques, government buildings, the homes of security force members and the like.” (HM (Iraq), at [86]).*

- d. *“serious threat to the life or person” extends to “significant physical injuries, serious mental traumas and serious threats to bodily integrity” and the evidence pertinent to establishing whether Article 15(c) is engaged must not be limited to the number of casualties (HM (Iraq), at [76]);*
- e. *Figures of casualties “only furnish a part of the overall evidence needed to assess Article 15(c) risk” (HM (Iraq), at [258]).*
- f. *“Sharp differences [in the figures of civilian casualties] illustrate that in wars and armed conflicts we must not exclude the possibility that one or more of those involved in giving or drawing up figures concerning deaths and injuries may sometimes be influenced by political or military considerations” (HM (Iraq), at [248]) and regard should be had to all figures produced, taking particular note of the highest ones (HM (Iraq) [253])”*

Indiscriminate violence

- 47 The extensive country background material before us demonstrates an increase in indiscriminate violence since 2009. We rely in particular upon:
1. the UNHCR Guidelines 17.12.2010, Appendix B paragraph 1,
 2. Report of the United Nations High Commissioner for Human Rights on the situation of Human Rights in Afghanistan 19.01.2011 Appendix B paragraph 2,
 3. United Nations, Report of the Secretary-General to the Security Council on children and armed conflict in Afghanistan 03.02.2011, Appendix B paragraph 3,
 4. Human Rights Watch, Annual Report - Afghanistan January 2011,
 5. Afghanistan NGO Safety Office (ANSO) reports, Appendix B paragraph 7,
 6. UN Assistance Mission in Afghanistan (UNAMA), Annual Report 2010 Protection of Civilians in Armed Conflict,
 7. Oxfam ‘Nowhere to Turn’: The Failure to Protect Civilians in Afghanistan 19.11.2010, Appendix B paragraph 8.
48. UNHCR Guidelines 17.12.2010 record a worsening security environment in certain parts of the country, and the increasing civilian casualties. It characterises the situation as one of generalised violence in the Helmand, Kandahar, Kunar and parts of Ghazni and Khost provinces further observing that:
- “In addition, given the fluid and volatile nature of the conflict, asylum applications by Afghans claiming to flee generalised violence in other parts of Afghanistan should each be assessed carefully...”*
49. Similarly the section of the Guidelines directed to the determination of eligibility for international protection of Afghan asylum seekers, who do not meet the refugee criteria in Article 1A(2) of the 1951 Convention noted *“(i) the worsening security environment in certain parts of the country; (ii) the increasing number of civilian casualties; and (iii) the significant population displacement”* (page 33).
50. The increase in civilian casualties is also recorded in the report of the Secretary General to the UN Security Council 3 February 2011 at Part II A, p2, paragraph 3-5:

“3 ...The year 2010 was the most volatile year in security terms since the fall of the Taliban in 2001. According to the United Nations, the number of security incidents was 40 per cent higher in January 2010 compared to January 2009, and 93 per cent higher in June 2010 compared to 2009. This was due in part to the continued attacks by the Taliban-led insurgency, their expansion into previously stable areas, such as northern and western Afghanistan, as well as increased counter-insurgency operations by Afghan National Security Forces and international military forces. Incursions of foreign fighters and the deteriorating security situation along the border area with Pakistan also contributed to increased insecurity.

4 ...As compared to 2,118 civilian casualties recorded in 2008 and 2,412 in 2009, the 2010 mid-year report documented 3,268 conflict-related civilian casualties between 1 January and 30 June 2010, a 31 per cent increase over the same period in 2009. In 2010, women and children made up a greater proportion of those killed and injured than in 2009, with child casualties increased by 55 per cent from the same period in 2009.”

51. The increase is also noted in the UNAMA Annual Report for 2010, and in the ANSO reports, for example that for the first quarter of 2011 (Appendix B paragraph 7).
52. The situation in Kabul has also been reported as deteriorating, and the map produced by the parties derived from the ANSO quarterly report for the fourth quarter of 2010, shows the provinces surrounding Kabul as at moderate to high risk, an area including the appellant's home region. The UKBA Afghanistan Security Situation Update for the period covering 1 January 2010 to 15 March 2011 recorded that Kabul experiences regular, indiscriminate rocket and bomb attacks and targeted attacks against ISAF patrols and establishments, and a heightened risk of roadside bombs and ambush outside Kabul city.
53. In this context we recognise, as did the UT in HK and Ors (see paragraph 18), that the methodology used to record casualties may result in under-reporting.
54. On 1 May 2011 the Taliban issued a press release announcing the start of the Spring offensive ‘Operation Badr’ further increasing the danger and attack throughout all of Afghanistan. Threats of terrorism are reported almost on a daily basis, with frequent and widespread lethal attacks against British and coalition armed forces, political and civilian targets.

Displacement of population

55. As to population displacement, the report of the Secretary-General to the UN General Assembly and Security Council, ‘The situation in Afghanistan and its implications for international peace and security’, dated 11.04.2011 (at Appendix B, page 14 paragraph 63) records the scale of displacement of the population as a result of the conflict. The Internal Displacement Monitoring Centre (IDMC) report of 15 April 2010 (p 5) ‘A profile of internal displacement situation’ records that:

“Forty-two per cent of the country's 28.2 million (UNFPA 2010) has been internally displaced at least once in their lifetime, according to a recent NGO study. Seventeen per cent have been displaced both internally and internationally (Oxfam, 2009).

56. Large numbers of internally displaced persons (IDPs) have moved to urban areas. Informal settlements make up 70% of Kabul's total urban area and accommodate 80% of the city's population (IDMC 15 April 2010 page 40). Many returning refugees are going hungry and are unemployed. The Brookings Project on U.S. Relations with the Islamic World, 'Displacement in the Muslim World: A Focus on Afghanistan and Iraq' (2009) and IDMC (p 13), note:

"In Kabul in particular there is a lack of infrastructure to support the population that has been swelled by returning refugees and IDPs – much of the city lacks proper sanitation facilities, electricity, schools or health centers. Unemployment and underemployment is rife. There are reports of food shortages and hunger in IDP camps. Lack of security is both a concern and a reality for returning refugees... Furthermore, young returnees often feel discriminated against as they often lack extensive networks or speak their mother tongue with an accent leading to a question of their 'Afghan-ness' by those who remained."

57. As part of the displacement of population large and increasing numbers of separated children have become street children in Kabul. The Watchlist report to the CRC Committee August 2010 and its Afghanistan Report 6.5.2011 note: *'The numbers forced to leave their homes have increased significantly in recent weeks'*. The Consortium for Street Children & War Child, NGO Shadow report for UN Committee on Rights of Child (p59) reports that 70% of Afghan population lives in poverty and that 60% of families rely on children for household income ... In Kabul estimates on street children increased from: 37,000 in 2003; 50,000 in 2007 to 70,000 in 2008. The Aschiana Foundation estimates there are 60,000 street children in Afghanistan. The report states:

"Children living in Kabul city are commonly forced into street begging and child labour even when living with their families. There are tens of thousands of homeless children aged between five and 18 in Kabul... The children work up to 16 hours a day selling anything from newspapers to plastic bags."

58. The UNICEF Afghanistan Humanitarian Action Report 2010 (pp93-96) reports that:

"Currently around 235,000 people are living in displacement, either in makeshift camps or host communities. These difficult living conditions are made even more so because of little or no access to essential health care, safe water, a basic education or child protection services. In addition, another 2.6 million Afghans remain registered as refugees in neighbouring countries. Despite the urgency to meet the basic humanitarian needs of Afghan disaster – and conflict-affected children and women, nearly 44 per cent of the country remains inaccessible to the humanitarian community because of armed fighting and concomitant lack of security."

59. About 54% of IDPS are under 18 years. Young, displaced and unemployed men are particularly vulnerable to recruitment to the insurgency, and research in early 2010 showed that insurgent groups had increased their recruitment efforts especially among the IDP populations. IDP children fleeing from areas controlled by the insurgency have also been suspected of loyalty to opposition groups and been arrested by Afghan or international military forces. Some of these children were ill-

treated in detention. The UN Committee on the Rights of the Child has noted in its Concluding Observations April 2011(p15) that there is no clear policy to monitor the situation of internally displaced children.

Sufficiency of Protection

60. The US Congressional Research Service, Afghanistan: Post Taliban Governance, Security, and US Policy, 15 April 2011 (p 17) states that:

“Prior to U.S.-led offensives launched since mid-2009, the Karzai government was estimated to control about 30% of the country, while insurgents controlled 4% (13 out of 364 districts). Insurgents “influenced” or “operated in” another 30% (Afghan Interior Ministry estimates in August 2009). Tribes and local groups with varying degrees of loyalty to the central government control the remainder. Some outside groups report higher percentages of insurgent control or influence. U.S. military officers in Kabul told CRS in October 2009 that the Taliban had named “shadow governors” in 33 out of 34 of Afghanistan’s provinces, although many provinces in northern Afghanistan were assessed as having minimal Taliban presence.”

61. The United Nations, Report of the Secretary-General on the situation in Afghanistan and its implications for international peace and security, 10/03/2010 (p3, paras 9-10) noted that:

“Corruption within the Government remains among the concerns most frequently cited by both private citizens and Government officials, and is a primary impediment to the entrenchment of effective institutions.

The formal justice system remains beyond the reach of many Afghans.”

62. The UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights, 19 January 2011, A/HRC/16/67 (p4) noted:

“Long-standing human rights problems associated with the ongoing armed conflict, dysfunctional governance, widespread and deeply entrenched impunity, weak rule of law,...pose significant challenges to the enjoyment of human rights ... Civilians experienced an erosion of Government presence and a further decrease in protection in more areas of the country.

63. There can be no doubt that the material before us reveals a deterioration in the security situation in Afghanistan from that revealed by the material before the UT in HK and Ors. That conclusion gives rise to two questions. In HK and Ors the UT found that although there had been an increase in the number of civilian casualties, it was not satisfied that the evidence was sufficient to show that the guidance given by the AIT in GS was no longer to be regarded as valid. Thus the first question is whether that conclusion holds good in the light of the further deterioration in the security situation. Secondly in HK and Ors the UT was not satisfied that “... children are disproportionately affected by the problems and the conflict currently being experienced in Afghanistan.” The second question is therefore whether the material before us now

demonstrates that children are disproportionately affected by the dangers to which the current situation in Afghanistan gives rise.

64. As to the first, in GS the UT undertook an extensive review of background and expert materials for the period to May 2009. It was assisted in its analysis of such materials by Professor Farrell of the Department of War Studies at Kings College London. Professor Farrell identified four measures of the consequences of armed conflict on the general population, the number of battle deaths, the number of civilians killed or injured, the number of displaced persons, both refugees and internally displaced persons (IDP), and state failure. With regard to the latter his evidence was that state failure, when chronic, can lead to the collapse of infrastructure and basic services, including law and order, making life for communities unsustainable. As to population displacement and state failure, it was his opinion, accepted by the UT, that they may provide reinforcing evidence when looking at the severity of an armed conflict, but are not necessarily independent tests of conflict severity.
65. We have given careful consideration to the very considerable volume of material before us with a particular focus on the measures of severity of the consequences of armed conflict identified by Professor Farrell, but we do not consider that the deterioration in the security situation is such as to lead to the conclusion that the adult civilian population is generally at risk.
66. We acknowledge that there has been a significant increase in civilian casualties; but the figures must be viewed in the context of the population of Afghanistan. There is no clear evidence as to the scale of increase in displaced persons since 2009. Nor is there evidence to suggest that any increase that there may have been, has been such as to make a material difference to the risk to which the adult civilian population is subject. Similarly the evidence as to state failure does not demonstrate a significant decline since 2009. In GS the AIT acknowledged at paragraph 214 that *"It is very difficult...to get a reliable feel for what is really going on"* and that *"Nobody is suggesting that the situation in Afghanistan is anything but a very long way short of ideal"*. We respectfully agree; but we do not consider that the voluminous background material now available serves to undermine the conclusion at which the AIT then arrived.
67. But the second question is whether the up to date material demonstrates that children are now disproportionately affected by the consequences of the armed conflict. To answer that question it is necessary to consider the principal features of the material before us in so far as it bears on the position of children.
68. First as to children casualties, the report of the Secretary-General to the UN Security Council on children and armed conflict in Afghanistan dated 3 February 2011, (p1) to which we have already made reference at paragraph 90 above, reported that:

"3 ... The year 2010 was the most volatile year in security terms since the fall of the Taliban in 2001. According to the United Nations, the number of security incidents was 40 per cent higher in January 2010 compared to January 2009, and 93 per cent higher in June 2010 compared to 2009. This was due in part to the continued attacks by the Taliban-led insurgency, their expansion into previously stable areas, such as northern and western Afghanistan, as well as increased counter-insurgency operations by Afghan National Security Forces and

international military forces. Incursions of foreign fighters and the deteriorating security situation along the border area with Pakistan also contributed to increased insecurity.” (page 2)

“4 ... As compared to 2,118 civilian casualties recorded in 2008 and 2,412 in 2009, the 2010 mid-year report documented 3,268 conflict-related civilian casualties between 1 January and 30 June 2010, a 31 per cent increase over the same period in 2009. In 2010, women and children made up a greater proportion of those killed and injured than in 2009, with child casualties increased by 55 per cent from the same period in 2009” (page 2)

69. Similarly the Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights, 19 January 2011, noted that:

“9. As civilian casualties rose in 2010, women and children made up a greater proportion of those killed and injured than in 2009. Women and children continued to experience an extreme lack of protection in conflict-affected areas along with widespread violations of their basic human rights. Between 1 January and 30 November 2010, IEDs and suicide attacks by AGEs caused the most women and children casualties - 33 per cent and 44 per cent, respectively. During this period, women casualties increased by 9 per cent and child casualties leapt by 56 per cent from 2009.” (page 5)

70. It is also to be noted that in a report entitled ‘Devastating Impact - Explosive Weapons and Children’ by Save the Children and published in 2011, the author notes at Part 2 chapter 3 ‘Armed Conflict and Education (p143)’ that:

“...casualty figures highlight the level of risk children face in many conflicts, but they do not adequately capture the impact of the associated violence, psychological trauma and loss of parents, siblings and friends (UNESCO, 2010a). One survey of Iraqi refugee children in Jordan found that 39% reported having lost someone close to them, and 43% witnessing violence (Clements, 2007). (p40) For marginalised and vulnerable households, armed conflict can block the path to more secure and prosperous livelihoods. Homes are destroyed, crops and livestock stolen and access to markets disrupted. The overall effect is to wipe out assets ...for poor households. .. reinforcing ..poverty [and] an increase in child labour”.

71. Such material is to be compared with that before the UT in HK and Ors, and in particular to paragraph 26.04 of the April 2010 COIR set out at paragraph 20 of the determination:

“On 6 January 2010 Integrated Regional Information Networks News stated that:

“Armed conflict killed hundreds of children and adversely affected many others in 2009 the deadliest year for Afghan children since 2001 – an Afghan Human Rights Group has said:

“About 1,050 children died in suicide attacks, roadside blasts, air strikes and in the cross-fire between Taliban insurgents and pro-Government Afghan and foreign forces

from January to December 2009 the Afghan Rights Monitor, a Kabul based rights group said in a statement on 6 January."

"At least 3 children were killed in war related incidents every day in 2009 and many others suffered in diverse mostly unreported ways Almai Smadi, ARM's Director was quoted in the statement as saying"

Forced Recruitment of Children

72. In HK and Ors the UT considered inter alia the COIR April 2010 which noted that armed groups continued to recruit children to be used as spies and informants or to transport explosives and conduct suicide attacks. It also referred to the USSD report 2009 which had noted that *"anecdotal evidence suggests that insurgent recruitment of under age soldiers was on the rise"*. In addition to such material we had a report of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict on a visit to Afghanistan in late February 2010 which at page 5 recorded that:

"Reports of recruitment and use of children have been received from all regions, and particularly from the south, south-east and eastern regions, but the security environment and the lack of human resources dedicated to monitoring and verifying cases has limited reporting on these trends of abuse. Internally Displaced People (IDP) and isolated populations in conflict-affected areas in particular are at risk of child recruitment into non-state armed groups, including the Taliban, Haqqani network, Hezb-i-Islami and Jamat Sunat al-Dawa Salafia. The Taliban have been listed in the 8th report of the Secretary-General on children and armed conflict for the recruitment and use of children under the age of 18 years (A/63/785- S/2009/158).

Documented cases show that children are also used as suicide bombers by the Taliban. Children involved range from 13-16 years of age and, according to testimonies of failed bombers, have been tricked, promised money or otherwise forced to become suicide bombers. However, some children who have attempted suicide attacks have been heavily indoctrinated, many times in foreign countries...

Detention of children for alleged association with armed groups remains a concern. The detention of children in Afghanistan on security-related charges is in contravention to provisions of the Afghan juvenile code. Since 2001, an unknown number of children have been captured and arrested by security/ law enforcement forces as well as International Military Forces. Many children reported no legal assistance or legal documentation, and some reported ill-treatment or threats against their person during interrogation. Of particular concern are children arrested under security-related charges held by the National Directorate of Security (NDS), which also receives cases arrested by ISAF. However, although access to these children remains a challenge, the NDS has begun sharing names of children detained in NDS facilities on a fairly regular basis with the United Nations."

The report also recorded concern as to the detention of children for alleged association with armed groups.

73. The UNHCR guidelines of 17 December 2010 (see Appendix B paragraph 1) note that:

“Among the most vulnerable groups in Afghanistan, children bear the brunt of the ongoing armed conflict. The Taliban and other anti-Government armed groups are reportedly responsible for the vast majority of the human rights violations against children. UNHCR considers that children with the specific profiles outlined below,¹⁶⁹ including child soldiers, ..., may be at risk on the ground of membership of a particular social group, religion and/or (imputed) political opinion depending on the individual circumstances of the case. ...

Forced recruitment of children by armed groups, including the Taliban, the Haqqani network, Hezb-i-Islami, the Tora Bora Front and Jamat Sunat al-Dawa Salafia, is reported, particularly in the southern, south-eastern and eastern regions. Internally displaced children and children part of isolated populations in conflict-affected areas are particularly at risk of recruitment into armed anti-Government groups.”

74. The Watchlist Report August 2010 (p27) notes that:

“There are no precise figures on child soldiers in Afghanistan but several reports attest to the severity of the concern. In particular, widespread displacement and the consequent absence of protective community structures have increased the vulnerability of children to recruitment. The March 2009 Secretary-General’s report on Children and Armed Conflict noted that forced recruitment of children by armed groups is “prevalent in areas with high concentrations of returnees or internally displaced persons, particularly in the south and southeastern provinces.” The surge in international armed forces is feared to trigger a new rise in the recruitment and use of child soldiers by armed opposition groups as part of new large-scale recruitment drives’.”

Child Protection

75. The UNHCR guidelines of 17 December 2010 noted that:

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

76. The vulnerability of unaccompanied children was underlined in the report of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict of the visit of 20-26 February 2010.

“UNAMA had established its Child Protection Unit and had one child protection adviser on the ground with one additional child protection officer expected in the near future. The Special Representative ... noted that... the Child Protection Unit should be expanded quickly to ensure that UNAMA fulfills its child protection mandate

adequately, as requested by Security Council Resolutions on Afghanistan 1868 (2009) and 1917 (2010)."

77. We note that at paragraph 45 of its determination in HK and Ors, the UT noted that the COIR of April 2010 "... refers to the fact that police regularly beat and incarcerated children they took off the streets, and "the USSD Report of 2009 which noted the child abuse was endemic throughout the country, ranging from general neglect, physical abuse, abandonment, and confinement to working to pay off family debts." The UT then went on to make reference to sexual abuse of children, a subject upon which there was further information in the material before us.
78. In this context it is also necessary to take account of the effect on children of the displacement of population, see paragraphs 95-99 above.

Sexual Violence

79. The report of the Secretary-General on Children and Armed Conflict in Afghanistan dated 3 February 2011(p10), which covers the period 1 September 2008 to 30 August 2010, notes that:

"36. Sexual violence continues to be vastly underreported and concealed in Afghan society. Sexual violence, including that against children, is pervasive. The general climate of impunity, a vacuum in the rule of law, lack of faith in investigating and prosecuting authorities, and misplaced shame have adversely affected the reporting of sexual violence and abuse against children to law enforcement authorities and subsequent prosecution of perpetrators. Child sexual abuse, against both girls and boys, is not clearly defined as a crime in Afghan law, and perpetrators of such violations are rarely held accountable."

80. The report also noted that there was insufficient protection for victims of sexual violence. Fear of violent retaliation against victims and families was cited as a factor for under reporting. Child victims, both boys and girls, are often arrested and charged with intention to commit *zina* (sexual intercourse outside marriage) (see p 10, paragraph 39).
81. The Watchlist report dated August 2010, noted that sexual violence on children is committed by armed or criminal gangs, family members, guardians, carers and staff of police stations, juvenile centres, orphanages, and that few if any perpetrators are brought to justice. The subject was also addressed in detail in the report of the UN Committee on the Rights of the Child, 8 April 2011 (p22), which expressed concern as to the "... great risk of physical emotional and sexual exploitation and abuse" to children working in the streets (paragraph 68).
82. The report of the Committee on the Rights of the Child, also addressed the issues of 'sale, trafficking and abduction.' At paragraph 72 it said:
- "The Committee expresses concern that children are trafficked by criminal groups mainly within the country and into neighbouring countries for forced prostitution, begging and labour in brick kilns, carpet making factories, the drug smuggling industry and domestic service. The Committee is also deeply concerned that some families*

knowingly sell their children into forced prostitution, including for bacha baazi. The Committee notes the concern that little has been done to implement the provisions of the 2008 Law on Counter Abduction and Human Trafficking and the 2004 National Plan of Action on Combating Child Trafficking, and that human trafficking convictions remain rare while victims of trafficking are punished for acts they may have committed as a direct result of being trafficked, and jailed pending resolution of their legal cases, despite their recognised victim status."

83. The IOM Trafficking Persons in Afghanistan Field Survey Report, June 2008 (p5) noted *"imbedded economic and social factors, contributing to the high prevalence of child trafficking in Afghanistan"*:

"There are numerous factors making Afghan people extremely vulnerable to trafficking: more than two decades of conflict and the subsequent loss of lives and livelihoods, prolonged economic instability and deteriorating insecurity Children are another large pool of potential "targets" for trafficking with widespread poverty compelling up to one third of Afghan children to work in order to augment their family income. The majority of them are exposed to adverse working conditions outside of any protective mechanism. Afghanistan is facing a mass population displacement. Many of the displaced persons have no secure place to stay and end up living in camps or open areas deprived of any basic social services or means of livelihood. Women and children living under these conditions are particularly at risk of being trafficked.

In addition to factors related to the supply of potential victims, Afghanistan offers an environment favourable to facilitating the process of trafficking. Afghanistan shares borders with six countries and some parts are very difficult to control due to the terrain and trans-border tribal structures. In the absence of modern border management and a weakening of law and order, racketeers freely cross borders to traffic or smuggle people to or through neighbouring countries. With poppy production and smuggling of narcotics flourishing in the country, the tactics of criminal groups are more sophisticated than ever and their well-established networks contribute to cross-border trafficking operations."

84. The IOM field survey report (pp22-23) also reported that:

"According to the International Labour Organization (ILO), 92.5 per cent of child labourers from 12 to 17 years of age work for more than 42 hours a week and the majority are exposed to adverse working conditions: a polluted environment (73.3%), risks of injuries(60.1%), dangerous equipments (57.6%), direct sunlight (54.9%) and extreme temperatures and noise (51.4%), among others³⁰. Child labourers are thus more prone to danger than any other segment of the child community, serving as a large pool of potential targets for human trafficking in Afghanistan".

85. In this context we have also had regard to paragraph 66 of the report of the Committee on the Rights of the Child (pp2-17) and the US State Department report 'Findings on the Worst Forms of Child Labour Afghanistan, 2009'.

86. The Watchlist Report August 2010 also noted at page 24 that:

"Armed conflict has exacerbated the socio-economic hardship of many Afghan families due to displacement, the death of one or both breadwinners or the loss of livelihood.

...As of November 2009, an estimated 38 percent of Afghan children were forced into hard labor in violation of international and national law, according to AIHRC.¹⁴⁶ In some provinces this number is substantially higher. ...Children's working hours often exceed 45 hours per week; children often must engage in activities that are harmful to their health ...These activities also render them susceptible to economic exploitation, sexual abuse or, in some cases, landmine injuries".

87. The risks to children of trafficking were also identified in the UNHCR Guidelines 17 December 2010 (see pp 25 – 27).

Landmines

88. There is material before us to the effect that children, and in particular, boys, are disproportionately affected by landmines. The Watchlist Afghanistan Report of 6 May 2011 notes that Afghanistan is *"among the most densely land mined areas in the world – including residential, commercial, grazing and agricultural land."* It states that children comprise more than half the land mine casualties. More than 70,000 have been killed or injured, and an estimated 61% of such deaths or injuries involve children – mostly boys, who play outside, tend animals, or collect food, water or wood. The Brookings Project on US Relations with Islamic World Displacement in the Muslim World: A Focus on Afghanistan and Iraq (2009) (p14) notes that:

"Land mines are another critical obstacle: Afghanistan is one of the most heavily contaminated countries in the world – with 15 percent of the population living in affected areas. "According to the Mine Action Coordination Centre for Afghanistan (MACCA), on average over 60 people are killed or injured every month in mine-related incidents and half of the victims are children."⁵⁸ There are currently 5,560 known hazards and still 690 million square metres of land that need to be cleared, impacting over 2,090 communities. Disputes over land ownership and tenure are major sources of conflict in Afghanistan,⁵⁹ as the livelihood of a majority of Afghanistan's rural population (about 70 percent) depends on agriculture."

Conclusion

89. It is clear that when considering the question of whether children are disproportionately affected by the consequences of the armed conflict in Afghanistan, a distinction has to be made between children who are living within a family and those who are not. It is to be noted that in HK and Ors the UT found that the three appellants had not lost contact with their families and that they could not therefore be regarded as unaccompanied children on return to Kabul, there being no reason to believe that their relatives would not be able to meet and accompany them. As the UT put it at paragraph 49 of the determination *"none of these boys is an orphan and none is without family in Afghanistan."*
90. But at paragraph 48 of its determination the UT observed that the material before it *"... presents a bleak picture for children who are returned to Afghanistan and who do not have a family that will care for them."*

91. That distinction has been reinforced by the additional material before us. Whilst we recognise that there are some risks to which children who have the protection of a family are nevertheless subject, in particular the risk of land mines and the risks of being trafficked, we are not satisfied that they are of such a level as to lead to the conclusion that all children would qualify for humanitarian protection. In arriving at that conclusion we have taken account of the necessity to have regard to the best interests of children.
92. But the background evidence demonstrates that unattached children returned to Afghanistan may, depending upon their individual circumstances and the location to which they are returned, be exposed to a risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection. Such risks will have to be taken into account when addressing the question of whether a return is in the child's best interests, a primary consideration when determining a claim to humanitarian protection.
93. We have therefore arrived at the following general conclusions.
- (i) *The evidence before us does not alter the position as described in HK, namely that when considering the question of whether children are disproportionately affected by the consequences of the armed conflict in Afghanistan, a distinction has to be drawn between children who were living with a family and those who are not. That distinction has been reinforced by the additional material before us. Whilst we recognise that there are some risks to which children who will have the protection of the family are nevertheless subject, in particular the risk of landmines and the risks of being trafficked, we are not satisfied that they are of such a level as to lead to the conclusion that all children would qualify for international protection. In arriving at this conclusion we have taken the account of the necessity to have regard to the best interests of children.*
- (ii) *However, the background evidence demonstrates that unattached children returned to Afghanistan, depending upon their individual circumstances and the location to which they are returned, may be exposed to risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection. Such risks will have to be taken into account when addressing the question of whether a return is in the child's best interests, a primary consideration when determining a claim to humanitarian protection.*

The Evidence of the Appellant

94. At the outset of the hearing on 28 October 2010, Ms Motz drew our attention to the Child, Vulnerable Adult and Sensitive Witnesses Practice Direction of 30 October 2008, and to the guidance as to its application issued in October 2010. We took account of both. We were satisfied that the appellant and the interpreter fully understood one another, and that the appellant fully understood the nature of the proceedings.
95. The appellant adopted his two statements and the contents of the interview record as amended by him, but did not adopt the screening interview record.

96. He gave evidence that until his departure from Afghanistan, he was living with his father, mother and a younger brother and sister in Mosaie (Musayhi/Musayi), Kabul province. He has two older sisters, both married. He attended school from the age of 7 until leaving Afghanistan. At school he had been in one class with children of different ages, and had studied science, maths, geography, physics and a little English.
97. He also had an elder brother named YA, who used to be a commander in President Karzai's army, located in Gardaz, living in a compound, and working with foreign troops. The appellant had learnt from other family members that his brother was in charge of men, and had fought against the Taliban.
98. His father worked for the Karzai government. He would go to the District Office or to Kabul to provide information on the movements and activities of the Taliban, of whom there were many in the village and the area of Mosaie. The Taliban were involved in killing and torture; and his father would provide information about them to the government as he did not approve of their activities. As a result of information given by his father many Taliban were arrested in the area.
99. The Taliban came to suspect his father was working for the government, and delivered letters to the house by night to warn his father and his brother YA to stop working for the government or the family would be killed. The first such letter was received about two and a half months before the appellant left Afghanistan.
100. After the letters had been delivered, the appellant's father went to Guzni, following which YA came home for a few days. On the second night after his return, some Taliban came to the house. On hearing their voices, the appellant's mother hid the appellant in the clay oven and wound a large scarf around YA's face and head. But the Taliban entered, recognised YA and took him away, to the great distress of the appellant and his family.
101. At morning prayer in the mosque on the following day, it was announced that a man had been killed. It was discovered that it was YA. The Taliban had slit his throat and left his body outside the mosque. His father came home and was very upset. The appellant's maternal uncle, Q, brought YA's body to the house, and with others conducted the funeral and buried YA.
102. About a month later the Taliban killed some foreigners with bombs, following which, on a date of which the appellant was unsure, he attended a Teachers' Day ceremony in front of the District Office. Many foreign army personnel were present, and they carried pictures of the people who had been killed in the bombings. At the ceremony the appellant sang an anti-Taliban song. An interpreter interpreted the words of the song to the foreigners, one of whom gave the appellant US\$ 50.00.
103. About two hours into the ceremony the Taliban arrived and opened fire on those who had gathered. People were killed and injured. The appellant returned home and told his mother what had happened. She then took him to her son-in-law's house, where his father would often stay when he was returning home from attending the government offices in Kabul.

104. Two nights after the Teachers' Day ceremony the Taliban came to the family house, asking after the appellant and his father. His mother said that they were not at home. The following morning she travelled to her son-in-law's house and told the appellant and his father that the family was in danger. As a result his father spoke to an agent to arrange for the appellant to leave Afghanistan. His father told him that he was to claim asylum in the UK.
105. The appellant met the agent in Kabul. He was not sure whether his father had paid the agent to take him to the UK. They travelled to Iran by vehicle and on foot, then on to Turkey, again by vehicle and on foot. From Turkey they travelled to Greece on foot and by boat, then to Italy by lorry and on foot, from Italy to France and eventually to the UK by lorry. The journey took about one year. He did not claim asylum en route because his father had told him to do so in the UK. He had been under the control of agents. There were different agents at different stages of the journey.
106. He said that although he had initially stated that he was not fingerprinted en route to the UK, he had been fingerprinted in Greece when detained by police or immigration officers. There was no interpreter and he did not understand the officers nor they him. He was held for several hours in an unknown detention centre. He was kicked on the shin and punched in the neck by the officers, as were other detainees. He was required to put his hands in ink and then put them on pieces of paper. He did not recall whether he signed anything. The agent was also detained and fingerprinted. On release they returned to the forested area where he waited until being put on a lorry bound for Italy.
107. In cross-examination the appellant gave further details of his journey to the UK, saying that he had been in Iran and Turkey for about a month, in Greece for about 9 months, in Italy only for a short time, and in Calais for about 2 months.
108. He said that he was in touch with his father until he reached Calais; but had not been able to contact him since arriving in the UK. His father, who had been in Kabul when the appellant last spoke to him, had told him that he continued to inform on the Taliban. The appellant further said that he has relatives in the UK, a step-cousin in Birmingham and a step-maternal uncle in London.
109. He repeated in cross-examination that since arriving in the UK the telephone number on which he had called his father has not worked. He had tried it himself and had also given it to his social worker, who had tried it without success. He said that his social worker had told him about the Red Cross tracing service about 8 months ago, and that he had asked the social worker to write to the Red Cross on his behalf to help him to find his family. In the course of the hearing on 28 October, a letter from his social worker, Jen Collett, was produced, which confirmed that there had not yet been any response from the Red Cross.

The Assessment of the Appellant's Evidence

110. In making an assessment of the appellant's evidence, both as to the events that preceded his departure from Afghanistan and as to the course of his journey to the United Kingdom, there are a number of considerations to be taken into account.

First, and of central importance, is the fact that the appellant was 14 years of age when he left Afghanistan. Due allowance must be made for his age at the time of the events in question.

111. Secondly in assessing the appellant's evidence it is necessary to bear in mind the evidence from Dr Melzak, to which we refer further below, to the effect that the appellant is suffering from PTSD, and in consequence from an arrested emotional development, conditions that may bear on his ability to give an account of distressing events occurring some years ago.
112. Thirdly, and in so far as it is submitted on behalf of the respondent that the appellant's account is implausible, we bear in mind the guidance afforded by the decision of the Court of Appeal in HK v Secretary of State for the Home Department [2006] EWCA Civ 1037 and contained in the judgment of Neuberger LJ at paragraphs 27 – 30:

“27 ... The standard of proof to be applied for the purpose of assessing the appellant's fear of persecution is low. The choice is not normally which of two parties to believe, but whether or not to believe the appellant. Relatively unusually for an English Judge, an Immigration Judge has an almost inquisitorial function, although he has none of the evidence-gathering or other investigatory powers of an inquisitorial Judge. That is a particularly acute problem in cases where the evidence is pretty unsatisfactory in extent, quality and presentation, which is particularly true of asylum cases. That is normally through nobody's fault: it is the nature of the beast.

28. Further, in many asylum cases, some, even most, the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence...”

113. Similarly in R (Milloja) v SSHD [2005] EWHC 283 (Admin) Gibbs J held that:

“33. The underlying reason which supports the special detailed provisions for children is obvious. The child, by reason of its lack of knowledge, experience and maturity, cannot be expected to comply with procedures in the same way as an adult. Of course a child might lie as well as tell the truth, but he may also find it more difficult to answer questions with the necessary understanding and insight.”

114. Fourthly and in so far as the respondent submits that the appellant's credibility is damaged by his failure to take advantage of a reasonable opportunity to make an asylum or human rights claim in a safe country, it is necessary to take account of the control exercised by agents over their charges. In R (Q & Others) v SSHD [2003] EWCA Civ 364, Lord Phillips MR noted at paragraph 40:

“...Home Office research ... demonstrates the degree of control that some facilitators have over their charges. The Attorney-General recognised the possibility of duress by threats against the families of asylum seekers, and this phenomenon is recorded in the Home Office research. It is also clear that some asylum seekers are so much under the

influence of the agents who are shepherding them into the country that they cannot be criticised for accepting implicitly what they are told by them. ... To disregard the effect that they may have on their charges would be both unrealistic and unjust."

115. The point was reinforced by the report of the UNHCR Policy Development and Evaluation Service study 'A study of unaccompanied Afghan children in Europe' June 2010, entitled 'Trees only move in the wind' (p21), which contained the following paragraphs:

"The organized smuggling networks involved in the movement of young Afghans to Europe clearly extend from the UK in the west to Turkey, Iran, Pakistan and beyond in the east.... The risks encountered by children who use the services of such networks are incalculable, especially as the boys' parents, relatives and friends who have arranged a contract with a local agent in the country of origin have no direct contact with the smugglers themselves.

Throughout the journey, the smugglers maintain tight control over the children through fear and intimidation, especially if the boys or their families are having difficulty in paying. They confuse the children through deliberate misinformation with regard to their options, so as to convince them to continue their journey and thereby exact the highest possible fee. ... this study suggests that there is a deliberate strategy among the smugglers to constantly split up the groups of children who are travelling together, keeping the level of anxiety high, and preventing people from building up friendships and trust that might threaten the authority of the smugglers and their assistants."

Expert Evidence

116. On 28 October 2010 we had the benefit of a report from Dr Giustozzi dated 23 December 2009, and at the restored hearing on 23 May 2011, reports from Dr Iain Shearer dated 9 May 2011 and Dr Sheila Melzak dated 16 May 2011. Dr Giustozzi is a research fellow at the Development Studies Institute within the LSE, with a specialist interest in Afghanistan, having frequently visited Afghanistan since 2003 in the course of his research. Dr Shearer is an archaeologist. He is the Sackler Scholar for Afghanistan and Iran at the British Museum and Research Affiliate at the Centre for Applied Archaeology at the Institute of Archaeology UCL. He has visited Afghanistan on numerous occasions since 2003, working with the National Museum in Kabul and undertaking archaeological investigations in remote parts of the country. It was submitted on behalf of the respondent that Dr Shearer's evidence did not qualify as expert evidence relevant to the issues with which we are concerned as his professional expertise is as an archaeologist. We accept that he is not one who has conventionally come to be described as a 'country expert'; but his considerable personal and recent experience of Afghanistan, and of the political situation within that country, together with the objectivity that is implicit in his professional qualifications and experience, give the authority to his evidence. Dr Sheila Melzak is a child psychotherapist who was formerly a member of the Child and Adolescent Psychotherapy Team within the Medical Foundation for the Care of Victims of Torture (as it then was), and is now the clinical director of the Baobab Centre for Young Survivors in Exile. In her opinion the appellant is suffering from post traumatic stress disorder, who although now 17 years of age "... is functioning emotionally as a troubled 13 or 14 year old."

Findings on the appellant's evidence

117. In assessing the appellant's evidence we have borne in mind that the standard of proof to be applied for the purpose of assessing his fear of persecution is low, and that benefit of the doubt should be applied liberally in his favour. But in any event we found the appellant to be a credible witness, doing his best to give a full and truthful account of his experiences. He has given a consistent account of his family and circumstances and of the events that prompted his flight from Afghanistan, in particular:

- i. His brother's involvement with the ISAF forces, his promotion to Commander and his killing;
- ii. His father's role as an informant against the Taliban, his father's flight and seclusion after he received threatening 'night letters' and
- iii. The appellant's own public expression of hostility against the Taliban at the Teachers' Day ceremony some weeks after his brother's murder and the Taliban enquiring about him at his family home."

118. We found persuasive the appellant's vivid account of the events at the Teachers' Day ceremony, giving a description which was compelling in its detail, and highly unlikely to have been invented. Furthermore some support for the occurrence of such an incident is to be found in the Home Secretary's Country of Origin Information Report 2010 at paragraph 12.02 where there is a reference to the Human Rights Watch World Report 2010 in respect of the year 2009 which contains the following:

"As part of their campaign of terrorizing the civilian population, the Taliban and other insurgent groups continued to target schools, in particular girls' schools. According to the Ministry of Education, in the first five months of the Afghan year 1387 (April – August 2009), 102 schools were attacked using explosives or arson, and 105 students and teachers were killed by insurgent attacks. Three girls' schools in the central region were attacked with chemicals (thought to be pesticide or insecticide) in April and May 2009, which the Ministry of Education says injured 196 girls."

119. The following core facts recounted by the appellant are supported by country and expert information:

- i. The appellant's home area was assessed as a site of increased insurgency and insecurity at the time of his departure (Afghanistan COI Report February 2009, 8.18-8.21 and 8.30)
- ii. In his asylum interview the appellant stated that just prior to his departure in 2008 foreigners (he thought Italian) had been killed by the Taliban in a village transcribed by the IO as *Sofi baba* near to his village. (Interview Q 98-99; Hearing evidence). *The Guardian* 20.8.2009 reports the killing of 10 and the wounding of 21 French soldiers following a Taliban ambush, near to *Sorobi* in east Kabul province – shown on the map as near the appellant's village. The killing attracted significant attention because of the numbers of soldiers killed and

because the ambush occurred soon after the French military replaced Italian military as the NATO forces responsible for the region. This provides some corroboration for this appellant's evidence.

iii. Contrary to the assertion in the refusal letter (para 28 -31) military personnel frequently attend school ceremonies (see for example *Military News* 4.4.2011 celebrating first day at S... school) Furthermore the country evidence shows repeat violent incidents in schools. The Afghanistan COI February 2009, covering the relevant period prior to the appellant's departure stated: '24.28 "Ministry of Education statistics shown to IRIN indicate there were 2,450 'terrorist' attacks on schools from March 2006 to February 2008. In the same period 235 schoolchildren, students, teachers and other education workers were killed, and 222 wounded. About 500 schools have remained closed due to insecurity, particularly in the volatile south where Taliban insurgency has also hindered humanitarian and development access. 'Up to 300,000 students cannot go to school because of insecurity and threats,' per Hamid Elmi, a spokesperson for the Ministry of Education.

iv. Dr Giustozzi states in his report that:

"The fact that A's father might have been suspected of spying for the Americans is plausible";

"The practice of the Taliban to threaten 'collaborators' in order to force them to resign or receive their cooperation is a widespread one";

"Night letters are the standard ways used by the Taliban to deliver their propaganda and carry out their intimidation and threat"(Afghanistan COI February 2009 at 17.2);

"When intimidation does not work, assassinations are common";

"Both the police and the Afghan security services (NDS) employ large numbers of informers; often even governors and other government officials have their own networks of informers";

"The Taliban networks in [...] were probably not very developed when they first entered the district en masse in 2006 and they might not have been in a position to spot A's [father's] activities early on; as they developed their own network of informers, their ability to pick up government supporters also increased";

"As the Taliban compiled information about local families, they would also find out that the brother served in the armed forces";

"Army soldiers are usually posted away from their province of origins" (with reference to the appellant's evidence that his brother was stationed in Gardaz)"

v. Dr Shearer states that the evidence of the appellant's father working as an informer against the Taliban *'is very believable as the Karzai regime and ISAF have invested heavily in paid informant networks throughout Afghanistan.'* He confirms the *'very active'* presence of Taliban in Kabul province and the *'very real and considerable risk to any individual perceived to be a traitor by the Taliban'* – with acts of *'brutality and murder'* carried out against such individuals in all parts of Afghanistan as part of the broader Taliban campaign to destabilise and discredit the Karzai regime.

120. The vulnerability of those connected with those associated with the Karzai regime or with ANSF is borne out by the Afghan Independent Human Rights Commission

(AIHRC) report of December 2008, 'Insurgent Abuses against Afghan Civilians' which records (pp 3,5,13) that:

"...the simple act of being a civil servant or being friendly with government officials is frequently seen as enough to justify an attack..."

...[insurgent targets] include...'unassociated relatives of civil servants have also be targeted"

In a country suffering from high levels of poverty and unemployment, threats and murders of people labelled by insurgents as 'collaborators' and 'spies' is striking such fear into people that they abandon their jobs and sometimes leave their homes."

The AIHRC has documented cases of widespread and systematic intimidation, abductions, shootings, beheadings, hangings, mutilations, perfidious suicide attacks, and indiscriminate rockets attacks by insurgents against civilians around the country and especially in the southern, south-eastern, eastern and central regions of Afghanistan over the past two years. Media reports and other sources have corroborated many of the testimonies included in this report

The insurgents argue that in their fight against the Afghan government and international forces, anyone associated with their enemy is a legitimate target, including civilians. As a result, insurgents have sought out for punishment doctors, teachers, students, government aligned elders, ...and former police and military personnel. Others have also been targeted, including un-associated relatives of persons alleged to have "collaborated" with the Government or international presence. The Taliban has gone so far as to issue death threats instructing family members not to attend burials and memorial services for people who insurgents have killed."

121. In the refusal letter the Secretary of State disbelieved aspects of the appellant's claim. Thus, (a) it was not accepted that the appellant's brother, Y, was a commander in the army in Afghanistan, as he never discussed his job with the appellant and the appellant could not say when or why Y joined the army nor when Y became a commander, he did not mention a brother Y at the screening interview, and in his written statement he said Y worked with foreign troops in a compound in Gardaz, whereas at interview he said Y never discussed his job with him; (b) he gave no reasons for why or how his father obtained information about the Taliban, he said, on the one hand that the Taliban discovered what his father was doing because too many Taliban members were arrested in their area and on the other hand that they discovered this because his father was always going to the district office; (c) the appellant was vague and speculative about the letter from the Taliban delivered to his house, as it lacked credibility that the Taliban would send his father a letter rather than acting immediately against him; (d) his evidence about the claimed incident in which the Taliban came to the house and took Y away lacked credibility; (e) his claim that the Taliban kill foreigners in bombings was speculative; (f) his claim about the Teachers Day ceremony incident was inconsistent and lack credibility, but, even if it were true, it had not been shown how the Taliban would have become aware of him singing a song about them.
122. We do not consider the concerns of the Secretary of State as set out above are fatal to the appellant's credibility. As regards (a), given the appellant's age we consider that he could not reasonably be expected to be aware of Y's role if Y had not specifically told him about it, and we think his vagueness on this matter was understandable given his age. As regards (b), Dr Shearer supports the evidence of the appellant's

father working as an informer against the Taliban (see paragraph 2 of his report), and the discrepancy over how the Taliban obtained information about his father is in any event a minor one. As to (c), we have already noted that Dr Giustozzi bears out the evidence of night letters as a technique used by the Taliban to intimidate and threaten (paragraph 9 of his report). Regarding (d), the appellant's explanation, that the scarf used to take his brother away was a woman's scarf does not seem to us implausible, and the credibility of this aspect of the evidence is enhanced by the lack of an effective challenge to the claim that Y was a commander (see paragraph 7 of Dr Giustozzi's report). As regards (e), the appellant's evidence about the killing of foreigners is supported, as we have already seen, by the Guardian report of 20 August 2009 concerning the killing of 10 French soldiers and wounding of 21 French soldiers following a Taliban ambush. As to (f), the claim finds support in the background evidence, see eg COIR February 2009 at paragraph 24.28; there is some support for the appellant's claim of a threat to him in Dr Giustozzi's report at paragraph 7 concerning the Taliban compiling local information; and they have their own network of informers (see also Dr Shearer at paragraph 2).

The Claim to Recognition as a Refugee

123. The first question is whether the appellant has a genuine fear of being persecuted were he to be returned to Afghanistan. In the light of our findings as to the appellant's credibility, that question must be answered in the affirmative. He fears persecution by the Taliban by reason of his membership of his family, and therefore being associated with their political opinions, and by reason of his own political opinions as demonstrated from his actions at the Teachers' Day ceremony.
124. The second and critical issue is whether such fears are well founded. In our judgment the objective evidence and that of the experts provides strong support for the contention that the appellant's fears are well founded. We accept that the appellant is a child with a profile of supporting the ISAF/Karzai government and of hostility to armed insurgency, specifically the Taliban. There is evidence to show that children are killed by armed opposition groups, including the Taliban, on suspicion of spying or alleged association with or support for international military forces, albeit a very low number. Children have also been killed when armed opposition groups have targeted parents because of their association with government (Report of the Secretary General on Children and Armed Conflict in Afghanistan, S2011/55).
125. The UNHCR Eligibility Guidelines for Assessing International Protection Needs of Asylum Seekers from Afghanistan, 17 December 2010 (the UNHCR Guidelines 17.12.2010) record that:

"There is a systematic and sustained campaign by armed anti-Government groups to target civilians associated with, or perceived as supporting, the Afghan Government or the international community, particularly in areas where such groups are active. Attacks by armed anti-Government groups, which have ranged from intimidation, assassinations, abductions and stand-off attacks, to the use of improvised explosive devises (IEDs) and suicide attacks, increasingly target civilians associated with or perceived as supportive of the Government and the international community/ISAF....A recently intercepted message from Mullah Omar, the spiritual leader of the Taliban

movement, ordered Taliban members to capture and kill any Afghan who is supporting or working for Coalition forces or the Government of Afghanistan ... The message, which departs from his previous instructions to minimize civilian deaths.

The increased targeting of civilians is perceived as part of an effort by armed anti-Government groups to gain control over territories and populations. Local inhabitants are reportedly coerced into supporting anti-Government groups through threats or the use of force. These intimidation tactics are compounded by the reduced public confidence in the capacity of the Afghan Government and international forces to maintain security and provide basic services. Intimidation tactics used by armed anti-Government groups against the civilian population reportedly include: individual or community warnings or threats, often in the form of "night letters" (shab nameha), to stop working for, or supporting, the Government or international forces, upon pain of death) as well as setting up road blocks. It is also reported that individuals, including children, suspected of "spying" on behalf of the Afghan military or international forces have been summarily executed by armed anti-Government groups.

Local and central Government officials of all levels, and their family members, are at increased risk of being targeted in areas where armed anti-Government groups operate or control."

126. The expert and country evidence confirms the risk to those who have 'collaborated with' or are associated with the Karzai government or UN or Western forces. The risk is identified in UN, UNHCR, COI and country reports. The UNAMA/Afghan Independent Human Rights Commission records Taliban targets as including 'unassociated relatives' of those alleged to have collaborated with the government or international presence. (Annual Report 2011), and documents the insurgent threat to Afghan police, military, and their families.
127. Such assessments are reinforced by the findings in RQ (Afghan National Army, Hizb-i-Islami, risk) Afghanistan CG [2008] UKAIT 00013, in which the Tribunal accepted the expert evidence that '*memories [of service] were long and even where service was complete*', someone who '*betrayed the cause*' by joining the occupying forces would still be viewed in a negative light. Those associated with the West were deemed to have abandoned Islam; '*the passage of time would not help.*'
128. Such evidence is also reflected in the decision in GS (Existence of internal armed conflict) Afghanistan [2009] UKAIT 00010 at 101 "*... where an individual was 'wanted' by the Taliban or Hizb-i-Islami, then the evidence was that the situation in Afghanistan remains sufficiently lawless that if he were found, there would be nothing to prevent them dealing with him as they thought fit. A person who was wanted in his home area for a specific reason would be able to show a real risk of persecution (or treatment entitling him to humanitarian protection, as appropriate) in his home area*". The UNHCR Guidelines 17.12.2010 confirm that family members of security services are targeted by anti-government forces.
129. Such a risk would be present were the appellant to be located in Kabul on his return, or if he was able to return to his home area in the Mosaie district, which is located near the border of Kabul Province with Logar and Wardak Provinces and not far

from Nagarhar. Travel to his home area would itself present risk, see the IDMC report, 14 April 2010, at page 26:

“The main highway between Kabul and Kandahar runs through Ghazni, and ISAF supply convoys come under frequent attack when they pass through the province. The security situation in adjacent Wardak province has deteriorated since 2008 as Taliban influence has grown and has been met with operations by international and Afghan military forces (CPAU, 27 April 2009). The Taliban are the main insurgent force, though Hizb-i Islami (HiG) and other factions also operate in the region. The Taliban have established shadow administrative systems in areas of Wardak and the inhabitants in Logar, Wardak and other provinces rely on them for justice (The Guardian, 24 August 2008). As in other regions, communal conflicts in the central provinces are related to land and water resources.”

130. As to the position in Kabul, it was accepted on behalf of the appellant that the Taliban would not actively be seeking to track him down within Kabul city, rather it is a chance encounter with the Taliban that he fears, and which Dr Giustozzi regards as a real risk.
131. Dr Giustozzi specifically reported on the lack of police protection available to the appellant in his home district or in Kabul city. We also take into account his evidence that tracking down someone from the provinces in Kabul is not difficult; and although the Taliban would not be proactively seeking him, it would not be easy for him to settle away from the southern and south-eastern parts of the city which are Pashtun dominated. The north is dominated by Tajiks, the west by Hazaras ‘heavily hostile to Pashtuns’, and the central areas are very expensive so that the appellant is highly unlikely to be able to afford to live there.
132. Similarly Dr Shearer identified a ‘*tangible*’, ‘*real, genuine, worrying*’ risk to the appellant as a young male related to ‘*perceived traitors*’. He considered that the risk exists both in the appellant’s home area, and were he to relocate, within Pashtun communities where his identity and family history would be ‘*probed... discussed and almost certainly discovered*’ as familial lineages and the webs of interlocking reciprocal obligations are Pashtun mechanisms of survival.
133. We are further satisfied that the appellant would be at real risk of persecution as an unattached child from his particular home area who has lost all contact with his family, so that family protection will not be available to him. We note in that regard that the respondent has not made any tracing enquiries as required by the Asylum Seekers (Reception Conditions) Regulations 2005. But as the Court of Appeal observed in DS (see paragraph 34 above) the appellant's claim has to be determined on its merits, whether or not any steps had been taken by the respondent in discharge of that obligation. We would simply add that we are entirely satisfied on the evidence that the appellant immediately responded when his social worker told him about the Red Cross tracing service; but that that has not yet produced any response (see paragraph 109 above). But the centrality of the question of whether a child would have the protection of his or her family on return, serves to demonstrate the importance of the discharge by the respondent of her duty to make tracing enquiries.

134. There is a further feature of Dr Shearer's evidence, which we accept as being based upon his direct and extensive experience of Afghanistan, namely that the appellant will be expected to avenge the death of his brother. The existence of blood feuds in Afghanistan is well-known and well-documented. The point made by Dr Shearer, is that the Taliban may consider that the appellant will intend to avenge the killing of his brother, and will therefore be prepared to pre-empt any such action. The respondent invited us to reject such evidence on the basis that the appellant has not himself asserted that he will be expected to avenge the death of his brother. In the event we decided that it was not necessary to resolve the issue, bearing in mind that we did not have full evidence on the point.
135. We are satisfied that the appellant has a justified fear of being persecuted or of other serious harm if returned to his home area or to Kabul; and it has not been suggested that there is another part of Afghanistan to which he can be safely returned.
136. We therefore conclude that the appellant is entitled to recognition as a refugee, and his appeal succeeds on this ground. Given the appellant's well-founded fear of being persecuted is based upon his anti-Taliban political opinion, whether actual, or imputed by reason of family membership; that he may have attained the age of majority does not, in the circumstances of his case, affect his entitlement to recognition as a refugee and the consequent grant of status.
137. In the light of our finding that the appellant is entitled to recognition as a refugee, it is not necessary specifically to address his claim under Article 3 of the ECHR. But in the light of our findings, he would clearly also be entitled to succeed on that ground.

Humanitarian Protection

138. In the light of our decision as to the appellant's entitlement to recognition as a refugee, it is not necessary to address the claim to humanitarian protection. Suffice it to say that we are satisfied that had he not succeeded in his claim to recognition of refugee status, he would have been entitled to humanitarian protection

Decision

139. The appeal is allowed on asylum and Article 3 ECHR grounds.
140. The appeal on humanitarian protection grounds is dismissed.

Signed

Mr Justice Owen

**APPENDIX A
DOCUMENTARY EVIDENCE BEFORE THE TRIBUNAL**

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**APPENDIX B
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APPENDIX C
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29. Reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) made on 18 August 2010 - *NS v Secretary of State for the Home Department* (Case C-411/10)

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31. *N. v Sweden* (23505/09) [2010] ECHR 1139 (20 July 2010)
32. *Muskhadzhiyeva and others v Belgium* (app no 41442/07) (2010) (French only, with translations of relevant extracts)
33. *Rantsev v Cyprus & Russia* [2010] ECHR 22 (app no 25965/04)
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35. *Mubilanzila Meyuka and Kaniki Mitunga v Belgium* [2006] ECHR 1170 (app no 13178/03)
36. *Z and others v UK* [2001] ECHR 333 (app no 29392/95)
37. *Aydin v Turkey* [2001] ECHR 440
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39. The Charter of Fundamental Rights of the European Union (2000/C 364/01)
40. Commentary of the Charter of Fundamental Rights of the European Union, the EU Network of Experts (extracts on Article 24)

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41. Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16.V.2005 (extracts)
42. Unaccompanied children in Europe: issues of arrival, stay and return Parliamentary Assembly Recommendation 1969 (2011)
43. EU Guidelines on Children and Armed Conflict 1507, 2004
44. Reception Conditions Directive 2003/9/EC

International law measures and statements

44. UN Convention on the Rights of the Child
45. Separated Children in Europe Programme (SCEP), Statement of Good Practice, 2004
46. Optional Protocol II to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2002
47. UN Committee on the Rights of the Child, General Comment (No 6): "Treatment of Unaccompanied and Separated Children outside their Country of Origin"
48. ILO Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999

Respondent's policy instruments

49. Every Child Matters: Change for Children: Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children: "the 2009 guidance" (extracts)
50. The Asylum Process Guidance on victims of trafficking: Guidance for Competent Authorities (extracts)
51. The Asylum Process Guidance, Victims of Trafficking: guidance for frontline staff (extracts)
52. The Asylum Process Guidance, Processing Asylum Application from a Child (extracts)
53. Operational Guidance Note on Afghanistan (March 2011)

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54. UNHCR Guidelines on International Protection, Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (22 December 2009)
55. UNHCR Guidelines on International Protection, The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (7 April 2006)
56. UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997)
57. UNHCR Refugee Children Guidelines on Protection and Care, 1994 (extracts)
58. UNHCR Handbook (extracts)

**APPENDIX D
INDEX TO THE APPELLANT'S PERSONAL EVIDENCE**

	Index to the Appellant's Bundle
1	Expert report from Dr Sheila Melzak, 16/05/2011
2	Opinion of Amnesty International, 12/05/2011
3	Expert report from Iain Shearer, 09/05/2011
4	Report from the Asylum Research Consultancy, 04/05/2011
5	Letter from Shropshire Council, 11/03/2011
6	Letter from Shropshire Council, 01/03/2011
7	Letter from Shropshire Council, 28/10/2010
8	Letter from Newcastle under Lyme College, 21/10/2010
9	Letter from foster carer, Mohammed Naeem, 19/10/2010
10	Letter from Wolstanton High School, 18/10/2010
11	Letter from Wolstanton Medical Centre, 17/10/2010
12	Letter from Shropshire Council, 28/09/2010
13	Decision of SIJ Jarvis, 10/03/2010
14	Grounds of Appeal, 24/02/2010
15	Determination of Immigration Judge Napthine, 10/02/2010
16	Expert report from Dr Giustozzi, 23/12/2009
17	Statement of Appellant, 17/12/2009
18	Award, Appellant is a Star, undated
19	Map of Afghanistan, undated
20	Map of Musayi district, undated
21	Map of Surobi district, undated