Upper Tribunal
(Immigration and Asylum Chamber)

HM and Others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8-10 June 2010	
	…………………………………

Before
MR JUSTICE BLAKE, PRESIDENT
SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE ALLEN

Between

HM
RM
ASA
AA

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

And

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (INTERVENER)

Representation:

For the Appellants: No appearance
For the Respondent: Christopher Staker and David Blundell instructed by the Treasury Solicitor

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i. *Rule 9(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008, which provides for UNHCR participation in Upper Tribunal proceedings as an intervener in an "asylum case", is to be construed purposively to include subsidiary (humanitarian) protection.*

ii. *In deciding whether to accept an application by an appellant to withdraw an appeal in an asylum-related case which the parties have previously agreed was suitable for fresh Tribunal country guidance, particularly relevant will be the importance to the public interest of the Tribunal assisting immigration judges, primary decision-makers and litigants in giving such guidance wherever it is possible and reasonably practical to do so.*

iii. *The Tribunal may decide that permission to adduce an expert report on a country guidance case shall be given on the basis that the report is disclosed to the Upper Tribunal irrespective of whether the commissioning party intends to call the witness.*

iv. *Following Elgafaji, Case C-465/07 and QD (Iraq) [2009] EWCA Civ 620, in situations of armed conflict in which civilians are affected by the fighting, the approach to assessment of the level of risk of indiscriminate violence must be an inclusive one, subject only to the need for there to be a sufficient causal nexus between the violence and the conflict.*

v. *The degree of indiscriminate violence characterising the current armed conflict taking place in Iraq is not at such a high level that substantial grounds have been shown for believing that any civilian returned there, would, solely on account of his presence there face a real risk of being subject to that threat.*

vi. *If the figures relating to indices such as the number of attacks or deaths affecting the civilian population in a region or city rise to unacceptably high levels, then, depending on the population involved, Article 15(c) might well be engaged, at least in respect of the issue of risk in that area, although it is emphasised that any assessment of real risk to the appellant should be one that is both quantitative and qualitative and takes into account a wide range of variables, not just numbers of deaths or attacks.*

vii. *If there were certain areas where the violence in Iraq reached levels sufficient to engage Article 15(c) the Tribunal considers it is likely that internal relocation would achieve safety and would not be unduly harsh in all the circumstances.*

viii. *The evidence relating to UK returns of failed asylum seekers to Iraq in June 2010 does not demonstrate that the returns process will involve serious harm. Further, it is significant that UKBA is already taking steps to improve procedures in the light of concerns expressed by UNHCR and others over the two charter flights in that month.*

ix. *So far as concerns UK enforced returns to Iraq, the Tribunal is not satisfied that recent problems demonstrate that the process results in serious harm.*

DETERMINATION AND REASONS

1. The decisions reached in this determination are the decisions of all three of us. Each of us has also contributed significantly to its writing.

Part 1: The procedural history and case management issues

The M brothers (RM and HM)

2. RM arrived in the UK in June 2007 aged 17 and claimed asylum a few weeks thereafter. His brother HM arrived in July 2007 and claimed asylum the same day. On the 17 January 2008 the respondent refused the protection claims of both brothers and decided to remove them to Iraq.

3. On the 20 March 2008 the IJ dismissed their appeals. He accepted that their father was a former resident of the territory of Kurdish Regional Government (KRG) (now also referred to as the Kurdish Region of Iraq (KRI)) concerned with the oil business who had encountered difficulties with the Kurdish authorities. He had separated from their mother. In 1998 he came to the UK where he sought asylum in 1999. He was granted exceptional leave to remain. Since 1998 the brothers had been living in Kirkuk in the Tameem governorate

4. The IJ did not accept the core elements of the brothers' claim to protection and concluded that they did not have a well founded fear of persecution in Kirkuk. Notwithstanding evidence of extremely difficult conditions in Kirkuk with respect to the security and humanitarian situation he rejected the claim to subsidiary protection "for the same reasons" and concluded that the high threshold required to engage Article 3 was not met.

5. On 10 April 2008 grounds for reconsideration of this decision were drafted by the appellants' then representative, the Refugee Legal Centre (RLC). The grounds submitted that the IJ had not considered properly or at all humanitarian protection under Article 15(c) of Council Directive 2004/83/EC, the EU Qualification Directive. By this time the Asylum and Immigration Tribunal (AIT) had promulgated its decision in KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023 to which further reference will be made in this judgment. The RLC contended that the AIT had erred in applying too narrow a view of "indiscriminate violence" in that country guidance case and attached their grounds of appeal to the Court of Appeal in KH to the grounds for reconsideration in the present case. Reconsideration was refused on 24 April 2008 by SIJ Storey. It was renewed to the High Court and Blake J directed that reconsideration should take place but be stayed until the decision of the Court of Appeal in KH was promulgated.

6. In fact the appeal of KH was never determined by the Court of Appeal. Laws LJ had stayed the case pending the outcome of the reference to the European Court of Justice

(ECJ) by the Dutch Court in Case C-465/07 Elgafaji v Staatssecretaris van Justitie and it seems that thereafter KH abandoned his appeal by voluntarily returning to Iraq. On 16 September 2008 SIJ Storey noted these events and gave effect to the High Court's order by staying reconsideration until another Iraq case concerned with the scope of Article 15(c) was heard by the Court of Appeal.

7. On 17 February 2009 the ECJ gave its judgment in Elgafaji. On 24 June 2009 the Court of Appeal gave its judgment in QD (Iraq) and another v Secretary of State for the Home Department [2009] EWCA Civ 620 disapproving the construction of Art 15(c) adopted by the AIT in KH and remitting the case to a different constitution of the Tribunal for re-determination.

8. On 26 August 2009 following a case management review (CMR) hearing, the decision of the IJ was set aside but the findings of fact were preserved and the case proceeded to second stage reconsideration on whether "considered simply as two male civilians from Kirkuk these two appellants would face a real risk of serious harm under paragraph 339C of the Immigration Rules (Article 15(c) of the Qualification Directive)." Thereafter the cases were joined with others to proceed as a country guidance case.

ASA

9. On 18 October 2008 the appellant ASA arrived in the UK and claimed asylum and humanitarian protection as a citizen of Iraq born and resident in the city of Baquabah in the governorate of Diyala. The claim was rejected by the Home Office and on 3 February 2009 his appeal was dismissed by the IJ. The judge found that the appellant had fabricated his claim to refugee status and there was nothing by way of a well founded fear of persecution to prevent him returning to his family in Baquabah. Summary conclusions were also reached on the claim to humanitarian protection relying on the Qualification Directive and the judge concluded:

> "I do not consider that there is sufficient evidence to show that in the Baquabah area there is indiscriminate violence of such severity to pose a threat to life or person generally. In his report Dr Rebwar [Fatah] concludes that Baquabah has been the scene of some serious activities by insurgent groups but in my judgment that is an opinion which falls far short of the requirement for evidence that indiscriminate violence in Baquabah is of such severity as to pose a threat to life or person generally – KH (Iraq CG [2008] 00023. KH is also authority for the proposition that neither civilians in Iraq generally nor civilians even in provinces and cities worst affected by armed conflict can show they face a 'serious and individual threat' to their 'life or person' within the meaning of Article 15 (c) merely by virtue of being civilians."

10. Reconsideration was granted by SIJ Storey on the question of Article 15 (c) protection in the light of the ECJ's decision in Elgafaji making it clear at the same time that there was no basis for challenging the IJ's adverse factual findings. By October 2009 this case was joined with that of the other appellants to form a country guidance case to be heard in due course.

AA

11. AA arrived in the UK in October 2006 on a visit visa and claimed asylum on 16 October 2006. He claimed to be a Shi'a Muslim from Baghdad but the IJ did not find his account credible and concluded that save for the fact that he was from Iraq and around 30 years of age, "there is nothing in his account that I find reasonably likely to be true". The IJ concluded that such a finding was also fatal to his claim under paragraph 339C and that the general security situation in Iraq did not provide him with a right to humanitarian protection. He dismissed the appeal on 23 April 2007.

12. Reconsideration was granted on 16 May 2007 but on 19 December 2007 SIJ Jordan concluded that the IJ had made no material error of law and the original determination of the appeal should stand. The same judge refused permission to appeal to the Court of Appeal on the basis that merely being an Iraqi citizen was not enough to establish a serious and individual threat by reason of indiscriminate violence. Permission was renewed to the Court of Appeal and the case stayed pending the outcome in QD following which on 2 September 2009 the appeal was allowed by consent to the extent of setting aside SIJ Jordan's decision and for a fresh reconsideration and determination by a different constitution of the Article 15(c) issue. Thereafter in October 2009 the case was joined with that of RM and HM as a country guidance case.

The progress of the Country Guidance case

13. By these various means these four appeals came together to form country guidance as to the risk to Iraqi civilians who were young men and who apparently came from the cities of Kirkuk, Baquabah and Baghdad respectively. It was notable that as a result of the adverse factual findings on credibility reached by the IJ in each appeal, there had been no detailed consideration of the levels of violence in different parts of Iraq at the material time and the implications of those levels for young men who had no distinguishing characteristics other than their place of residence in Iraq.

14. At a CMR hearing on 1 December 2009, HM, AM and ASA were represented by counsel instructed by Refugee and Migrant Justice (RMJ) - as RLC had by then become - and AA by counsel instructed by Wilson and Co. A memorandum of the discussion at the direction hearing reveals:

    i) The AIT was aiming to list the case in March 2010 (having originally intended the cases would be heard in January) and that while counsel's availability would be taken into account it could not be decisive.
    ii) While the Home Office agreed to reply to some queries raised by RMJ as soon as possible,

    "The Tribunal expects instructing solicitors to seek to obtain evidence from country experts as soon as possible. Whatever the reply to the aforementioned questions, it is clear that the experts will need to address the issue of the levels of indiscriminate violence in Iraq and how it is

considered they might give rise to a real risk of serious harm to civilians living there, bearing in mind that these levels may vary from area to area. They can be preparing their reports on this subject now".

iii) The Tribunal expected that the parties would prepare their cases to address not merely the issue of risk in the appellants' home areas but the viability of internal location to other parts of Iraq. That expectation would only change if the respondent notified the appellants to the contrary.

15. On 3 February 2010 notices were issued that these cases would be heard as country guidance cases between 7 and 11 June 2010. In due course a further CMR hearing was set down for 10 May 2010. Ignoring a request to vacate the hearing date through the unavailability of counsel that was rejected, the next developments in the case were shortly before the CMR. They may be summarised as follows:

i) On 5 May 2010 UNHCR sought to intervene in this case as it had done in the case of QD in the Court of Appeal.

ii) On 10 May RMJ wrote seeking a response to the questions it had posed to the respondent before the last CMR in December and to which it had not received an answer. It stated that although it had commissioned an expert to produce an opinion in order to assist the tribunal the expert could not finalise instructions unless the questions were answered.

iii) RMJ further pointed out that in a recent decision of the Court of Appeal in HH & Others (Somalia) [2010] EWCA Civ 426 the question whether there was a duty to consider the route of return to a safe area of a country in a state of armed conflict at the time of the original protection claim was one that may need a reference to the ECJ/Court of Justice of the European Union (CJEU). It was suggested that such a reference was now necessary to resolve the present case and that four further questions arising from the decision of the AIT in the case of GS (Article 15(c); indiscriminate violence) Afghanistan CG [2009] UKAIT 00044 would also need to be made the subject of such a reference.

iv) On the same day Wilson & Co for AA associated themselves with RMJ's request for a reference to the CJEU.

v) Again on the same day, the Home Office responded to the RMJ request for information from December 2009 indicating that the place of intended return was by way of air transport to Baghdad with any necessary onward travel being by means of public transport. No admissions were made as to whether there was a state of internal armed conflict in Iraq as that was deemed irrelevant in the light of QD. In the case of HM and RM internal relocation to the KRG was a reasonable possibility as they originated from there. In the other cases, as an

alternative to the primary submission that there was no part of Iraq where the Art 15(c) test was met, the viability of internal relocation to safe parts of Iraq notably the south would be a secondary submission in respect of any of these Appellants.

16. Following the representations of all parties at the CMR the Tribunal decided not to join a further case as country guidance but issued the following directions:

1. (The) appeals to be country guidance cases on the application of Art 15(c) of the Qualification Directive to the appellants and address:-

   a. Whether there is a risk to the appellants of indiscriminate violence arising from armed conflict within the meaning of Article 15 (c) in their home areas in Iraq.

   b. If so whether internal relocation within Iraq is available to any of the appellants.

   c. If so whether the intended route of return enables them to access such a place in safety.

2. The UNHCR is joined as a party to these appeals.

3. We find that there is an error of law in the case of ASA, namely determining the Article 15(c) point by application of KH [2008] UKAIT 00023. The consequences of such error, if any, to be determined at the hearing of the appeals.

4. The appellants to serve a report of its expert Dr Herring on the parties and the Tribunal by 4.00 pm on 24 May 2010. In the event that the report cannot address all aspects of the evidence that the appellants intend to lead, the appellants shall indicate what issues will be addressed in a supplementary report and when such report shall be made available to the parties and the Tribunal. Leave to adduce such supplementary report will only be granted if it served in good time before the hearing of these appeals.

5. The respondent to serve any documentary material on which it intends to rely at the appeal that is supplementary to the material to be served by the appellants as material considered by Dr Herring at the same time.

6. The appellants to serve a skeleton argument for the appeal on the parties and the Tribunal by 4.00 on 27 May 2010.

7. The UNHCR to inform the parties and the Tribunal by 4.00 on 27 May 2010 whether its submissions at the hearing will differ from the submissions referred to in the CA decision in QD subject to any response made to the skeleton arguments of the other parties.

8. The respondent to serve its skeleton argument by 4.00pm 3 June 2010.

9. Any further documentary material (other than that referred to in 7. above) that the respondent considers necessary to adduce in response to the appellants case shall be served promptly and in any event no later than 4.00pm 3 June 2010.

10. The parties cooperate with each other and produce a joint bundle of all relevant legal materials by 4.00pm 3 June 2010.

11. The hearing shall start at 11.00am on 7 June.

Reference to the CJEU

17. The question of a reference to the Court of Justice of the European Union was not pursued to a formal determination at the hearing in the light of the Tribunal's indication that it was not considered appropriate at this stage in the proceedings. Since the entry into force on 1 December 2009 of the Treaty of Lisbon (Treaty on the Functioning of the European Union (TFEU)) the Upper Tribunal is aware that any court or tribunal in the UK may make a reference on any issue of EU law including those where references were formally reserved to a final court of appeal. At the same time the name of the court was changed from ECJ to CJEU.

18. The previous practice of the AIT with respect to making references to the ECJ has been abrogated. No Practice Direction has been made by the Senior President of Tribunals. Pending the issue of any further guidance that may be needed on the question, it is apposite to set out the intended basic practice of the Upper Tribunal Immigration and Asylum Chamber with respect to references to the CJEU in immigration and asylum cases.

19. We have had regard to the case law both of the ECJ/CJEU and the superior courts in the United Kingdom and the Information Note for National Courts issued by the Court of Justice OJC 2009 C/297/01, 5 December 2009. We conclude:-

    i) A reference should only be made to the CJEU where it is necessary to do so to resolve a live and material issue in a pending appeal that the Tribunal could not with complete confidence answer for itself.[1]

    ii) A reference has the consequence of substantial delay and further costs in the determination of immigration and asylum appeals, whereas there is a public as well as a private interest in speedy resolution of the question. Accordingly the Tribunal will normally only make a reference where the answer to the question to be referred is likely to prove decisive to the determination of the appeal.

    iii) The Tribunal could only conclude that a reference is either necessary or likely to be decisive when the relevant facts in the case have been

[1] See Information Note Paragraphs 11 and 12.

identified and are either the subject of agreement or prior determination by the Tribunal.[2]

iv) It follows that for so long as there remains the possibility of the factual basis of the First-tier Tribunal being disturbed on appeal to the Upper Tribunal, we consider it would be highly unusual and normally premature for the First tier Tribunal to make such a reference.

v) Where it is apparent that the criteria in i) to iii) are met, then the Tribunal ought to make a reference at the earliest opportunity in order to obtain the earliest guidance from the Court of Justice on the question.

20. In the present appeals it was apparent that there was no need to make a reference to the CJEU either at the CMR on 10 May 2010 or subsequently either because the issues suggested did not arise in point of fact or the Upper Tribunal considers it is well able to resolve for itself with complete confidence all relevant matters of law in the light of the guidance it has received from the Court of Justice in Elgafaji and the Court of Appeal in QD.

UNHCR intervention

21. Rule 9(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that in an asylum case the United Kingdom representative of the UNHCR may give notice to the Upper Tribunal that it wishes to participate in the proceedings and on giving such notice Rule 9(6) provides that it is entitled to participate and to receive copies of the documents.

22. 'Asylum case' is defined by Rule 1(3) as an appeal under ss. 82-83A of the Nationality Immigration and Asylum Act 2002 where a person claims that being required to leave would breach the UK's obligation under the Convention relating to the status of refugees of 1951 and the 1967 Protocol. This definition does not include protection subsidiary to refugee status under the Qualification Directive whose purpose and scope is defined as laying down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

23. UNHCR has substantial experience of and interest in both refugee status and subsidiary forms of protection. Its mandate is somewhat broader than simply refugees under the 1951 Convention and it has important experience of and engagement with the evolution of protection norms in the European Union. It has frequently made oral and written submissions on protection issues to the higher courts in the United Kingdom. We consider that in a case where UNHCR has decided that it is appropriate to give notice to participate in the proceedings, it is very likely that the Tribunal will receive invaluable assistance independent of the parties

[2] Information Note paragraph 19 "a decision to seek a preliminary ruling should be taken when the national proceedings have reached a stage when the national court is able to define the factual and legal context of the question".

drawing attention to comparative case law or other materials of which the parties may be unaware. Its submission to the CA in QD was an extremely helpful compilation of issues and principles that proved to be of great assistance to that Court in construing the objectives and purposes of subsidiary protection, who took the unusual step of appending the submissions to its judgment.

24. We are also aware that where the meaning of the Qualification Directive may require a reference to the CJEU, the only means by which UNHCR can participate as a party in those proceedings is if it is joined in the national proceedings. The Rules of Procedure of the European Court make no provision for non state party interveners in reference cases. Following a Seminar of Judges - in Luxembourg on 22 and 23 March 2010 ("The entry into force of the Lisbon Treaty and the consequent effects on the court system of the European Union"), it is our understanding that the participation of the UNHCR through appropriate joinder in national proceedings would be welcomed by the CJEU as that would bridge a present gap in the present Rules of Procedure. This is an unfortunate omission by comparison with the Rules of Procedure of the European Court of Human Rights (ECtHR). We note that a third party had been joined in proceedings before the Administrative Court when a reference to the ECJ was under contemplation: see Case C-192/99 R. v Secretary of State for the Home Department [2001] 2 C.M.L.R. 24 where the non-governmental organisation Justice was joined to the proceedings. Any such direction by the national court must be made before the order for reference is made.

25. We are satisfied that we have power to permit the participation of the UNHCR in this case, whether under the express powers conferred by Rule 9(5) or the general case management power under Rule 5(1). We conclude that there is a compelling case that Rule 9(5) should be interpreted purposively to include subsidiary protection in the light of the developments in protection law emanating from the European Union. We draw support for this proposition from the decision of the Court of Appeal in FA (Iraq) v SSHD [2010] EWCA Civ 696 18 June 2010 at [23] to [25] where it concluded that ss.82-83A of the 2002 Act (the same statutory provisions, we note, that are specified in Rule 1(3)) should now be read as including an appeal claiming subsidiary protection status. In any event we shall draw the attention of the Tribunal Procedure Committee to this judgment to consider whether the definition of asylum should be broadened in the light of contemporary developments. We accordingly granted the UNHCR's application to intervene.

26. In the light of subsequent events it is fortunate that we did so. We are grateful to the UK Representative for the written submissions and supporting materials received promptly in accordance with our case management directions and some further information and materials provided to us in response to post-hearing directions.

Subsequent events to 8 June

27. On 26 May, 2 days after the time when the appellants should have lodged Dr Herring's report or preliminary report, RMJ advised the Tribunal that the delay in obtaining the information from the Secretary of State as to the proposed place of

return and internal relocation hampered its ability to comply with the timetable. When the information was delivered it was necessary to provide Dr Herring with further instructions. In consequence:

> "We propose to serve the joint bundle of country material, the expert opinion and any further evidence by Friday 28 May 2010. We further hope to file a skeleton argument by Tuesday 1st June 2010. We reiterate that we have made every effort to comply with directions and regret failing to do so."

28. We accept, of course, that the Home Office delay in responding to the fairly simple questions posed in December was unacceptable and may have left some issues unresolved. But we confess to having difficulty in understanding why an expert's report commissioned in December 2009 for a March 2010 hearing on the intensity of the current violence in Iraq and the risks it posed for simple civilians was not available by the 10 May hearing in the light of the express terms of the directions given in December that preparation could not be contingent on obtaining the answers sought. The Tribunal is aware from the way that Dr Herring presented his evidence in the case of KH that he pays careful regard to the available factual material concerning conditions in Iraq on an ongoing basis.

29. RMJ would be well aware as an experienced specialist legal agency representing in refugee and protection cases that from the autumn of 2009 the UK had started to return failed Iraqi asylum seekers to Baghdad. The issue of internal relocation was also expressly addressed in the December directions, and we doubt that the delayed answer finally received could have come as a particular surprise. In any event it need not have delayed lodging the basic report with any addendum needed in the light of the answers to be a little later. We would further have expected that whether the report was in its final stages of preparation or not the broad approach would have been communicated so the legal representatives could prepare for the appellants' cases to be presented by them, the burden being on them to show that the relevant level of risk existed applying the correct test.

30. The RMJ letter of 26 May also stated that they were without instructions in the case of ASA and applied to be taken off the record and as a result believed the five days allowed for the hearing could be reduced to four days. It subsequently emerged that RMJ had lost contact with ASA and considered it could not continue to act. The Tribunal does not know when contact was last made with ASA and what his instructions were then. The country guidance appeal did not depend on his personal instructions. If he was willing to continue with his appeal on Article15(c) grounds in the autumn of 2009, we cannot see why he would be unwilling for it to be determined subsequently. It is disappointing to say the least given the efforts that had been made to select suitable cases that would address relevant aspects of the issue from October 2009 onwards, that no earlier warning had been given of a potential problem in selecting this case for guidance.

31. On 28 May the Tribunal indicated that in the light of the representations made the appeal would not begin until 8 June (rather than 7 June as originally envisaged).

32. On 1 June Wilson & Co wrote to the Tribunal informing it that in the light of the expert evidence commissioned for this case it could no longer represent AA in the forthcoming appeal. It sought the Tribunal's consent to the withdrawal of the appeal pursuant to Rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended and indicated that it could no longer claim public funds pursuant to its contract with the Legal Services Commission as it could no longer estimate that prospects of success in the appeal were 50% or higher. The solicitors explained that AA had intended to rely on the report commissioned by RMJ to save costs and that "the expert evidence in finalised form was not consistent with the direction that the drafts and verbal communications (to which we had been party throughout the preparation of the report) were taking".

33. On the same day RMJ sent a fax to the Tribunal to the following effect:

> "We have taken up to date instructions from our clients (the RM and HM brothers) and write to explain that we are as of today no longer instructed in either appeals. We should therefore be grateful if we could be taken off record as their legal representative. We have advised the appellants of the need to secure alternative representation for the hearing".

34. These letters understandably produced inquiries from the respondent as to what was happening or intended to happen. No bundles had been served on them although the material on which it intended to rely had been served on the appellants on 21 May 2010. The Tribunal indicated that it was not prepared to accede to Wilson & Co's request to withdraw, sought further information as to the position of RMJ and the clients they formerly represented and issued further directions with a view to keeping open the possibility of hearing these appeals on 8 June 2010.

35. On 8 June 2010 when the case was called on none of the appellants appeared in person. Mr Symes of Counsel appeared for Wilson & Co and Mr Knafler QC appeared for RMJ. The latter explained that Dr Herring 's report was made available late on the 28 May 2009. It had been considered by counsel on the following day and a conference had been held with RM and HM on the day following the Whitsun Bank Holiday 1 June 2010. At that conference instructions were withdrawn. Legal professional privilege prevented further information being given as to the reasons why instructions were withdrawn and litigation privilege prevented the disclosure to the Tribunal of the report itself. Later in the morning RM and HM themselves attended the hearing and indicated through an interpreter provided by the court that they wanted the appeal to continue and they wanted the RMJ to represent them in the appeal.

36. The present appeals had long been designated as intended to give guidance in circumstances where many hundreds of cases before the Tribunal and the higher courts have been stayed awaiting a judicial assessment of risk in Iraq applying Article 15(c) and related criteria. "Country Guidance" is a well established technique in the AIT and transferred to the Upper Tribunal pursuant to Senior President of Tribunal

(SPT) Practice Directions. A duplication of time effort and public funds by appellants, respondents and judges considering appeals at all levels can be avoided by thorough and painstaking review of the background materials, with commentaries and assessment by objective and informed experts where necessary and the material tested through the participation of experienced legal teams on both sides to assist the Tribunal to identify the relevant issues and direct itself appropriately in law.

37. The system has recently been described by Robert Thomas in his article, "Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom" IJRL [2008] vol 20 (4). As his article makes plain the development of the system has been encouraged by the higher courts, who have been concerned with the problem of inconsistent decisions in different panels of the AIT. The challenge of the system of asylum appeals is to ensure that cases are reviewed as country guidance with sufficient frequency to record changed circumstances so that previous guidance as a mandatory starting point for the assessment of an individual case does not outlive its utility (see Sedley LJ in KH (Sudan) v SSHD [2008] EWCA Civ 887 at [4]).

38. Although any appeal in the field of protection has importance for the individual appellant, country guidance cases have an importance far beyond that. This country guidance case in particular was not founded on any individual characteristic of any of the appellants other than their place of normal residence, nationality, age and gender. Considerable public funds had already been expended in processing the cases from their original rejection in 2007 and 2008 to 2010. Since the cases had been identified as country guidance cases in October 2009, the Home Office had prepared three volumes of country material and the UNHCR had prepared written submissions and two volumes of material. Five days had been set aside for a three person panel of the Upper Tribunal with the President in the chair to hear the case.

39. The circumstances in which a late change of mind was communicated were for the reasons set out above wholly unsatisfactory and in RMJ's case at least did not condescend to an explanation of whether the appellants sought to withdraw the appeal altogether or why instructions were said to have been withdrawn. Although legal professional privilege may constrain what a representative can tell the Tribunal, the profession will be aware that an explanation of why professional instructions have been withdrawn will be an important factor in whether an adjournment for fresh representation should be contemplated, and in the absence of any credible explanation adverse inferences may in appropriate circumstances be drawn. We draw attention to the important duty of cooperation with the Tribunal spelt out in Rule 2 (4)(b) to which we make further reference below.

40. We indicated that we were unwilling to accede to the applications to withdraw the appeals at this late stage, and concluded that there was an overriding public interest in proceeding to determine them. We adjourned the matter for a few hours for the parties to consider their positions further, and for RMJ to consider whether it could after all represent their clients in the light of the RM and HM's request.

41. On the afternoon of 8 June, the position regarding AA remained the same. Mr Symes informed us that he still wished to withdraw his appeal; in the event that the appeal was not withdrawn the appellant would not be represented, did not wish to participate and had no evidence or submissions he wished to advance to us. We had already been informed that this was based on the legal representatives' assessment of prospects of success in the light of the expert's report.

42. As regards HM and RM, we were informed that the appellants did not want the expert report to be adduced in their appeals. No instructions had been given to amplify the matter. The brothers now wished also to withdraw their appeal and had been informed of the consequences of so doing. It appeared that even though the public interest in the appeals continuing and RMJ continuing to act had been brought to the attention of the Legal Services Commission (LSC), further funding for representation was refused applying its established criteria.

43. It was apparent that the appeal of ASA had to be determined as no instructions had been received to withdraw. This would require an examination of the background evidence in respect of Baghdad (the intended place of return) and Baquabah in Diyala (the intended place of residence) as set against the legal criteria identified by the Court of Appeal in QD. Examination of the material specifically relating to Kirkuk (the intended place of residence for RM and HM) added little by way of further time in hearing submissions and making a determination.

44. We remained of the view that the public interest reasons why these appeals should be determined and the material so carefully brought together judicially assessed were overwhelming. We refused the application to withdraw the appeals and we now give full reasons for doing so.

The decision to proceed with the appeals

45. We had regard to the overriding objective to deal with appeals justly and fairly under Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules. We concluded that in a country guidance case of this type, justice and fairness was also owed to the many hundreds of appellants whose cases would be materially affected by a thorough review of all the available up to date material and the application of the test in QD.

46. As regards the specific factors in Rule 2(2) we concluded:

    a. "*dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties*"

    The importance was considerable, and the costs already largely incurred in the previous six months. The costs would be entirely wasted if we did not determine the appeals and would fall to be regenerated in future appeals where the parties may not have had the experience or the resources of the RMJ in identifying an appropriate expert.

b. “*avoiding unnecessary formality and seeking flexibility in the proceedings*”

We had through paper directions, active case management and short adjournments sought to explore every practical way to advance the over-riding objective. We considered whether we should call the expert Dr Herring ourselves, despite the fact that assertion of litigation privilege had prevented us knowing of his conclusions. Although this course was clearly open to us and may be an appropriate course of future action, we decided against it in this case. Neither the tribunal nor the respondent knew what the expert might say although we were aware it would be based on consideration of documents already before us. The costs of the expert’s attendance may be wasted if attendance added nothing to the documents. Two expert teams of legal advisers had now told us in one way or another that in their opinion the report reduced the prospects of the appellants succeeding to below 50%. It seemed unlikely that it would present a materially different picture to that contained in the Home Office compilation of documents supplemented by the UNHCR materials. It risked created extra delay and costs for an uncertain or no apparent tangible benefit. We will address later in this judgment how we consider country guidance cases should be case managed in the future to avoid this unfortunate outcome.

c. “*ensuring so far as practicable that the parties are able to participate fully in the proceedings*”

We had done what we could to ensure that the appellants were represented and assisted. The funding criteria for the LSC are not for the Upper Tribunal far less their application to an individual case. Nevertheless we propose to send a copy of this judgment to the LSC to draw its attention to what we consider the undesirable consequences of withdrawing funding at the last moment thereby placing in jeopardy the ability of the Upper Tribunal to perform an important part of its recognised function in giving informed guidance on country conditions in the most efficient way for public resources and litigation costs generally. Although we were concerned that RM and HM who initially expressed to us a wish to continue with their appeals would be severely restricted as unrepresented litigants with little or no English, we noted that on further instructions they had expressly indicated that they did want to place any further material before the Upper Tribunal and had sought to withdraw the appeal thus indicating that there was nothing further they wished to draw to our attention. We add here that the brothers stayed to listen to the subsequent appeal, the gist of which was translated to them by the interpreter and confirmed on more than one occasion that they did not wish to add anything or make any submissions.

d. “*using any special expertise of the Upper Tribunal effectively*”

We consider that the Upper Tribunal has special responsibility and expertise to assist Immigration Judges, primary decision-makers and litigants by engaging

in up to date assessments of risks in countries giving rise to commonly occurring situations, where it is possible and reasonably practical to do so.

e. *"Avoiding delay so far as compatible with proper consideration of the issues"*

The narrative of events in these cases speaks for itself. It would probably have taken another six months to set up another constitution to deal with further appeals raising these issues. Avoiding delay is always an important consideration in immigration cases to both sides for differing reasons. In our judgment it is particularly important in Article 15(c) cases where levels of general violence arising in armed conflict may change rapidly in the course of weeks or months and there is always the considerable likelihood of assessments being out of date.

47. We accordingly directed that the appeal start at 2.00pm on 9 June 2010. We had the benefit of a detailed skeleton argument from the respondent, although it did not bear a burden of establishing a negative in this case, and it had been sensibly anticipated that its skeleton argument should address the appellant's case rather than deal with protection issues entirely in the abstract. The hearing took the form of an elaboration of aspects of the written arguments by reference to the factual materials, a formal response to the written submissions of UNHCR, and response to questions put by members of the Tribunal as to various matters of law, fact and the practicalities of the intended return to Iraq. At the end of the hearing some information remained outstanding or subject to confirmation in writing. We asked that it be provided within 14 days. RM and HM indicated they would like to receive a copy of this further information and we directed that it should be sent to them. Whilst our decision was under consideration further information relating to the return of failed asylum seekers to Iraq came to our attention and we asked for further information from UNHCR and from the respondent, the appellants again being copied in. This was provided to us in accordance with the time limits set and is considered below. We are again grateful to all those who assisted us.

Future case management of country guidance cases

48. We recognise of course that whether to pursue an appeal or not is primarily a question for the parties and not infrequently contingencies arise in the course of litigation that lead to a change of heart or mind for one reason or another. These four appellants had persistently sought to challenge the summary dismissals of their humanitarian claims by the IJs in the light of the developing jurisprudence and a body of data extending back to 2005 and 2006 that revealed a serious state of affairs regarding the situation of civilians in Iraq.

49. We feel it necessary to repeat the view we expressed at the start of the appeal that we found the RMJ letter of 1 June 2010 profoundly unsatisfactory as to what it said, what it did not say, and when it said it. We have already expressed our surprise that experienced representatives instructing an experienced expert in the field would be

completely unsighted as to the overall conclusions likely to be reached in the case until 28 May 2009. If that was the case then it should not have been and something has seriously gone wrong with the task of preparing the case in accordance with the directions issued in December. We are aware, of course, that around this period RMJ was in the throes of a funding crisis, which led shortly thereafter to its closure. Whilst accepting that there were good reasons why, therefore, RMJ members involved in these appeals must have had a lot on their mind, that does not excuse inattention to their duty to the Tribunal and to the public interest in effective pursuit of these appeals.

50. It is also unsatisfactory that the Tribunal should be put in the position of making its assessment of risk without the assistance of objective relevant expert opinion that is available and was commissioned to assist the UT to perform its task. We would regard it as unacceptable if the Home Office were to suppress relevant opinion evidence it commissioned to assist the Tribunal because it considered that it did not assist the case it wished to put forward. We would equally be unwilling to accede to a late application to withdraw a Home Office appeal or resistance to an appeal if it appeared that the result was to prevent the Upper Tribunal receiving the evidence on an important question that it was in the public interest that it should receive.

51. Whilst the legal representative of an appellant is not a public authority with the same public law responsibilities as the Home Office, in our judgment the Rule 2(4)(b) duty of cooperation in the context of a country guidance case where the public interest is apparent and longstanding requires the representatives to consider and promote that public interest when preparing for important appeals as this one is.

52. Having regard to the above rule, together with Rules 5 and 15, we conclude that for the future case management of country guidance cases should proceed along the following lines:

i. The Tribunal should identify, with the assistance of the parties, the particular questions of fact or assessment on which any expert witness is to be instructed in the appeal.

ii. In order to do so the Tribunal should require at an early stage detailed grounds of appeal identifying how the appellant puts the case.

iii. The Tribunal should explore the possibility of a single jointly instructed expert being used by both sides as is the case in civil litigation under CPR 35.7 and more frequently in family law cases where the interests of the child may be more important that the interests of any one party to the litigation.

iv. The expert witness should be identified at an early stage and informed that he or she has the right of access to the Tribunal in case of difficulty with completing the report (see by analogy with civil proceedings, CPR 35.14).

v. The documents that either side wants the expert to consider should be assembled at an early stage, indexed and paginated and any supplementary materials arising subsequently added sequentially to the bundles.

vi. The Tribunal may direct that permission to use an expert granted at the outset of case management shall be on the basis that the report commissioned shall be disclosed to the Tribunal and the other party to the appeal irrespective of whether the commissioning party intends to rely on the report at trial. In these circumstances litigation privilege may well cease to exist in respect of the report.

vii. An expert's report should be disclosed well before the appeal date or final CMR, enabling the Tribunal or either party to pose supplementary questions (see by analogy, CPR 35.6).

viii. In a country guidance case skeleton arguments and authorities bundles should be prepared in advance of the last CMR so that informed decisions as to the length, form and nature of the appeal can then be taken.

ix. When the case has reached an advanced level of preparation, the interests of a party in not wishing to continue with the appeal are likely to carry considerably less weight than the public interest in continuing with it.

53. With these measures in place, it is hoped that last-minute changes of position can be avoided, and that if the Tribunal is left in the unfortunate position that one party is no longer willing or able to participate in the appeal it will have that party's submissions and the documentary form of any material it had intended to rely on before it. It is also hoped that the LSC will be able to consider means by which public funding could be continued in such a case.

Part 2: The meaning of Article 15(c) Qualification Directive

Submissions on the law

54. The written submission from the UNHCR, whom the Tribunal had joined as an intervener on 11 May, recalled that this body's position on the application of Article 15(c) to Iraq was placed before the Court of Appeal in QD in the form of submissions that were formally annexed to the judgment of the Court. It was not considered necessary to add to those submissions on the law save to draw attention to two matters. The first was the decision of the Conseil d'État in Office Français de Protection des Réfugiés et Apatrides v Baskarathas, 3 July 2009, No.32095 (as translated by UNHCR) in which the Conseil d'État upheld a decision by the French National Court of Asylum that had found that a Sri Lankan national was entitled to subsidiary protection under Article 15(c) on the basis that there was a situation of generalised violence existing in the eastern part of Sri Lanka, notwithstanding that the Sri Lankan army had taken control of that area. It was submitted that in addition

to illustrating the effect of Article 15(c) in relation to regional levels of indiscriminate violence, the judgment also made clear that the threat to a person's life or person need not arise from actions of a combatant to the armed conflict and that the violence from which protection is granted need not be limited to areas where the armed conflict itself is concentrated. This was consistent with the submissions made by UNHCR in QD that it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question – it can simply be the product of the breakdown of law and order - and there does not have to be active military or armed combat taking place in that precise area at that precise time.

55. A second decision UNHCR wished to highlight was that of the Supreme Administrative Court of the Republic of Bulgaria, First College dated 5 March 2009 (Administrative Case No 300/2009 in the matter of Hassan Fayed (again as translated by UNHCR)). In upholding a claim for subsidiary protection based on Article 15(c) the Supreme Administrative Court stated that in the light of "irrefutable evidence, including but not limited to the opinion of the International Law Directorate of the Ministry of Foreign Affairs", the situation in Iraq was one of internal armed conflict and the situation in the appellant's home area (Diwaniq, Kadisha Province in southern Iraq) "is defined as unstable with acts of indiscriminate violence and therefore, there is a real threat of a basic attack(s) against [the appellant]."

56. We shall consider UNHCR's written submissions on the factual situation in Iraq below in Part 4.

57. The respondent's position as to the law was that the Tribunal should follow the guidance given in Elgafaji and QD.

58. With regard to the submissions put in on behalf of the UNHCR, it was submitted that the decision of the Conseil d'État referred to in their written submission was not an Iraqi case, so though it was relevant to the legal principles in question it was not relevant to the facts of this case. It was argued that in any event the point of law analysed there did not arise in this case.

59. In respect of the Bulgarian case cited by UNHCR, which was concerned with Iraq, the point was made that the only evidence referred to there was an opinion of the Bulgarian Foreign Ministry, and there were insufficient accompanying reasons for the Tribunal to draw support from it. At best it could only be persuasive authority by way of a factual assessment made as of March 2009.

60. The respondent urged the Tribunal to ensure when applying Article 15(c) that proper differentiation was made between targeted violence and indiscriminate violence and between the level of risks encountered by "ordinary" (Iraqi) civilians and deaths and injuries suffered by combatants.

61. As regards the question of safety of route of return the respondent submitted that although the conclusions on this set out in HH and Others were expressly stated to be *obiter,* they confirmed that the burden of proof was on the appellants. Mr Staker said

that the Secretary of State reserved her position as to whether these conclusions were correct, but did not seek to argue for a different approach in these appeals. He only sought to highlight that what is said in HH and Others does not mean that simply because the Secretary of State does not deal with or consider that there is any issue with the route of return, the decision on entitlement is rendered unlawful as a result. An appellant can always appeal and raise the issue on that appeal. Only where the appellant raises a cogent argument on the issue, is it for the Tribunal to deal with it. At the appeal stage, where it is the Secretary of State's case that there would be no difficulties involved in the route of return, it is for an appellant to set out alleged difficulties and demonstrate them to the required standard of proof. There is no general requirement on the Secretary of State to specify all routes and methods of return within the country of destination.

Discussion

62. The principal focus of these appeals is whether all or any of these appellants is entitled to the form of subsidiary protection spelt out in Article 15(c) as interpreted by the ECJ in Elgafaji C-465/07 (17 February 2009) and the CA in QD and HH and Others.

63. Our focus is the Directive because there is no indication that national transposition has been more generous, and if its language might incline to narrower reading such language must yield to the requirement to interpret national measures in accordance with Community law (see Marleasing [1990] ECR 1 4135 and Elgafaji at [42]).

64. The relevant terms of the Directive are as follows:

Art 2

> "(e) 'person eligible for subsidiary protection' means a third country national…who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin,…would face a real risk of suffering serious harm as defined in Article 15…and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country.

…

Art 15 Serious harm consists of

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

65. The application of the Directive is ultimately a factual assessment of all relevant material available to us at the date of the determination of this appeal but before we

can decide whether any of the appellants meets the test we need to remind ourselves what we are looking for in the evidential part of the assessment.

66. It is plain from QD at [18]) that in its conclusions in KH at [206] to [209] the AIT's misconception that international humanitarian law (IHL) should drive the construction of the kind of harm identified in Article 15 led it to read the terms "indiscriminate violence" and "life or person" too narrowly and to set the threshold of risk too high. Our task is to revisit the evidence that is now available as to risk to civilians in the light of the broader approach identified in QD: "to locate the evidence within a different legal paradigm and reach a fact sensitive fresh conclusion".

67. We identify the following passages of the case-law binding on us as particularly apposite in the identification of the test for Article 15 (c) protection in the present case:

    a. The Article seeks to elevate the state practice of not returning unsuccessful asylum seekers to war zones or situations of armed anarchy for reasons of common humanity into a minimum standard (QD at [21]).

    b. The scope of protection is an autonomous concept distinct from and broader than Art 3 protection even as interpreted by the European Court of Human Rights (ECtHR) in NA v United Kingdom (Elgafaji at [33]-[36]; QD at [20], [35]); HH and Others) at [31]).

    c. It is concerned with "'threat .. to a civilian's life or person' rather than to specific acts of violence .. the threat is inherent in a general situation of .. armed conflict…The violence that gives rise to the threat is described as indiscriminate, a term which implies that it may extend to people irrespective of their personal circumstances" (Elgafaji [34]).

    d. The Article is intended to cover the "real risks and real threats presented by the kinds of endemic acts of indiscriminate violence - the placing of car bombs in market places; snipers firing methodically at people in the streets - which have come to disfigure the modern world". It is concerned with "serious threats of real harm" (QD at [27] and [31]).

    e. "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 reaches such a high level that substantial grounds are shown for believing that a civilian …would solely on account of his presence on the territory… face a real risk of being subjected to the serious threat" (Elgafaji [35]).

    f. "The more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required" (Elgafaji [39]).

g. A consistent pattern of mistreatment is not a necessary requirement to meet the real harm standard. "The risk of random injury or death which indiscriminate violence carries is the converse of consistency" (QD at [32]).

h. There is no requirement that the armed conflict itself must be exceptional but there must be "an intensity of indiscriminate violence great enough to meet the test spelt out by the ECJ" and this will self evidently not characterise every such situation (QD at [37]).

i. "The overriding purpose of Article 15(c) is to give temporary refuge to people whose safety is placed in serious jeopardy by indiscriminate violence, it cannot matter whether the source of the violence is two or more warring factions (which is what conflict would ordinarily suggest) or a single entity or faction" (QD at [35]).

j. 'Civilian' means all genuine non-combatants at the time when the serious threat of real harm may materialise (QD [37]).

68. In the light of the above, and the circumstances of each of these appellants we pose to ourselves the question identified in Elgafaji at [43], namely, does:

> "the degree of indiscriminate violence characterising the armed conflict taking place… (reach) such a high level that substantial grounds are shown for believing that any 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 or that country or region , face a real risk of being subject to that threat ?"

69. In the case of GS, decided after Elgafaji and QD but before HH and Others, the AIT considered the distinction between indiscriminate and targeted violence and suggested at [62] that there may be a distinction between bombing insurgents hiding in civilian areas and a targeted attack with individuals caught in the cross-fire so as to exclude the latter scenario from the ambit of Article 15(c).

70. In the written submissions before us the respondent had suggested that figures of overall civilian casualties in Iraq had to be discounted by reference to a number of factors including the distinction between targeted killings of security service personnel and unintended civilian casualties. There was reference back to the distinctions that the AIT explored in GS. As the oral submissions developed it became plain that the respondent did not contend that as a matter of law the ways in which civilians might come by death or serious injury had to be sub-divided into targeted or non-targeted killings. Rather it was advanced as a matter of practicality that the class of civilians who might be exposed to these risks would be smaller if they arose not from random killings in the market place but were directed at the elimination of security service personnel or government functionaries.

71. The respondent's submissions imported a further related proposition, namely that when determining the levels and extent of indiscriminate violence in a particular

country or area decision-makers should adopt a non-inclusive approach, making sure to subtract certain types of violence, in particular that between combatants. Mr Staker stated that the Court of Appeal had confirmed, in [37] of QD, that a civilian must be a genuine non-combatant. For the respondent there was an additional reason why "civilians" should not be treated as including military personnel: plainly such individuals could not be described as ordinary civilians with no particular features which could increase risk.

72. Similarly in KH the AIT sought to apply a non-inclusive approach to indiscriminate violence. It stated that in general, the level and degree of targeted violence which combatants direct against each other [defined in IHL terms] should not be taken into account unless it turns out to consist in acts carried out in the course of hostilities in a way which disproportionately affects civilians ([100]).

Our conclusions on the law

73. We consider that an attempt to distinguish between a real risk of targeted and incidental killing of civilians during armed conflict (as in GS: see [67] above) is not a helpful exercise in the context of Article 15(c) nor does it reflect the purposes of the Directive in the light of the factors set out at [65] above. The judgment of the ECJ in Elgafaji indicates that the scope of protection in this part of the Article is a broad one at least during such time as the conflict is intense and the risks to civilians greater.

74. The evidence of the unhappy and prolonged history of civilian casualties in Iraq since 2003 demonstrates that in predominantly twelve urban centres very large numbers of people have died from improvised explosive devices, shootings, hostage-taking, aerial bombardment and many other means. While it can be said that many of these incidents that resulted in civilian deaths may have been aimed at eliminating members of the security force or insurgents, or particular religious or ethnic minorities, the means employed frequently resulted in significant numbers of non-combatant deaths whether such deaths were specifically targeted or otherwise.

75. In the light of Elgafaji and QD it is also clear that a non-inclusive approach to the assessment of violence as advocated in KH (and also to a lesser extent in GS) must be regarded as flawed and in at least some respects unduly restrictive. Whilst there are important differences between targeted and non-targeted attacks we know all too well from armed conflicts arising in Iraq and elsewhere in the world today that civilians can be adversely affected by violence whatever its source. For example, many targeted attacks can result in heavy collateral damage. Causing death and injury not just to particular groups but to the civilian population at large can sometimes be a deliberate strategy employed by one or more parties to the conflict. The lines between civilians and combatants can sometimes be blurred. There can also be a heavy overlap between criminal and military violence. Further as we shall note later on, attempts to subtract certain types of violence can lead to a futile exercise in analysing statistics of deaths and casualties which fails to take into account common problems such as underreporting.

76. It is also salient to recall that we are concerned in the context of Article 15(c) not just with threats to life but also to person; and, even if the term "life or person" is not construed as widely as UNHCR and some other commentators have advocated, it is certainly the case that it must extend to significant physical injuries, serious mental traumas and serious threats to bodily integrity. That has significance for the type of evidence relevant to establishing whether Article 15(c) is engaged. Such evidence cannot be confined to the numbers of casualties.

77. Once freed from the constraints of a requirement to evaluate whether the indiscriminate violence is a breach of IHL or otherwise legitimate in armed conflict, we cannot see that the true purpose and scope of Article 15(c) requires some precise assessment of the intentions or culpability of the actors to the conflict. Nor do we consider ordinarily that it would be consistent with the broad approach enjoined by the ECJ in Elgafaji to adopt a non-inclusive approach when assessing the level and extent of indiscriminate violence. There may be armed conflicts in which civilians are little affected by the fighting going on, but far more often that is not the case.

78. Further, as noted in GS (following AM and AM (Armed conflict: risk categories) Somalia CG [2008] UKAIT 00091), in the context of Article 15(c) the serious and individual threat involved does not have to be a direct effect of the indiscriminate violence; it is sufficient if the latter is an operative cause.

79. That is not to say that it can be assumed that every type of violence occurring in a country always impacts on civilians. Article 15(c) requires there to be a sufficient causal nexus between the violence and the conflict; an operative cause that is not too remote. In that context the Tribunal in GS recognised that general criminality that caused harm of the necessary degree of seriousness could be a consequence of armed conflict where normal law and order provisions are significantly disrupted.

80. We agree with that approach. In our judgment the nexus between the generalised armed conflict and the indiscriminate violence posing a real risk to life and person is met when the intensity of the conflict involves means of combat (whether permissible under the laws of war or not) that seriously endanger non-combatants as well as result in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive. Such violence is indiscriminate in effect even if not necessarily in aim. As the French Conseil d'État observed in Baskarathas, it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question: it can simply be a product of the breakdown of law and order.

81. The immigration judge in finding the facts and reaching a conclusion is not passing any form of judgment on the legitimacy of the actions of the parties to the conflict whether international, national or regional. If there is a serious risk of injury and death to civilians in the location by reason of the fact that the armed conflict is being fought out in areas where civilians happen to be, that is a sufficient reason not to return them to war zones until that risk has decreased to the point where it is no longer real or substantial.

82. There must be a serious threat of real harm, but if the return in question is at a time when there is real harm being perpetrated on a very substantial number of civilians in the country in question, that harm is taking place in cities or provinces to which the appellant is expected to return and there is no readily accessible internal safe haven predictably free of such harm where it would be reasonable to expect the appellant to go as an alternative, then the IJ would be entitled to find the conditions for protection made out. What cannot be required is a clear prediction of when a particular individual will become the victim of indiscriminate harm. All that is necessary is that there are substantial grounds for considering that there exists a serious threat of the real harm. In the context of this case, that means assessing whether the scale of the harm caused to civilians by the variety of means by which they come to harm is substantial because of the intensity of the conflict as it is waged at the relevant time.

83. We accept that if the insurgent activity is no longer happening on a wide scale and the security forces have sufficiently regained control of the situation so as to greatly reduce any real risk of collateral damage to the lives of civilians, then it can well be said that the intensity of the conflict does not reach or no longer reaches the level required to engage Article 15(c) protection.

84. Even if the level of violence in Iraq today can still sensibly be considered as "armed conflict" involving organised parties with some continuing capacity to inflict deadly force, the ultimate question for us in this case is whether the intensity of the violence threatening life and bodily integrity is such as to pose a real risk of harm to a civilian such as any of these four appellants, among others. They have no personal characteristics other than that they are young male Iraqis from Kirkuk, Baquabah and Baghdad. A mere possibility of being the victim of such violence as is still taking place will not suffice in such circumstances. Something more is required.

85. This case is not concerned with people who have a credible claim to exposure to violence based on something other than simple nationality of Iraq (or young age or particular geographical location). It is not concerned, for example, with government employees, families of members of the security forces, political leaders, members of religious minorities in vulnerable areas, who may be at significantly greater risk of being the victims of such violence by reason of such characteristics.

86. Irrespective of whether they have claims to refugee status or protection under Articles 2 or 3 of the ECHR, appellants can still claim to be victims of indiscriminate violence within Article 15(c) as the ECJ has made plain at [39] of Elgafaji. They may not be individually identified on death lists and specifically targeted for harm as identified individuals but they are at greater risk than others because, for example, 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.

87. There are clearly considerable overlaps between refugee status, the protection afforded by Articles 2 and 3 ECHR and that afforded against the serious harm in

Article 15 (a), (b) (c), but there also differences at least in emphasis. Whilst in NA v UK the ECtHR recognised at [115-117] that in exceptional cases of generalised violence Article 3 protection may be available, the essential concept was based on personalised individual risk, and only in the most extreme cases would it extend to risk of ill treatment on a more general basis. Thus Article 3 has broadened so that it can apply to certain kinds of harm in situations of armed conflict.

88. Article 15(c) also has a different starting point: indiscriminate violence in a situation of armed conflict. The reference to the threat being "individual" includes a real risk to anyone in that situation. It is now clear that being singled out, targeted or subject to differential impact is not a necessary precondition of Article 15(c) protection, although the greater the risk factors arising by reason of relevant personal characteristics the less is the need to rely on generalised violence. We should add for the sake of clarity that neither is being singled out a precondition of refugee or Article 3 ECHR protection. The distinction between the protection afforded under Article 3 ECHR and that referred to in Article 15(b) may therefore be narrow in practice but that does not mean that 15(c) does not have its distinct ambit and purpose that should be the focus of analysis. If an applicant falls within one or other it may not be necessary to specify which. The observations of the ECJ at [39] of Elgafaji indicate that there is no rigid allocation of different degrees of targeted harm to different parts of the Directive.

89. "Armed conflict" must mean something other than unpredictable and short lived outbreaks of deadly criminality however indiscriminate or the lone gunman on the rampage. Armed conflict and indiscriminate violence are not terms of art governed by IHL, but are terms to be generously applied according to the objects and purpose of the Directive to extend protection as a matter of obligation in cases where it had been extended to those seeking to avoid war conflict zones as a matter of humanitarian practice.

90. Although IHL does not define the operative concepts, in order to identify circumstances when they are clearly engaged, we can see nothing in the case law binding on us that makes it impermissible to draw assistance from the rules of IHL as to when violence goes beyond casual criminality and becomes armed conflict. We understand from the submissions of UNHCR and other sources that IHL continues to inform the judgments of some other national courts and tribunals in the EU.

91. We have also drawn assistance from the review of case law and concepts by Helene Lambert and Theo Farrell "The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence" IJRL (2010) Vol 22 (2) at 237. The authors note the continuing reference to IHL to inform the spirit of the measures by French courts (at 251-255). They regard it as self-evident that the metric of battlefield deaths used by the Correlatives of War Project since 1963 for inter state conflicts is not an appropriate means of measuring civilian deaths (260-261). The authors recognise that civilian casualties are a material metric in the present context but note the difficulty in obtaining reliable data whilst the conflict is in progress and the risks in excluding indirect casualties who are "killed or suffer serious illness as a

consequence of the effects of war, for example, from imprisonment, abuse, starvation, or even the destruction of critical infrastructure and services" (262-263). They accordingly suggest that attention can also be directed as a way of measurement of the intensity of the conflict to population displacement and to evidence of state failure (263-266 and 272).

92. We see no reason why these considerations should not be factored into the overall assessment provided that there is a sufficient although not necessarily exclusive causal nexus between the violence arising in the conflict and the harm suffered. The AIT in GS was right to conclude that this could include risk of exposure to criminal violence resulting from the failure of protection arising from armed conflict. Destruction of the necessary means of living, if not simply a remote consequence (as was found by the Tribunal in GS to be the case in Afghanistan in 2009), may equally be a relevant factor. Similarly, population displacement may well be an indicator of the intensity of such problems, whilst consideration of the availability of state protection itself and its efficacy is required under Article 2 of the Directive. An applicant is unable to access protection that is not available.

93. We recognise that the terms of the Directive indicate that internal relocation may be as relevant to Article 15(c) protection as to refugee status and that the provisions of the Directive can be informed by the case law of the House of Lords on what is unduly harsh: see Januzi [2006] UKHL 5 and AH (Sudan) [2007] UKHL 49 where their Lordships approved the UNHCR legal approach to the question**.**

94. We have yet to state our conclusions on the submissions made by Mr Staker concerning the issue of safety of internal travel. We remind ourselves that the Court of Appeal in HH and Others stated at [58] that:

> "[…] in any case in which it can be shown either directly or by implication what route and method of return is envisaged, the AIT is required by law to consider and determine any challenge to the safety of that route or method. That conclusion is consistent with AG and GH; it is consistent with past established practice and, as we will later explain, it is consistent with the requirements of the Qualification and Procedures Directive."

95. Further, at [84] it was stated:

> "…In any case in which the Home Secretary did not deal with safety during return (because he did not consider that any issue arose) but where the appellant raises a cogent argument that there might not be a safe route of return, the appeal tribunal would have to deal with that issue, possibly after calling for information from the Home Secretary as to his intentions. In any event, as it seems to us at present, the decision on entitlement must be taken within a reasonable time and cannot be left until the Home Secretary is in a position to set safe removal directions."

96. The Court had described "technical obstacles" to return as "probably confined to administrative difficulties such as documentation; they may include physical difficulties such as the lack of return flights": see [83].

97. The appellants in these appeals did not make any submissions to us on this matter. However, we remind ourselves that at the last CMR hearing when the Tribunal had the HH & Others judgment to hand, the issue of internal safety of travel was identified as a relevant issue by the Tribunal and (separately) in the course of receiving replies to further directions issued shortly after the hearing we came to learn of concerns expressed by UNHCR and others about the treatment of some returnees involved in charter flights that took place on 9th and 16th June. In such circumstances we deem it incumbent on us to examine and assess the evidence and submissions we have relating to these matters. In HH & Others the Court of Appeal makes clear that it is for the appellant in any case to show to the lower standard that the methods of return involve ill treatment or that the route they would need to travel in order to return to their home area is unsafe.

98. Our decision will constitute new country guidance on the application of Article 15(c) in Iraq and as such should be applied by immigration judges under the SPT Practice Direction 12. 2. The questions we have posed for ourselves summarising our legal conclusions and the questions that an IJ should consider where the issue needs to be addressed where there is no current country guidance or there has been a material change in the evidence are:-

(i) Is there a situation of armed conflict in any part of the country that produces harmful effects for civilians who are non-combatants, that are not too remote?

(ii) Do the effects resulting from the armed conflict include violence that poses a real risk to the life and bodily integrity of such civilians?

(iii) Are there substantial grounds for believing that any non-combatant civilian who is returned to that country faces a real risk of being the victim of such violence?

(iv) If a claimant has additional characteristics (over and above being a mere civilian) that pose a greater risk of adverse consequences, do these additional features when added to the background position for any civilian meet the threshold for subsidiary protection?

(v) If either (ii), (iii) or (iv) is satisfied, is there internal protection available to the claimant in an area where it reasonable to expect him or her to go to, having regard to Articles 7 and 8 of the Qualification Directive?

(vi) Will the proposed route of return for the claimant enable him or here to access such protection without violation of fundamental human rights?

Part 3: The Background Evidence

General security situation

99. The UNAMI report, 1 Jan-30 June 2009, notes at [3]:

> "The first half of 2009 was characterised by further improvements in the security situation with fewer high-visibility mass-casualty attacks by militias, insurgents and criminal groups than recorded in 2008. However, notwithstanding the reduction in the number of attacks, indiscriminate attacks as well as targeted killings of security forces, high-ranking officials and civil servants, religious and political leaders, members of professional groups such as journalists, educators, medical doctors, judges and lawyers continued to claim lives throughout the reporting period. Numerous reports indicated an increased number of attacks directed at persons based on their perceived sexual orientation. Violence against women and "honour"-related homicides also remained to be of serious concern, as particularly reported in the KRG where, despite the efforts of legislators, many crimes were unpunished."

100. The COIR, December 2009 at 8.07 notes that the United States Department of Defence (USDoD) report, December 2008, stated that:

> "Many factors have contributed to an environment of enhanced security and political progress, including increasingly capable Iraqi Security Forces (ISF) aided by the Sons of Iraq (SoI), Coalition forces' continuing support to the ISF, the demonstrated will of the Government of Iraq (GoI) to counter extremists, and the rejection of terrorists by the Iraqi people."

101. The US Department of State (USSD) Report, 11 March 2010 gives the following summary of the evolving security situation in Iraq during 2009:

> "During the year, the general security situation in the country improved substantially. Violence decreased to the lowest level since 2004, although attacks on military, police, and civilians continued. Compared to the previous year, civilian deaths from violence during the year fell 47 percent to an average of seven civilian deaths per day and Iraqi Security Forces (ISF) deaths from violence fell by 52 percent to an average of 1.4 ISF deaths per day. Successful ISF operations contributed to decreasing violence by consolidating government control of areas Shi'a special groups and other extremists previously dominated. Sectarian killing declined due to the continued observance, except by some breakaway factions, of a series of unilateral ceasefires the Shi'a militia Jaysh al-Mahdi (JAM) first announced in 2007, and the continued efforts of … SoI neighbourhood security forces -- initiated in 2007 and 2008 and mostly affiliated with Sunni tribal groups -- to undermine the influence of the terrorist group Al-Qa'ida in Iraq (AQI) and other largely Sunni extremists.
> …
>
> Although overall violence against the civilian population greatly decreased during the year, insurgent and terrorist bombings, executions, and killings were regular occurrences throughout all regions and sectors of society."

102. The Internal Displacement Monitoring Centre (IDMC), 4 March 2010 report from the Norwegian Refugee Council states that the number of civilian deaths has fallen significantly but "violence remains endemic".

103. The UN Secretary General (UNSG) report for March 2010 notes that in 2009 hundreds of civilians were reportedly killed in attacks that have targeted Christian, Shabak, Turkmen and Yazidi communities, with minorities in Ninewah governorate being a particular target.

104. The Amnesty International (AI) report, April 2010 entitled Iraq: Civilians Under Fire focuses on civilians who are particularly at risk of attack because of their human rights or professional work, their political activities, their identity, gender or sexual orientation or their plight as displaced people.

105. The UN 2010 Humanitarian Action Plan (HAP), a document setting out the joint humanitarian strategy developed by 9 UN agencies, the International Organisation for Migration (IOM) and 12 non-governmental organisations operating in Iraq, states at [3.1]:

> "Iraq in 2009 has become a more secure and stable country when compared to the peak of sectarian violence and counter-insurgency operations in August 2007, although the security risks are still considerably higher than in 2003 to 2004. Levels of violence have dropped by more than 85% compared to 2006-2007. Despite these visible improvements Iraq is still a country affected by significant levels of violence, with a considerable impact on civilian lives. The security gains made during the second half of 2008 have not continued at the same pace during 2009, with the number of security incidents hovering around the same level of 27 incidents per day since November 2008 [UNAMI]".

106. In the same paragraph reference is made to the wider effects of the violence:

> "Six years of violence have visibly affected the fabric of Iraqi society. Casualties among civilians have had a direct and long-term effect on families through loss of livelihoods, particularly in conservative parts of the country where women's participation in the workforce may be low in some areas. Loss of parents and family members has had a devastating effect on the lives of thousands of children and the subsiding conflicts continue to harm the mental health of the population in conflict-affected areas. Almost half (48%) of the population has experienced a war-related trauma."

Actors

107. One obvious feature of the current situation in Iraq and its susceptibility to continuing violence is that there remains an ongoing internal armed conflict involving a number of parties, principally foreign troops, Iraqi government forces and various insurgent groups.

108. Since 1 January 2009, under the Iraq-United States Bilateral Security Agreement, the Government of Iraq (GoI) assumed security responsibility for all 18 provinces

supported by US forces. The Status-of-Forces Agreement (SOFA) of 30 June 2009 saw the Iraqi authorities take over full responsibility for the security of the country.

109. According to a Prism interview in early 2010 with US General Raymond T Odierno, in September 2007 the US had around 175,000 troops in Iraq. Under the Obama administration the US has committed itself to a “responsible drawdown” of US Forces. This began in Jan 2008. On 1 January 2009 the US commenced the transfer of the Green Zone in Baghdad to the Iraq Army. The US armed forces withdrew from Iraqi cities at the end of June 2009, leaving around 750,000 members of the ISF to take charge. According to the UNAMI 1 Jan-30 June 2009 report at [26], the new arrangements which came into effect on 1 January 2009 resulted in “a lighter footprint of MNF-I military operations”.

110. Since January 2010 the Multi-National Force-Iraq (MNF-I) has become the United States Forces-Iraq (USF-I). Numbers of US troops were then around 100,000. We do not have the very latest figures to hand, but we understand from recent news reports that since 31 August 2010 less than 50,000 US troops remain to focus on stability operations centred on training, advising and equipping the ISF, protecting US military and civilian personnel, conducting targeted counter-terrorism operations and supporting civilian agencies and international organisations in their capacity-building efforts., operating from their military bases only. The date set for withdrawal of all US troops is the end of 2011.

111. The USDoD report of July 2009 stated that as of April 30, 2009, the ISF numbered approximately 645,000 forces. The USSD report, 2010 assesses total trained ISF numbers as 655,000. The CFR report, published 27 March 2008, stated that in the KRG the Peshmerga consisted of around 100,000 fighters. The FCO human rights report for 2008, released March 2009, stated “There are now around 400,000 Iraqi Police Service (IPS) officers nationwide”**.** At 10.68 the COIR December 2009 cites the FCO report, 27 March 2009, stating that:

> “The FCO Erbil stated that the KRG is policed and secured effectively by a combination of the Peshmerga (the Kurdish military force that is technically part of the Iraqi armed forces), local police and the Asayeesh security force. The KRG maintains an effective border (the ‘green line’) between the KRG and the rest of Iraq and controls entry into the KR to keep insurgent and terrorist elements out of the KRG.”

112. There are plans for the integration of significant numbers of the Awakening Councils or SoI into the security infrastructure, although whether they will be realised is open to some doubt. According to SIGIR, April 2010, by April 2010, of the 94,000 SoI, some 9,000 had transitioned into the ISF and a further 30,000 into other government employment.

113. Several Sunni nationalist groups remain in armed resistance and continue to conduct attacks against US and Iraqi forces. Remaining Shi’a militants have reorganised themselves into three main militant groups.

114. As regards the role played by non-state criminal actors, the UNAMI report for 1 Jan-30 June 2009 notes at[15]:

> "With regard to the motivations behind these attacks, it is often difficult to draw a line between ideologically-driven insurgent operations and criminal actors committed by organised gangs as there is frequently overlap between the two".

Levels and extent of violence

115. Violence in Iraq continues to be heavily researched. Until recently most surveys were conducted by US or international bodies. The USDoD continues to release monthly trends including those relating to Iraqi civilian, police and security forces deaths. The most notable international bodies analysing trends in civilian casualties and related aspects of the armed conflict have been the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and UNAMI. Several Iraqi ministries also release casualty figures.

116. Nongovernmental bodies producing analyses include the Associated Press, the Brookings Institution, Iraq Body Count (IBC), the International Institute for Strategic Studies (IISS), the Iraq Coalition Casualty Count, Iraq Family Health Survey, the British Lancet study and the British survey firm, Opinion Research Business (ORB).

117. Few of these bodies use identical methodologies. In the view of Hannah Fischer, in the Congressional Research Service study of February 2010 (Iraq Casualties: US Military Forces and Iraqi Civilians, Police and Security Forces) this calls for caution in seeking to rely on any particular survey:

> "Because the estimates of Iraqi casualties contained in this report are based on varying time periods and have been created using different methodologies, readers should exercise caution when using them and should look to them as guideposts rather than as statements of fact."

118. The John Hopkins survey published in the Lancet in October 2006, which was based on remote supervision of locally hired researchers and estimated 450,000 more deaths from violence in Iraq than the WHO-funded study (which estimated 151,000 deaths by July 2006) has been the subject of strong criticism in a new peer-reviewed study by Professor Michael Spagat of Royal Holloway University. In January 2008 the Opinion Research Business (ORB), an independent polling agency who had surveyed Iraqi households asking for information of deaths revised its original estimate of 1.2 million deaths since 2003 down to 1,033,000 deaths. Its study has not been peer-reviewed and, by virtue of having survey methods similar to the Lancet study, does not appear to be regarded as a reliable source.

119. The IISS armed conflict database, under the heading "Human security developments Jan-Feb 2010," states that Iraqi defence, interior and health ministries said that 2,800 civilians were killed during 2009 - less than half of the total for 2008 (5,886) and the lowest annual estimate since 2003. In 2009, in addition to 2,800 civilians being killed there were 439 police and 202 military.

120. However, the IISS added:

> "Whilst causalities appear to be on the decline since 2008, the Iraqi Interior Ministry said on 21 January that there had been a 36% increase in violent acts in 2009 compared to 2008 (700 kidnappings, 129 armed robberies and 656 homicides)".

121. The Iraq Body Count (IBC) website (accessed 4 June 2010) states that during 2009 4,644 Iraqis were killed, half of the amount of 2008 (9,219). In 2006, by contrast, their figures listed 25,774 - 27,599 deaths reported and in 2007 22,671 - 24,295. "At 25 per day", the IBC notes, "the 2008 rate for violent civilian deaths is equivalent to that existing throughout the first 20 months of post-invasion Iraq, from May 2003 to December 2004".

122. On IBC figures, on a per capita basis Mosul was the most deadly city (756 recorded deaths in an estimated population of 1.8m). Baghdad by comparison had 1,545 deaths in an estimated population of 6.5m.

123. A Wikipedia entry accessed on 8 June 2010 contains a list of countries by "intentional homicide rate", giving rates per 100,000 population for 2004 - 2008/9. It lists Iraq's rates as being 101 in 2006, 89 in 2007, 21 in 2008 and "most recent[ly]" 9.99. For comparison, based on figures for 2004, the rates were Jamaica 58, South Africa 37, Somalia 33, Mexico 12 and United States 5.48. The latest rate in England and Wales is given as 1.37. So far as concerns figures for Iraq it is not made clear whether the figures include all intentional homicides including those inflicted by combatants in the course of armed conflict, but such would seem to be suggested by the source given ("All Iraqi deaths from violence from 2005 to present". icasualties.org: http://icasualties.org/Iraq/IraqiDeaths.aspx. Retrieved 2010-04-09)")

124. The IDMC, 4 March 2010 report from the Norwegian Refugee Council, p.10, concludes:

> "Despite the decline in violence, the UN and humanitarian community have continued to report human rights abuses against civilians by militias, criminal gangs and security forces (UNAMI, December 2009). In mid-2009 it was reported that 500 civilians were being killed and over 2,000 injured each month, mainly in Ninewah, Baghdad and Diyala (ICRC, August 2009)".

125. Some leading surveys seek to cover multiple aspects of the armed conflict. The Brookings Iraq Index of 25 May 2010 uses a number of "tracking variables". One variable consists of an estimated number of civilian casualties (=deaths) by year (3,000 in 2009, down from 6,400 in 2008; for Jan - March 2010 the figure is 590). The complete figures since 2003 are:

2003	2004	2005	2006	2007	2008	2009	2010 (January-March)

7,300	16,800	20,200	34,500	23,600	6,400	3,000	590

126. The authors of this Index note that the figures for January-March 2010, assuming no change over the course of the year, would produce an annualised figure of 2,360 civilian casualties.

127. But there are a number of other variables used by this Index: enemy-initiated attacks against the coalition and its partners; weapons caches found and cleared; killed and wounded in multiple fatality bombings; multiple fatality bombings targeting civilians by sectarian group; US troop fatalities; number of foreigners illegally crossing into Iraq to support the insurgency; attacks on Iraqi oil and gas pipelines, installations and personnel; number of daily insurgent attacks; and surveys of Iraqi public opinion on security situation in Iraq.

128. The USDoD analyses also take a multidimensional approach. It is stated in its March 2010 report that in December 2009 - February 2010 "security incidents" remained at lower levels than in the five years previously. "Security incidents" are said to include all reported attacks against civilians, the ISF and US forces. The same report also gives figures for "high profile attacks (Explosions)", "Ethno-Sectarian Deaths", "average daily executed attacks by provinces", "weapons caches found by Coalition and Iraqi Forces" and public opinion surveys. It was stated that monthly high-profile attacks remained essentially unchanged from the previous reporting period.

129. The Centre for Strategic and International Studies (CSIS) in its March 2010 report, Iraq: Meeting the Challenges of 2010, gives figures drawing on MNF-I SIGACTS III Database (Coalition and Iraqi Reports) of Security incidents, IED Incident Trends, Civilian Deaths and Casualties by Type, Insurgent, Jayish Al-Mahdi (JAM) and Iranian Activity, Ethno-sectarian deaths, Average Daily Attacks, Average Daily Executed Attacks, High-profile attacks (Bombings) and Weapons Caches Found. The report notes that figures for these different indices disclose similar patterns emerging showing a decline in civilian, ethno-sectarian and military casualties. In the CSIS reports "security incidents" are defined as incidents involving the death of more than one person. Civilian deaths do not include deaths due to accidents unrelated to friendly or enemy actions.

130. Although all background sources document reduced levels of violence generally, none suggest it has been in the form of a continuous linear reduction in levels of violence. For example, the UNSG 10 March 2010 noted various "spikes" in the number of incidents, after successful adoption of the election law and the targeting of Shi'a pilgrims during Ashura commemorations.

131. In terms of the geographical spread or distribution of the violence, according to the Special Inspector General for Iraq Reconstruction (SIGIR), April 30, 2010, nearly 70% of all attacks occurred in Baghdad, Diyala, Ninewah and Salah-Al-Din provinces which are home to approx half of Iraq's population. In northern Iraq Mosul remains

the principal area of concern. Incidents in central Iraq continue to be concentrated around Kirkuk.

132. In the view of the CSIS report of February 2010, most of the violence remains concentrated in provinces with mixed ethno-religious demographics, particularly in the areas surrounding Baghdad and in Northern Iraq, in territories shared by both Arabs and Kurds. "Most reflect a pattern directed at creating a broad climate of insecurity, efforts to discredit the government, and attacks that probe at ethnic and sectarian fault lines in an effort to provoke reprisals and new outbreaks of major ethnic and sectarian violence ".

133. According to this same report, the average number of monthly security attacks did rise in some provinces and in disputed areas adjacent to the KRG – Ninewah, Tameem, and to a lesser extent, Diyala – tensions remained high between the Peshmerga and the ISF. Levels of violence fell in each province over the course of 2009 with the decline ranging from 48% in Tameen to 77% in Diyala. Security incidents in Baghdad and Salah Al-Din decreased by 78 and 79% respectively, indicating a decline in Sunni - Shi'ite violence, though there were provinces where the number of average monthly security incidents had risen from 2007 to 2009.

Patterns/Trends

134. As regards patterns of violence, according to the SIGIR April 30, 2010, Iraq remains vulnerable to sporadic, low-grade violence and well-coordinated mass-casualty attacks. The country's ability to manage underlying ethno-sectarian divisions through the political process and state security apparatus may be increasingly stressed as US forces continue to draw down. An article/report by Reuters of 28 October 2009 (cited in the COIR December 2009 at 12.07) noted:

> "Counter-terrorism experts say insurgent tactics in Iraq follow a typical pattern of targeting that cycles between the security forces, the wider public and economic institutions and government facilities or personnel. When one set of targets becomes too protected, or the public and government become inured and no longer shocked, a new set is selected. The aim is to keep the authorities guessing. The political aims of insurgents may also be shifting -- having failed to reignite sectarian war through attacks mainly on Shi'ites, insurgents may be focusing more specifically on destabilizing the political system and upsetting the elections."

135. The report further noted that factors such as a shortage of resources used by AQI in suicide bombings and an increased number of checkpoints had led them to focus their resources on conducting attacks less frequently but with a greater impact.

136. The COIR at 21.16 quotes the CSIS report of 7 October 2009, stating that:

> "The decline in the Sunni Jihadist and Sadrist threats has also been offset by rising internal political tensions. These include serious tensions between Iraqi Arabs, Kurds, Turcomans, and other minorities in the north. Arab and Kurdish tensions are now the most serious near-term threat to Iraq stability and involve power struggles over control

of a broad band of disputed territory from Mosul to the Iranian border in the area south of the three provinces that make up the Kurdish zone, as well as over control of the nation's petroleum reserves and income … Most of the violence in Iraq remains concentrated in provinces with mixed ethno-religious demographics, particularly in the areas surrounding Baghdad and in Northern Iraq, in territories shared by both Arabs and Kurds. Shi'ites and Kurds have been the most frequent targets in these attacks, most likely carried out by Sunni insurgents or AQI."

137. As the passage from Reuters illustrates, there is considerable evidence that the insurgency has also changed the focus of its attacks in recent times. According to Anthony J Cordesman of the Centre for Strategic Studies writing on 17 February 2010:

> "[…] insurgents have replaced attacks on civilian population centres for attacks aimed at the state through large-scale bombings of government facilities and hotels where foreign news organizations operate starting with the bombings of the Ministries of Finance and Foreign Affairs on August 19th and continuing with bombings in October, December and January […]"

138. To similar effect, the SIGIR in his Quarterly Report and Seminannual Report to the United States Congress, 30 January 2010 commented that:

> "November 2009 had the fewest Iraqi civilian casualties since 2003, and December was the first month since the invasion that no US service members died in combat in Iraq. Attacks against soft civilian targets, such as marketplaces, have been replaced by attacks aimed at the state, either through large-scale car bombings or assassinations.
> […]
> A wave of targeted political violence swept Iraq this quarter with the apparent aim of destabilizing Iraq's government and exacerbating sectarian and ethnic tensions. Targets included judges, significant security officers, and leading public officials in prominent cities, including Mosul and Telafar."

139. According to General Odierno in the Prism interview the change in the patterns of violence is symptomatic of the weakening of insurgent groups such as AQI:

> "…our consistent pressure has degraded AQI, and they have had to morph into a covert terrorist organization capable of conducting isolated high-profile attacks. The Iraqi people have rejected Al Qaeda, and the organization is no longer able to control territory."

140. The SIGIR report also notes a concomitant shift in the means used to perpetrate attacks:

> "Improvised explosive device (IED) attacks in Iraq have decreased nearly 80% during the same time, while car bomb and suicide-vest attacks decreased by 92%."

141. According to CSIS, February 2010, the future is unlikely to see violence fall below current levels. Despite the relative success of the March 2010 elections, which were generally considered to have been credible and legitimate by UN and international observers, there remain various "drivers of instability", including communal and factional struggles for power and resources, insufficient GoI capacity, violent extremist groups and interference from external state and non-state actors, Arab-Kurds tensions, AQI, Sunni extremist groups, Shi'ite militant groups, lack of agreement on core issues such as oil wealth distribution, management of oil resources, the resolution of disputed internal boundaries and persistent Sunni-Shi'a tensions.

Socio-economic, political and humanitarian factors

142. A number of studies see socio-economic, political and humanitarian factors as relevant to existing and likely future levels of violence. Three features emphasised in this regard are that corruption is rampant (COIR December 2009 at 2.09), that the Iraqi economy is still ailing with few job opportunities (ibid, 2.11 which cites the International Organisation for Migration (IOM) Enhanced and Integrated Approach regarding Information on Return and Reintegration in Countries of Origin (IRRICO) report, dated 5 May 2009) and that poverty is still an ongoing issue (see the United Nations Security Council (UNSC) report of 2 June 2009 which states:

> "…The Iraq Household Socio-Economic Survey, released in January 2009 by the World Bank and the Government of Iraq, confirms that 13 per cent of all Iraqis have a monthly per capita income of less than $51; in rural areas, the rate is 26 per cent. It also underlined problems with municipal services in many areas. For example, 71 per cent of Iraqis have no municipal garbage collection, and only 12 per cent of household water connections are deemed reliable. An analysis of the country's labour force in January showed that 450,000 young people were likely to enter the workforce in 2009, with limited employment opportunities."

143. The Report of the UN Secretary General, 14 May 2010 notes that access to quality education, shelter, electricity and sanitation services are compromised for many Iraqis.

144. Bearing in mind our earlier agreement with Lambert and Farrell that "state failure" is also a matter that should be factored in to the overall assessment under Article 15(c) (see [90]-[91] above), we note that in the Brookings Institution Index of State Weakness in the Developing World for 2008 (to which they refer) Iraq is ranked fourth (Afghanistan was second). A related foreignpolicy.com website dealing in very similar terms with "failed states" shows Iraq having a ranking of second in 2007 and seventh in 2010 (this index refers to the following indices: demographic pressures, refugees/IDPs, group grievance, human flight, uneven development, economic decline, delegitimisation of state, public services, human rights, security apparatus, factionalised elites and external intervention).

International assistance

145. Another relevant variable is the continuing high level of international assistance. As already noted, there are 9 UN agencies involved in Iraq, several other international bodies and a considerable number of NGOs. On 11 May 2010 the UN and Iraq signed the first UN Development Assistance Framework for Iraq for the period 2011-2014. The latest Brookings Iraq Index charts a tenfold increase in the amount of foreign direct investment in Iraq since 2007.

Returns of refugees and IDPs

146. The UNAMI report for 1 Jan 2009 - 30 June 2009 at [49] notes that in the six month period there were 101,490 returning Iraqis, either internal IDPs returning to their places of origin within Iraq or refugees returning from outside Iraq (these numbers included 22,290 refugees). These were attributable to the relative improvement of the security situation. The Brookings Institution publication, Resolving Iraqi Displacement, Nov 2009 notes at p.16 that imposed security levels, together with better coordination with national and local level institutions, have allowed humanitarian assistance to reach virtually all of Iraq's sub-districts, including those where IDPs are concentrated.

147. At the same time the 2010 HAP report notes at [31] that Iraq has yet to see large-scale returns of IDPs and refugees and, according to the same Brookings Institution publication, , "[r]eturn is neither feasible nor desirable for a large number of the displaced".

148. According to IOM, November 2009, their research established that 43% of returnees cited improved security as the main reason for deciding to return to their places of origin, while 33% cited a combination of improved security and harsh conditions of displacement. However, security still remains a concern for returnee families once they have come home: 61% reported feeling safe and 38% said they felt safe only some of the time.

149. In a June entry, 2010 UNHCR Country Operations Profile notes that "[s]ome 300,000 IDPs and nearly 80,000 refugees returned spontaneously in 2008 and 2009". It adds, however, that the majority of some 1.5 million IDPs have not found solutions to their plight.

150. According to UNHCR between April 2009 and March 2010 there were 34,570 refugee returns. The countries listed as the previous country of asylum include Netherlands, Germany, the UK, Denmark, Australia, Canada and Norway.

Documentation

151. The Ministry of Displacement and Migration (MODM) is the responsible government body for registering IDPs in all 15 southern and central governorates. Registration practices are not uniform and vary from place to place.

152. The IDMC, Feb 2010 report notes continuing difficulties for refugees and IDPs in registration and obtaining documentation.

153. In a 4 March 2010 report from the Norwegian Refugee Council for the IDMC, it is stated that in Iraq documentation is central to exercise of citizenship rights, including registration as IDPs or returnees, voting and accessing basic services, to access income/financial assistance, (pension, service records, driver's licenses and car registration, medical committee certificates and property deeds). "Some kind of key documentation was reported lacking", it is said, quoting UNHCR, December 2009 (a reference to the UNHCR Iraq Factsheet, November 2009).

154. One of the main forms of assistance offered by UNHCR's Protection Monitoring Assessment network was to refugee returnees in relation to documentation (UNHCR, Jan-March 2010 report).

155. UNHCR also assists the Government of Iraq's return registration centres (UNSG March 2010, [42]).

156. Despite a February 2009 directive to lift restrictions on registration by the Ministry of Displacement and Migration (MoDM), the responsible government body for registering IDPs in all the southern and central governorates, it is said, by UNHCR in its Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers April 2009 (hereafter "April 2009 Guidelines") that restrictions continue to exist in several governorates including the requirement to originate from a "hot area" or face a direct threat to one's life. Like the former, the latter is not defined and has been left to the discretion of local authorities. There may be requirements to have a sponsor from the area of relocation and/or to provide proof that the person originates from the area of relocation. It is said that some IDPs in remote areas may not be able, for example for lack of resources or security, physically to approach MoDM which has its offices in the urban centres. It is said that protection monitoring undertaken by UNHCR revealed that three quarters or more of the IDPs in the Central and Southern governorates had registered with MoDM or other authorities. Recently the MoDM in Baghdad had informally ordered its branch offices to put on hold IDP registration and several governorates stopped the registration process for any arriving IDPs or IDPs who had not been registered at the time in late 2008/early 2009. On 19 February 2009 the Council of Ministers officially instructed all MoDM offices to halt registration of IDPs. UNHCR states that this puts unregistered IDPs at risk of harassment by the police and the local authorities and hampers access to assistance and basic services such as access to social welfare grants and emergency assistance, access to education, employment, food, fuel and land allocation and inability to transfer PDS cards all of which may be restricted for unregistered IDPs.

157. In its report entitled "IOM Emergency Needs Assessment Four Years of Post-Samarra Displacement in Iraq", which it seems is dated 16 April 2010, the IOM refer to the fact that the MoDM continue to register returnee families and provide the 1,000,000 Iraqi Dinar ($850) stipend for those who are eligible and through its Return Assistance

Centres (ARCs) MoDM also provides referral to other ministries, services and some direct assistance. The report refers to the fact that IDP registration has currently stopped in the majority of governorates across Iraq but says that this is due to both lack of new displacements and the current focus on return, integration and reintegration for IDP families.

158. In the IOM Report there is reference to the continuing return home of displaced Iraqi families. At the time of the report 62,361 returnee families (an estimated 374,166 individuals) had been identified across the country by IOM field monitors.

159. It is said that across the country some 88% of IDPs and returnee families are reported lacking documentation, most commonly PDS ration cards (64%), national ID cards (60%), birth certificates (58%), marriage certificates (46%). It seems that over 95% in Baghdad, Ninewah and Basra have nationality certificates although the figure is lower for birth certificates. It is said that in particular PDSI identification cards remain an issue for some who face delays in transferring them and thus are unable to access their rations or to vote. Registering as IDPs is said to be required in many governorates and thus the consequence of non-registration is exclusion from government assistance. In the paper dated June 2009 from the Brookings Institution entitled "Internal Displacement in Iraq: the Process of Working Toward Durable Solutions", it is said that about 60% of IDPs and returnees stated that they resided in governorates where registration was required and around 78% of those required to register had done so.

160. Figures are given by UNHCR for December 2009 of different kinds of key documentation, reporting returnees lacking most commonly civil identification (20% IDPs, 45% IDP returnees, 35% returnee refugees), PDS ration cards (31% IDPs, 12% IDP returnees, 24% refugee returnees), civil ID (25% IDPs, 18% IDP returnees, 22% refugee returnees), nationality certificate (22% IDPs, 11% IDP returnees, 29% refugee returnees); and passport (21% IDPs, 9% IDP returnees, 15% refugee returnees). In a survey in January 2007 surveys of the IDP communities revealed that 97% held nationality certificates, 97% had identification cards, 74% had marriage documents, 47% had birth certificates and 18% had death certificates. These figures come from the IOM. They contrast somewhat with the UNHCR figures of 30 December 2009 quoted immediately afterwards stating that from January to March 2009 some 25% of IDPs, 18% of IDP returnees and 22% of refugee returnees reported lacking civil ID. This seems a very significant decline from the 97% who had identification cards in January 2007.

161. According to the US Embassy, Baghdad, by the end of 2009, roughly half of some 64,000 registered returnee families had received a promised lump-sum payment of roughly $850 from the GoI (SIGIR, April 30, 2010 report). There were two assistance centres in Baghdad and one each in Diyala, Anbar, Salah Al-Din and Basrah provinces where returnees could present documents and verification of property ownership and ask police to evict illegal occupants. The KRG Department of Displacement has been struggling to provide adequate relief in northern Iraq as well,

and IDPs in the Kurdistan Region face a particularly restrictive employment environment.

EU and UK returns

162. In a recent witness statement prepared in response to Tribunal directions of 21 June, Mr Walker of the Country Specific Policy Team within the Directorate of Central Operations and Performance, UK Border Agency states that UKBA is aware from Foreign & Commonwealth Office (FCO) personnel in Baghdad that Sweden, Norway, Denmark and the Netherlands are currently returning failed asylum seekers to Baghdad. In an annex figures are given for "EEA returns to Iraq based on the European Union Network for asylum practitioners (Eurasil) source for 2007 - Sept/Oct 09". This shows that both voluntary and enforced returns have also been made either to "Any area" of Iraq or to the KRG by Switzerland, Germany, the Czech Republic and Finland. In 2009 the country returning the most was Sweden (1,495 voluntary returns, 211 enforced returns).

163. The statement annexes Home Office statistics, showing that in 2009 enforced removals and notified voluntary departures from the UK to Iraq totalled 2,100.

164. The statement cites an FCO letter of 7 June 2010 stating that the security situation in Iraq is significantly better than it was since 2008 and assisted voluntary returns to Iraq have increased year on year since 2007:

> "Further to this the UK negotiated a mutually satisfactory returns agreement with the Government of Iraq; provision was made to ensure that returns occur in a safe and dignified manner, with the UK providing a returns package for those cases that have been found to have no lawful right to remain in the UK. The emphasis was placed on the ability of those returning being able to travel to their home area should they wish and receive assistance in order to reintegrate into their country of origin as smoothly as possible."

165. The statement adds that returnees are provided with contact details of the two Iraqi Ministries that provide official support for returnees (Ministry of Labour and Social Affairs).

June 2010 Charter Flights

166. Subsequent to the hearing several press reports were brought to the attention of the Tribunal. They concerned events surrounding the return of a number of Iraqi failed asylum seekers on charter flights back to Baghdad on 9th and 16th June 2010. In a direction dated 21 June the Tribunal sought the assistance of the respondent and UNHCR with what information they had concerning these events. On 5 July 2010 Wilson & Co acting for Mr AA reconfirmed he wished to withdraw his appeal but enclosed nevertheless a letter from Amnesty International (AI) of 15 June 2010 and a statement from Tori Sicher of Immigration and Advisory Service dated 10 June 2010. The AI letter recalled that AI had repeatedly called on European states to cease forcible return of individual to Iraq because AI considered their human rights were at

serious risk there. Noting that several European governments had forcibly returned rejected Iraqi asylum seekers (Denmark, the Netherlands, Norway, Sweden and the UK) it made reference to the forcible return on 15 October 2009 by the UK authorities of 44 rejected Iraqi asylum-seekers to Baghdad and the fact that the Iraqi authorities only allowed 10 of them to enter. The letter said that AI had spoken to several Iraqis from a group of 35 who had been forcibly returned by the Netherlands government on 30 March 2010 including a 22 year old man from Tal Afar, a city north of Mosul, who said he was "stranded in Baghdad out of fear for his life should he return to a region where hundreds of civilians have been killed in sectarian or other politically motivated violence". It said that on 9 June 2010 an AI representative had met a Kurd from Erbil who claimed to have been returned to Baghdad from the Netherlands on 30 March 2010: "He confirmed that those who were from the three Kurdish governorates were held for up to one week at a Baghdad Airport detention centres while their identities were checked. Conditions at the detention facility were poor. After their eventual release the returnees had to arrange for their own travel to the Kurdistan region".

167. The statement of Tori Sicher made reference to a telephone call from a client on 10 June. She said he was from Kurdistan and he had applied for voluntary return to Iraq due to his personal circumstances. In the call the man said that all the other Kurds with him had been flown straight to Erbil but he was put in detention at a police station at the airport in Baghdad with 13 people in one small room without sleep or food. As soon as the UK immigration official left the Iraqi authorities were angry, "some of them kicked us". The authorities had let people from Sweden and Holland go but detained people from the UK. He said the Iraqi authorities had put a gun to people's heads and asked them why did they leave and why had they complained about Iraq and the government. The client told Ms Sicher that none had solicitors. He was able to give her the details of the other 9 detainees. She had passed this information on to UNHCR who then also passed it to the International Red Crescent.

168. In respect of the 16 June return, the UNHCR response to directions dated 5 July stated that their implementing partners were able to interview some of them at the airport and also to conduct some follow-up interviews by telephone. Some claimed to have experienced or witnessed mistreatment during their removal. Eleven deportees from the UK were reportedly held at Baghdad International Airport in one small room, with two beds and one toilet for twelve persons. It was confirmed by the Iraqi authorities to UNHCR that all returnees were held for routine security and identity screening purposes. Because the majority of these screened said they felt extremely unsafe it was not possible to follow normal UNHCR procedures and obtain their written consent to having their accounts placed on record, nor had it been possible to establish identity to the extent desirable. The response gave further details about four of the individuals on the 16 June flight. KFA made no claim of ill treatment during the deportation process. Although reunited with his family he did not have access to medical care or education and wished to leave Iraq due to protection concerns. FOK, who had been deported after more than five years in prison in the UK, had now been reunited with his family but had no access to medical care or education and was unemployed. HAS said he had not experienced ill

treatment himself but had witnessed the beatings of others in his group. He had been detained for 18 months in the UK and was now in hiding because he believed it would be dangerous for him to stay with his mother and he was seeking to leave Iraq as soon as he could. RJH said that those rejected asylum seekers who refused to board the plane were handcuffed by British security guards. On 17th June, when deportees refused the request of an Iraqi officer to leave the plane, they were dragged out by force and one of the British security guards had grabbed him by the neck and he believed they were about to suffocate him. He was denied an interpreter and was insulted. All the deportees, he said, were locked up for 11 days under very difficult conditions where they had limited access to the toilet and only one meal a day. RJH claimed that an official requested $200 per head for releasing each of them. After release from detention they were flown to Erbil. There they were received by airport officials and transferred to a security prison inside Erbil town for one night. The next day all were released after providing necessary documentation proving their nationality.

169. A uruknet.info report dated 19 June stated that "the UN" was to investigate claims that handcuffed Iraqi asylum seekers were beaten by British security officers during a charter flight back to Baghdad. A UNHCR spokesman, Andre Mahecic, was quoted as saying that UNHCR was looking into the accounts of the deportees they had interviewed. "We met six of the men and saw fresh bruises that indicate mistreatment". The item quotes one returnee called Abdullah stating that during the flight he had taken his seat belt off and officers had jumped on him and grabbed him by the neck. When the plane had landed Iraqi officials had told them if they did not get off the plane voluntarily "we will kick and beat you". Abdullah said that British officials and Iraqi officers beat them. The same item mentions that a group called International Federation of Iraqi Refugees who monitor deportations said they had received a text message from some in custody saying they were locked up with 24 others in one small cell, some being seriously ill because of the hunger and the heat. The item concluded with quotes from a UKBA spokesman and a G45 spokesman saying that no unreasonable force had been used.

170. In a BBC news item dated 28 July 2010 a BBC journalist Gabriel Gatehouse described interviewing S, a 35 year old, in Sulaymaniyah, who said he had been deported from the UK on 16 June. He had refused to get off the plane and officers from the UKBA had then beaten him and others in the ribs. At the airport he was held for 10 days along with 11 others. On 27 June he had been flown to Erbil from where he made his way to Sulaymaniyah. There he had been taken in by someone who had been a fellow UK deportee.

171. The witness statement from Mr Walker of the UKBA, to which we have referred earlier, in addition to dealing with general returns procedures, also addresses the specific charter flight returns of 9th and 16th June. He explained that where facts stated were not derived from his own knowledge, they were derived from information on Home Office files or that provided to him by colleagues in UKBA, the FCO in London, the British Embassy in Baghdad and the British Embassy Office in Erbil.

Some of the information was obtained by FCO officials from the Iraqi and Kurdish authorities.

172. Mr Walker states that since the October 2009 charter flight on which 34 of 44 returnees had to be brought back to the UK, the FCO and UKBA had been working closely with the GoI to establish a systematic method of returning Iraqi nationals with no legal basis of stay in the UK to Iraq via Baghdad. For this purpose a team of Iraqi officials visited UKBA between 31 May and 8 June to conduct nationality interviews (between 1-3 June) of 137 Iraqi citizens. In all some 83 of the 137 were found to be eligible for return to Iraq. "This general approach is in line with how some other EU Member States arranged enforced Iraqi returns direct to Baghdad". His statement explains that Iraqi nationals possessing valid passports can enter Iraq without difficulty. People who do not possess a valid re-entry document can return with a European Union Format Letter (an EU letter) issued by UKBA in accordance with an agreement with the Iraqi authorities. EU letters provide prima facie evidence of identity and nationality. It is said that they are only used in cases where UKBA has strong grounds for believing the individual to be a national of the country to which removal is envisaged. If on arrival in the receiving country they are found not to be a national of that country, UKBA will accept their return without delay and at UK expense. If a voluntary returnee is participating in the UK's Assisted Voluntary Return (AVR) programme, UKBA will provide the EU letter to the IOM.

173. Returnees are given $100 for incidental needs, a further $100 grant for onward travel to their home even if they are from the KRG and $50 for onward travel if they are from elsewhere. They are given contact details for AGEF, a German NGO with an established programme to provide advice about enhancing employment opportunities. They are also given contact details for the Ministry of Displacement and Migration (MoDM) which is charged with supporting the integration of returning Iraqi citizens. If any enforced returnee shows that they would be genuinely homeless on their return to Iraq, there is provision to find and pay for affordable accommodation for a month.

174. Under the three standard AVR programmes - the Voluntary Assisted Return and Reintegration Programme (VARRP) (running since October 2007), for those in the asylum process; the Assisted Voluntary Return for Irregular Migrants (AVRIM) programme and the pilot Assisted Voluntary Return for Families and Children (AVRFC) programme - return is by scheduled airline, and a cash grant of $500 is paid to each returnee where required with the travel arrangements back to the home locality, and IOM will have agreed an individual plan with the returnee, which will entail agreeing the most effective option on return for establishing an income-generating activity. On arrival in Iraq the returnee contacts the local IOM office to arrange the provision of their re-integration assistance (which is currently "in kind" rather than in cash).

175. On arrival in Baghdad, Iraqi law requires that any returning nationals seeking to enter the country without documentation appears before a judge to confirm their nationality and identity. This is a standard practice, and individuals may be detained

in advance of their court appearance. This procedure is not waived even if someone has been through the nationality verification exercise involving Iraqi officials carried out in the UK. UKBA does not routinely monitor the treatment of individual unsuccessful asylum seekers on return to their country of origin. IOM does not monitor voluntary returnees, though if an individual receives re-integration assistance on return, contact is maintained for up to a year, with reviews of how the assistance is progressing six and twelve months after return. The FCO advised Mr Walker that almost all returnees to the Kurdistan region are met by family and friends, so onward costs are minimal. There are no flights to Kirkuk, but a good road system is available, and coaches and taxis go to Kirkuk. The $100 provided for onwards transportation is sufficient for those needing to travel to the KRG.

176. Addressing the two June charter flights, Mr Walker confirmed that Sweden, the Netherlands and the UK had participated in a joint returns charter to Baghdad on 9 June. Neither the UKBA nor the FCO had received any substantiated reports from enforced returnees of difficulties on return. The IOM had not reported to the UKBA any voluntary returnees experiencing difficulties with the authorities or third parties on return. All 11 of the UK returnees on the joint charter flight of 9th June travelled on EU letters. On this occasion their detention by the Iraqi authorities while enquiries were made was prolonged because the judge was not available before the Iraqi weekend (11 and 12 June) and so were not seen by a judge until 14 June. The judge found that 10 of the 11 were from the KRG area and that they should therefore travel there for further checks to be made. The eleventh returnee was released. The 10 were flown to Erbil on 15 June; the Iraqi authorities had put them on an Iraqi airways flight to Erbil (cost of a single ticket $90).

177. However, the flight was delayed for several hours at Baghdad due to a dust storm. When the time came for the returnees to take the flight they claimed no longer to have any of the US$200 cash UKBA had provided ($100 being for onward travel). This necessitated a further delay until 16 June. On arrival at Erbil the 10 were detained pending further checks by the KRG authorities, 9 were released by 21 June, the final returnee was released on 28 June, the delay in his case being due to the reluctance of his family to attend to provide the necessary supporting documentation. The journey time between Erbil and Kirkuk was only 45 minutes by road.

178. Mr Walker states that the 16 June flight was the first UK-led charter operation since October 2009. All 42 involved had been cleared by the nationality verification interview exercise. Mr Walker states that the entire boarding process was recorded on a hand-held camcorder and portable CCTV by G45 and was witnessed by a number of UKBA officials including a Deputy Director (Grade 6) and a CIO. The footage and documentation relating to the use of force had been reviewed by a second Deputy Director from Detention Services, who had concluded that the force used was necessary and reasonable and for a minimum period necessary. During the boarding process two returnees had to be physically restrained (but not handcuffed) because they tried to escape boarding. On board one was handcuffed because he was becoming non-compliant; the handcuffs were removed after 70 minutes. A third

returnee who had been brought to the aircraft separately on account of his non-compliant behaviour was handcuffed before he left the Removal Centre and prior to boarding and during the flight as he continued to be aggressive and abusive at various times during the flight. During the flight each returnee was provided with $100 as is standard procedure for enforced returns. Five originally refused the money but later asked for and were given it.

179. On arrival thirty detainees refused to disembark. The head of the receiving authority in Iraq was informed of this and attended the aircraft where he spoke to one of the returnees and led him off the aircraft by the arm. As a result, others followed, leaving the two who were still in handcuffs. They were then escorted off the plane and their handcuffs removed.

180. On arrival on 17th June UKBA officials observed the returnees in the immigration hall; there was no disruption. Two were released immediately because of passport or other adequate official documentation. The remaining forty were detained at a police station pending checks into their identity and appearance before a judge. By 21 June all but twelve had been released. The remaining 12 were cleared to fly to Erbil on 23 June but the next available flight was not until 27 June. On the morning of 28 June an FCO official in Erbil confirmed that all had been released by the KRG authorities.

181. Mr Walker said that following allegations in the media the UKBA Professional Standards Unit (PSU) was conducting an investigation into complaints of mistreatment, although no complaint of mistreatment had been made directly to UKBA. PSU had spoken to the UK Representatives of UNHCR who had confirmed that UNHCR was not conducting its own investigation but that it was seeking information from some of the returnees about the allegations. UNHCR had said they would pass the information they obtained onto PSU to inform the UKBA investigation. Mr Walker states that at no time did UKBA representatives witness returnees being mistreated during the removal process. Mr Walker stated that the UNHCR spokesman's statement that it had seen 6 of the returnees with fresh bruising that they assert was from when they disembarked in Baghdad, did not accord with accounts received from G45 and UKBA staff on the plane who did not witness any maltreatment.

> "It is therefore the SSHD's position that the 9th June and 16th June charter flights to Baghdad were operated efficiently and effectively; that the use of force was necessary; that the force used was reasonable and for the minimum period necessary; and the operation of the flights does not raise any protection issues".

182. The SSHD's view was also that it was for the Iraqi authorities to adopt the procedure they had requiring attendance before a judge. A short period of detention while the necessary investigations took place was reasonable; however, in order to minimise the time future returnees can be detained, UKBA would review the timing of future flights and work with the Iraqi authorities to try and find ways to streamline the process so that such periods of detention are minimised.

183. Concerned to know the UNHCR response to Mr Walker's statement, particularly in view of his reference to the existence of camcorder and CCTV footage, the Tribunal issued further directions requesting UNHCR to respond. UNHCR replied saying that it was not currently in a position to add anything further to its previous response although colleagues in Baghdad were currently making further inquiries. UNHCR did not ask for further time to obtain these.

Internal travel

184. The COIR December 2009 at 30.04 notes that a report by International News Safety Institute (INSI), published on 4 September 2009, states:

> "All of Iraq's roads remain potentially dangerous. There is an increased risk while in the vicinity of vehicle checkpoints and security forces where there is a higher likelihood of terrorist attacks or clashes between militants and the authorities. Areas where vehicles are overlooked (such as around bridges) or are forced to slow down (for example at traffic control measures or even just bends in the road) are also potentially hazardous."

Kirkuk/Tameem, Diyala, Baghdad, Mosul/Ninewah

185. The appellants' circumstances require us to examine in more detail the background evidence relating to three areas, Tameem/Kirkuk, Diyala/Baqubah and Baghdad. For reasons which will be made clear shortly, we also consider the position in Ninewah and in its largest city, Mosul.

Kirkuk/Tameem

186. The home area of the M brothers is Kirkuk which is in the Tameem governorate (which has a population of approx. 9000,000). Various reports describe most violence in the governorate as being linked to the yet unresolved administrative status of Kirkuk and related power struggles between the various Arab, Kurdish and Turkmen actors, accentuated by the fact that Kirkuk has huge oil reserves. Security conditions in the governorate and in particular in Kirkuk city tend to worsen during political events related to the status of Kirkuk as armed groups aim at influencing political decisions. An example is given from the summer of 2008 of a suicide attack on demonstrating Kurds which resulted in an outbreak of inter-communal violence leading to the deaths of more than 25 people and over 200 injuries at a time of intense negotiations over provincial elections law. Conversely, it is said, tensions and sporadic violence can complicate future status negotiations. Concern has been expressed by some observers that tensions among ethnic groups in this regard could turn into another civil war. Insurgent groups such as AQI aim to stir inter-communal violence by attacking proponents of ethnic/religious groups. It is also said that there are reports of community groups in Kirkuk arming themselves in preparation for future clashes.

187. The CSIS report of 17 February 2010 entitled The Uncertain Security Situation in Iraq, subheading "Trends in Violence, Casualties and Iraqi Perceptions", refers to insurgent groups like AQI seeking to exploit tensions between Arabs and Kurds in

northern provinces including Tameem. It is said that in that province crime, corruption and ethnic disputes also contribute to daily reports of violence. As we have seen, the report then goes on to quote from the Measuring Stability and Security in Iraq report by the US Department of Defence in respect of the various regions of Iraq.

188. In the IOM Report on IDP and Returnee Assessment of February 2010, it is said that the disputed governorate of Tameem/Kirkuk remains unstable, combining continued fears of violence with the already difficult living conditions faced by IDPs and returning families there. While those who feel safe enough to return had begun to do so, Kirkuk is one of the few governorates where displacement flows continue, though in comparatively small numbers. Many IDPs are still waiting to return. Displacement has been a gradual flow from 2006, the numbers increasing in late 2007 and early 2008 before dropping lower once again. It seems that most families displaced in Kirkuk fled in fear after being targeted for religion, sect, ethnicity or political opinion and over a third reported fleeing after receiving direct threats to their lives. It is reiterated that new displacements are still occurring as violence and political disputes still create insecurity and danger. The total of post-February 2006 IDPs is stated as being 8,798 families which is estimated as 52,788 individuals. There have been some 4,766 returnee families which is estimated at 28,596 individuals. Around a half therefore have returned, bearing in mind there were some 7,500 individuals from 1,252 families who were IDPs before February 2006. It seems that many families have been displaced from one part of Kirkuk to another in search of more ethnically and religiously homogenous areas where they feel more comfortable. More than a third of interviewed families told IOM monitors that they decided to return home because of the slight improvement in security in Kirkuk and the offer of the 1 million Iraqi dinar returnee grant. It is said that of IOM-assessed IDP families displaced in Kirkuk, 36% overall would like to return, and 47% of those displaced in another part of Kirkuk would like to return home, although 40% of those currently displaced in another part of Kirkuk wished to integrate into their current places of displacement, thus reflecting the redistribution in Kirkuk from one part to another after the ethnic and sectarian related violence of recent years. Of IDPs in Kirkuk, 51% wished to return to their places of origin, of which 26% would go to other places in Kirkuk. The UNHCR figures on returnees to Kirkuk show 970 returnees between April 2009 and March 2010 (this is the collective figure for refugees and IDPs.)

189. In the CSIS report of February 2010 it is said that levels of violence fell by 48% in Tameem. In the CSIS document of 10 March 2010, it is said under the heading, "Iraq: National Unity in late 2009", that the future status of Tameem province remains a major challenge to national unity. Evidently the three main ethno-religious groups refuse to make concessions on issues such as elections out of fear that any compromises could harm their future territorial claims in the province and that the presence of security forces controlled by political parties remains a major concern. In respect of the average daily executed attacks by province between 1 December 2008 and February 2009, the figure for Tameem is one per day: the figure for 1 June 2009 to 31 August 2009 is however close to two a day.

190. The July 2010 UNHCR Note states that there was now in place an interim joint security plan for Kirkuk and other internally disputed areas by the USF-I (Kirkuk is one of the few areas where US troops continue to be involved). It involves joint action and coordination by the Iraqi Army and Police as well as the KRG Peshmerga. This plan has resulted in the establishment of a network of checkpoints and joint patrols around major cities and the training of security personnel. Recent press reports give October 24 as the date set for a census of the Kurdish areas.

Diyala

191. Mr ASA is from Baqubah, which is the capital of the Diyala governorate (which has a population of approx. 1, 560,000). In the section on Diyala in the April 2009 UNHCR Guidelines it is said that Diyala remains volatile and continues to see car bombs and suicide bombings. This often involves the targeting of members of the ISF/MNF-I and the SoI and also civilians. Although overall violence in Diyala decreased significantly as of mid-2007 (70% between June 2007 and May 2008), nevertheless AQI maintained its ability to conduct attacks throughout the governorate including in the populated urban areas while keeping strict control of rural areas, terrorising the local population with intimidation, detention, torture and extrajudicial executions. Civilians were also targeted by mortar and small arms fire, assassinations and kidnappings. However, as a result of successive military operations against it between June 2007 and May 2008, AQI was largely pushed out of Diyala's main urban centres, although it kept hold of the more rural areas of the Balad Ruz District, and other areas where it regrouped and reconstituted itself.

192. In the CSIS report of 17 February 2010 entitled The Uncertain Security Situation in Iraq: Trends in violence, casualties and Iraqi perceptions it is stated there had been a 77% reduction in violence in Diyala. There is reference to insurgent groups like AQI seeking to exploit tensions between Arabs and Kurds in northern provinces including Diyala by deliberately targeting ethnic minorities to spark some type of sectarian violence.

193. The US Department of Defence Report to Congress of March 2010 entitled Measuring Stability and Security in Iraq, in reference to Diyala gives a similar account.

194. In the HAP 2010 report there is reference at page 5 to Diyala, which is said to have the second highest number of IDPs after Baghdad, slowly seeing improvement of the security situation and thousands of displaced families returning to their homes. According to the United Nations Integrated Regional Network (IRIN) reporting what was said by officials in the Ministry of Displacement and Migration, although the security situation in some parts of the province is described as being still violent, a senior official in the Ministry reported some 12,800 displaced families (roughly 77,000 individuals) returning to their homes between late 2008 and the end of 2009. However 39,000 families remain displaced, with 13,000 within the province and 26,000 in other provinces.

195. The report by IOM on Diyala, dated February 2010 notes, among other things, the fact that the security situation has improved since returnees to Diyala were first displaced, although IOM monitors report that local security forces are often suspicious of IDP families and are quick to blame them when violence occurs. There were reports of sporadic violence targeting returnees in Diyala, particularly in Al-Khalis. 84.9% of returnees to Diyala cited security in their area of origin as their reason for returning. The report says that there have been some 11,821 families (estimated 70,926 individuals) who have returned to Diyala. It is said that continues to be one of the most volatile and unstable governorates in Iraq. The security situation sometimes limited IOM monitors' access to IDP and returnee families.

196. In the CSIS report of 10 March 2010 entitled Iraq: Meeting the Challenges of 2010 the figures given for average daily executed attacks by province between 1 December 2008 and 28 February 2009 show that the figures for Diyala were slightly over one attack per day, although the figure for average daily executed attacks by provinces between 1 June 2009 and 31 August 2009 appears to be closer to two a day. Both figures reflect executed enemy attacks targeted against coalition, IASF, civilians, Iraqi infrastructure and government organisations.

197. The UNHCR figures for internal displacement and return between 2003 and 2010 are set out elsewhere in the bundle. They show a total of 17,080 returning to Diyala between April 2009 and March 2010. These are refugee and IDP returns.

198. The IDMC, 4 March 2010 report from the Norwegian Refugee Council notes that in mid-2008 the MoDM opened two centres in Baghdad to help returnees register, receive assistance and resolve property issues. A third centre was established in Diyala in mid-2009. As of 2008, returnees could receive around $850 after returning to their place of origin and formally renouncing their IDP status. In Baghdad and Diyala, returnees are also reportedly provided additional protection by local authorities.

199. The UNSG Report 8 Feb 2010 records at para 42 that UNHCR is undertaking a number of joint initiatives in Diyala with other members of the UN country team to improve livelihoods so as to help anchor returnees in the communities and ensure that their reintegration process is sustainable.

Baghdad

200. Nothing was found to be credible in the claim of Mr AA other than that he is from Iraq and is a male of around 30 years of age. He would be returned to Baghdad and therefore it is appropriate to consider the situation there that would face him on return. Baghdad is also, of course, the first point of return for all Iraqis being returned to Iraq from the UK.

201. The governorate of Baghdad is said to have a population of between 6.5 and 7 million. According to the July 2009 IOM Baghdad governorate Profile, the IOM consider that the Baghdad governorate is currently receiving and will likely to

continue to receive the largest number of returnees of all Iraq governorates. The majority of current returnees in Iraq are from Baghdad, with particularly large numbers in the districts of Karkh and al-Resafa. IOM expresses the view that in the face of uncertain security improvements, the future of return is unsure, and many IDP families continue to say that they are waiting for security to improve in order to return.

202. In the Human Rights Watch report on Iraq of January 2010 there is a general statement that civilians remained the targets of attacks across the country, and examples are given of coordinated truck bombs outside the Foreign and Finance Ministries in Baghdad on 19 August 2008 killing nearly 100 people and wounding more than 600, and on 25 October 2008 two vehicle bombs driven by suicide bombers destroying three major government buildings, including the Ministry of Justice, causing the deaths of more than 155 people and wounding over 500. These appeared to be the responsibility of Sunni Arab insurgents and they were also responsible for earlier attacks in January and April on the Kadhmiyya Mosque, a major Shi'a place of worship, killing more than 100 people, and targeting of groups of Shi'a refugees waiting for food rations, children, religious pilgrimages and other gatherings.

203. In the CSIS report of 17 February 2010, it is said that recent bombings show that AQI remains a viable and capable group. It continues to pursue its campaign to undermine the ISF in an effort to create uncertainty in the government of Iraq's overall security capability and incite sectarian violence. Most violent activity within the Baghdad security districts is the responsibility of AQI and Shi'a extremist elements. Other militant groups continue low level operations exhibiting the residual will and capability to operate in Baghdad. Overall, attacks by such groups occur intermittently and mostly target US forces in Baghdad. Sunni resistance activity in Baghdad has steadily declined since early 2008 though AQI maintains cells in and around Baghdad with the intent to remain relevant and undermine the GoI and with the residual capability to conduct high profile attacks. AQI's ability to operate is significantly constrained by GoI security initiatives. While AQI's presence has declined inside the capital, it seeks to re-establish itself there and in the surrounding areas and maintains the ability and desire to carry out periodic high profile attacks designed to cause high levels of casualties. It is also said in more general terms that the level of violence in Iraq is sharply lower than the level at which it peaked in 2007 and most of the violence related to the Sunni insurgents is now concentrated in Baghdad. Security incidents in Baghdad are noted as having decreased by 78%, indicating a decline in Sunni-Shi'ite violence. From tables provided it can be seen that there was a very significant decrease in average monthly security incidents in Baghdad from some 1,700 in 2007 to some 200 in 2009. This improvement is broadly reflected, as we have seen, in the figures for Tameem and Diyala.

204. The IDMC, 4 March 2010 report from the Norwegian Refugee Council notes that in mid-2008 the MoDM opened two centres in Baghdad to help returnees register, receive assistance and resolve property issues. As we have seen, as of 2008, returnees could receive around $850 after returning to their place of origin and formally

renouncing their IDP status. In Baghdad (as in Diyala), returnees are also reportedly provided additional protection by local authorities.

205. In the CSIS document Iraq: Meeting the Challenges of 2010, dated 10 March 2010, there is a chart showing Iraqi casualties by type in Baghdad in 2009. This shows deaths per month at somewhere between 100 and 200 and numbers of wounded ranging from fewer than 300 to over 1,000 a month. There is another graph for attacks per month by type in Baghdad in 2009 identifying in particular regular use of IEDs and mortars. The average daily executed attacks by province between 1 December 2008 and 28 February 2009 shows an average of just under four attacks in Baghdad province per day, the figure for 1 June 2009 to 31 August 2009 being slightly over six per day. The IBC report of 2008 reported the most noticeable reduction in violence as being in Baghdad and mirroring the point we have noted earlier that for the first time since the occupation by the Coalition fewer deaths were reported in the capital than in the rest of the country (from 54% of all deaths in 2006/2007 to 32% in 2008).

206. In the UNHCR figures on returns dated March 2010, it can be seen that returns of refugees and IDPs to Baghdad between April 2009 and March 2010 totalled 123,970. These figures are broken down in a further table, which showed particularly significant numbers of returnees to Karkh and to the Kadhmiyah, Adhamiya and Mahmoudiya districts of the Baghdad governorate.

207. Reference to the insurgent attacks in Baghdad is made in the SIGIR report of 30 April 2010. For example it is said that insurgent attacks killed more than 100 Iraqis in a series of bombings and mass murders in and around Baghdad in the first week of April, and there were further bombings targeting mosques and an outdoor market on 23 April. Dozens of people were killed and more than 180 were injured. In general it is said that the post-election transition period may be marked by an increase in violence as extremists seek to take advantage of political uncertainty and undermine the state.

Mosul /Ninewah

208. A number of sources state that on current figures the deadliest place in Iraq is Mosul. That being so it may be helpful for us to note some key materials relating to the governorate of which it is part: Ninewah (Ninewah is said to have a population of approx. 2,800,000 and Mosul approx 1,800,000). According to the CSIS report, March 2010, drawing on SIGACTSIII database, the number of daily executed attacks in Ninewah in the period June 1, 2009 – August 31, 2009 was between 5 and 6. According to the Measuring Stability and Security in Iraq report, March 2010 (drawing on the same database) the average number of daily executed attacks in Ninewah was between 2 and 3 for the period Dec 1 2009 to Feb 28, 2010. In the Iraq Body Count (IBC) analysis of civilian deaths from violence in 2009, which talks (as we have seen) of a number of significant improvements in levels of armed non-state terrorist violence in Iraq, it is said that on a per capita basis Mosul with 756 recorded deaths and an estimated population of 1.8 million in 2009 became significantly more

deadly than Baghdad (estimated population 6.5 million, 1,545 deaths). Also Mosul's absolute number of violent deaths of civilians in 2009 (556) far exceeded Baghdad's total of 301.

209. In the April 2009 UNHCR Guidelines it is said that the demographic make up of the Ninewah governorate (a mixture of Arabs, Kurds and Turkmen as well as religious and ethnic minority groups) together with the fact that large parts of the governorate are contested between the KRG and the central government make it a breeding ground for extremist groups seeking to destabilise the country. Mosul City has become the last urban stronghold of AQI. There is only a limited presence of some 2,700 SoI in the southern parts of Ninewah in contrast to its stronger presence elsewhere. It is reported that insurgent groups have infiltrated the local ISF. The strategic position of Ninewah near the border with Syria and its remote mountainous and desert terrain represents another challenge to secure it. The relative security improvements in many parts of the country have not yet taken hold in Mosul, despite a wide scale military operation launched in May 2008 to root out AQI and other insurgent groups. Despite the deployment of a massive ISF presence into Mosul City after the displacement of over 10,000 of Mosul's Christians in September and October 2008, mass casualty attacks, kidnappings and targeted assassinations continue to occur on an almost daily basis. Civilians are targeted on a regular basis also in Ninewah's second city Tal Afar, mostly in public places such as mosques, restaurants and markets and many attacks target Shi'ite Turkmen with the aim of reigniting sectarian violence.

210. A further complication is the fact that Ninewah contains some of the so-called "disputed areas" that the KRG seeks to incorporate into the Kurdistan region. Though the majority of the governorate is Sunni Arab (approximately 60%) the Kurds have dominated the local security forces and the Provincial Council. There are concerns that ethnic-political tensions may spill out violently. Many of the "disputed areas" are inhabited by religious and ethnic minority groups and as such have become vulnerable to political pressure and manipulation, and extremist groups such as AQI are further exploiting the ethnic and religious fault lines. This is in general confirmed by the UNSC in his report of 8 February 2010 and by the Centre of Strategic and International Studies, though the latter notes a reduction of 56% in 2009 of security incidents in Ninewah.

Part 4: Submission on the facts

211. For reasons noted earlier there were no submissions from the appellants' representatives.

UNHCR's submissions

212. UNHCR's written submissions as to the facts essentially state that its current position on the security situation in Iraq remains as set out in its April 2009 Guidelines (which were also before the CA in QD). It is appropriate that we summarise these in more detail and also cover updates given by UNHCR in June and July 2010.

UNHCR materials

UNHCR Eligibility Guidelines April 2009

213. When in early 2008 the Tribunal in KH examined in detail the evidence relating to violence in Iraq the position taken by UNHCR at that time - as expressed in August 2007 Guidelines and a December 2007 Addendum - was that all asylum-seekers from the Central and Southern parts of Iraq were in need of international protection and (i) should thus be considered as refugees under the 1951 Convention criteria; and (ii) failing that, should be considered as eligible for complementary (including subsidiary) protection. In April 2009, however, UNHCR issued new guidelines.

214. At [2] and[3] these April 2009 Guidelines note that in view of changes since December 2007, important improvements in the overall security situation require UNHCR to revise and update its position. It is accepted that there has been "significant stabilisation since late 2007 and in 2008" ([6]) and "quite meaningful significant improvements in the overall security environment" ([11]) in the country. The Guidelines caution nevertheless that such improvements have to be seen in the context that changes can be unpredictable, can suffer set-backs, and that major uncertainties and risks remain. Armed groups remain lethal. There is a continuing occurrence on a regular basis of suicide attacks and car bombs directed against the MNF-I/ISF and Awakening Movements as well as civilians (often in areas attracting crowds such as markets, bus stations, restaurants, places and areas of religious significance or worship, police stations, and recruitment centres) in addition to targeted assassinations and kidnappings. These claim lives and cause new displacement. Overall levels of violence are lower, but fluctuate and vary significantly from governorate to governorate, and even within governorates, districts and neighbourhoods:

> "This means that, on the whole, Iraqis will continue to leave their country or remain outside it in the search for safety and protection which cannot be found at home. At the same time, in those instances where the security conditions have undeniably changed, the relevant claims for asylum and protection by Iraqis can be dealt with differently…" ([11]).

215. The Guidelines note that in March 2009, there was a "remarkable increase in car and suicide bombings, which could indicate an assertion of strength by militant groups since the US announced its intentions to withdraw all its combat troops from Iraq by August 2010." Citing the US Department of Defence statement of 15 March 2009 that security achievements remained fragile in some places, most notably in Ninewah and Diyala governorates as well as in some parts of Baghdad, the Guidelines note that "…observers widely agree that there are still serious concerns with regard to the sustainability of the security improvements…." ([10]).

216. At [239] the Guidelines refer to figures concerning levels of violence given by such bodies as the IBC and the Iraqi Ministries of Interior, Health and Defence showing a

substantial drop in comparison with the preceding two years, with 2008 seeing the lowest number of civilian deaths since the fall of the former regime in 2003. They further note that as a result of the sharp decline in sectarian violence there has been a notable reduction of violence in Baghdad. The conclusion drawn is that, notwithstanding these developments, "there remains a high level of violence in parts of the country and, in the words of the UN Secretary-General [in his UNSC, July 2008 Report], "…civilian casualties as a result of violence remain unacceptably high". The Guidelines state:

> "As a result of various factors, extremist groups have either changed their alliances, have been weakened or are lying low. Sectarian violence between the Shi'ite and Sunni communities, which accounted for a majority of the civilian casualties and was a main factor leading to the large-scale displacement of Iraqis in mainly 2006 and parts of 2007, has virtually halted, although extremist groups continue to aim at reigniting the violence. … Armed groups are still capable of launching attacks aimed at disrupting the security environment, but the intensity of hostilities and the impact on the civilian population has decreased in many parts of Iraq."

217. At [12] and [13] the Guidelines summarise UNHCR's position in relation to refugee protection and subsidiary (humanitarian) protection:

> "12. In view of the serious human rights violations and ongoing security incidents which are continuing in the country, most predominantly in the five Central governorates of Baghdad, Diyala, Kirkuk, Ninewah and Salah Al-Din, UNHCR continues to consider all Iraqi asylum seekers from these five Central governorates to be in need of international protection.
>
> 13. In those countries in which such asylum-seekers are not recognised under the 1951 Convention because of the way the Convention criteria are interpreted, international protection should be afforded through the application of an extended refugee definition, where this is available, or otherwise through a complementary form of protection. In such cases, UNHCR considers that asylum-seekers originating from the five Central governorates who are found not eligible for refugee status should be considered to be at risk of serious harm in the situation of armed conflict which is ongoing in Iraq and should, therefore, be accorded a form of complementary protection."

218. In a footnote to this passage it is stated:

> "In the European Union, where the term "subsidiary protection" is used, UNHCR considers that asylum-seekers originating from the Central governorates of Baghdad, Diyala, Kirkuk, Ninewah and Salah Al-Din who are not found to be refugees should receive subsidiary protection under Article 15(c) of the [Qualification Directive]. Applying the reasoning of the ECJ in Elgafaji…UNHCR considers the degree of violence which characterises the ongoing armed conflict in those areas to be of such a high level that there are substantial grounds for believing that a civilian, if returned to those areas, would, solely because of his/her presence in those areas, face a real risk of being subject to a serious and individual threat to his/her life or person."

219. As regards internal relocation, the Guidelines state:

“87. In the context of Iraq, UNHCR’s analysis distinguishes between the situation in the Central governorates, the Southern governorates, and the three Northern governorates. The availability of an IFA/IRA [internal flight alternative, internal relocation alternative] in the latter area would also depend on whether the individual concerned is from the Central or Southern governorates, or from within the three governorates themselves.

88. With respect to refugee claims of Iraqi asylum-seekers from the Central and Southern governorates of Iraq, it is UNHCR’s assessment that an internal flight alternative is not viable for persons fleeing State persecution, as the agent of persecution would be able to pursue the individual throughout the territory.

89. When assessing whether an individual fleeing persecution from non-state actor(s) is able to find an internal flight alternative elsewhere in the Central or Southern governorates, key considerations include whether the individual can practically, safely and legally access the area of internal flight alternative (the “relevance analysis”), and whether the individual could live a relatively normal life in that area without facing undue hardship (“the reasonableness analysis”).

90. Generally, no internal flight alternative will be available because of (i) the ability of non-State agents of persecution to perpetrate acts of violence with impunity, (ii) the ongoing levels of violence in mainly the Central governorates of Baghdad, Diyala, Kirkuk, Ninewah and Salah-Al-Din giving rise to new persecution, (iii) access and residency restrictions, and (iv) the hardship faced in ensuring even the basic survival in areas of relocation. When, however, the availability of an internal flight or relocation alternative must be assessed in a national asylum procedure, it should be examined cautiously and in the context of the individual claim…

91. As also indicated in these guidelines, persecution emanates mainly from a range of non-State actors. Generally, protection by national authorities will be not available given that the national authorities have yet limited capacity to enforce law and order, the ISF may be infiltrated by radical elements and the judiciary is prone to intimidation and corruption.

…

93. Persons seeking to relocate to other areas may be at risk of facing renewed violence. UNHCR Protection Monitoring showed that IDPs suffered from general violence, inter ethnic/religious violence, general criminality, targeted attacks, detentions, kidnappings and military operations…..in the governorates of Al-Anbar, Baghdad, Diyala, Najek and Salah Al-Din, IDPs reported abuse and harassment. IDPs in Diyala are reported to have been targeted specifically by armed groups. …In Kirkuk IDP families displaced from Diyala to Al-Multaqa sub-District were attacked.

94. Quasi-security forces such as the SoI, which exercise de facto control over certain areas, should not be considered to be operating as effective authorities as they themselves are the targets of attacks in those areas and their legal status has not yet been clarified.

> 95. Common ethnic or religious backgrounds and existing tribal and family ties in the area of relocation are crucial when assessing the availability of an IFA/IRA as these generally ensure a certain level of community protection and access to services. …In Kirkuk, which has a very diverse ethno-sectarian make-up, tensions and even harassment and persecution have been reported in areas where the host community and the IDPs do not share the same background.
>
> …
>
> 97. The high levels of ethno-religious violence in the formerly "Arabised" areas, the highly sensitive political, ethnic and economic nature of these areas and the risk of further destabilising the situation through significant population movements need to be considered when assessing the availability of an IFA/IRA in these governorates (i.e. Kirkuk, Ninewah, parts of Diyala and Salah Al-Din governorates)."

220. Subsequent paragraphs detail the serious difficulties faced in accessing basic services and ensuring economic survival in a situation of displacement.

221. At [111-135] IFA/IRA in the three Northern governorates of Dahuk, Erbil and Sulaymaniyah is analysed. UNHCR states that despite the hospitable view taken by the KRG towards a considerable number of IDPs, the availability of an IFA/IRA must be carefully assessed on a case-by-case basis. Difficulties noted include the risk of travel to these areas along routes that see daily roadside bombings. In [136-137] there is treatment of IFA/IRA within the three Northern governorates for Iraqis who originate from those governorates.

222. At [98] the Guidelines address the issue of safety of internal travel:

> "Travel by road within the Central and Southern governorates has become fairly safe in many areas, but all roads remain potentially dangerous. Roadside bombings, robbery and carjacking remain a daily occurrence mainly in the population centres. The main routes from Baghdad to the North, i.e. the Baghdad Western North route from Baghdad through the governorates of Salah Al-Din and Ninewah and further North to Dahuk as well as the Baghdad Eastern North route from Baghdad through the governorate of Diyala up to Kirkuk, see daily roadside bombings. In the South, there is a high risk of attacks on most routes in the governorates of Babel and Wassit, especially in the districts lying closest to Baghdad. Travelling prior or during religious festivities also involves a heightened risk as armed groups aim at launching mass casualty attacks on Shi'ite pilgrims. Military operations among armed groups and the ISF/MINF-I continue mainly in the Central governorates. Travelling is often delayed by ISF/MNF-I checkpoints and convoys, which also increase the risk of being targeted by armed groups or criminals or being caught in armed clashes. Moving near official government convoys is particularly dangerous as they are a frequent target of armed groups, including by roadside bombs and "sticky bombs" attached under vehicles. Reportedly there has been a rise in the deployment of false vehicle checkpoints from which violent attacks have been mounted. "

UNHCR Briefing Note, 8 June 2010

223. In an 8 June Briefing Note, reiterating the position set out in its April 2009 Guidelines, UNHCR cautions against removals from the EU to Iraq. It also notes that UNHCR's position is that:

> "no internal flight alternative exists in Iraq because of the ongoing levels of violence in Baghdad, Diyala, Kirkuk, Ninewah and Salah Al-Din, and in view of access and residency restrictions in various governorates as well as the hardship faced by returnees in ensuring even survival in areas of relocation."

UNHCR Note, July 2010

224. In July 2010 UNHCR issued an interim advisory "to affirm the continued validity of the April 2009 UNHCR Guidelines and to inform that issuance of revised guidance is pending further developments in Iraq." This Note refers to the ongoing uncertainty due to the delay in the formation of a new government following the elections of March 2010 and the unpredictable security situation. The Note refers to IBC data showing that some 2,000 Iraqis were killed and some 5,000 others were injured during the first five months of 2010 with other sources identifying an increase in casualty statistics for the months of April and May 2010. Most incidents were noted as taking place in the central governorates of Baghdad, Diyala, Kirkuk, Ninewah and Salah Al-Din.

225. Finally UNHCR refers to its position on internal flight possibilities in Iraq as set out in the same Guidelines at [88-110].

Respondent's submission on the situation in Iraq

226. Mr Staker said that the critical question as set out by the Court of Appeal in [40] of QD, was whether there was in Iraq or a material part of Iraq such a high level of indiscriminate violence that substantial grounds existed for believing that appellants such as those in the instant case would, solely by being present there, face a real risk threatening their life or person. The respondent's view was that there was not. In the alternative it was argued that the relevant level of indiscriminate violence was not to be found in the appellants' home areas and even if it was, then they could relocate. As regards the question of safety of route of return (a question whose relevance had been reaffirmed by HH and Others), the appellants could be returned to Baghdad Airport and could get home from there. The burden of proof, which fell on the appellants, had not been met. It was also relevant that assistance can be obtained from the IOM and other organisations, including the Iraqi government.

227. A propos the levels of indiscriminate violence, Mr Staker argued that the evidence spoke for itself and he referred us to a number of pieces of evidence in the bundles. Taken together, he argued, these showed that the level of threat was decreasing. There was also evidence showing a move away from indiscriminate violence to targeted attacks. That was clearly of relevance in assessing the level of risk in the instant cases. The level of deaths and, more widely, of incidents of violence had

fallen significantly. Such matters as the numbers of people returning and the statistics on current social attitudes were also indicative of the general level of improvement.

228. Another important indicator in assessing the safety of Iraq in Article 15(c) terms was, he said, the position on voluntary returns. As recorded by IOM in its document entitled IOM Emergency Needs Assessments 16 April 2010, "there are few new incidents of displacement in Iraq". Tables contained in their report showed that the average number of displaced families per month has fallen from a peak of 14,865 in July to December 2006, to only 35 per month in July to December 2009. It was estimated that there were 62,361 returnee families, consisting of 374,166 individuals. The Brookings Institution figures in its Iraq Index were lower but still identified a very high figure of voluntary returnees from January 2009 to March 2010, at 240,580. Survey answers indicate that 50% of those remaining displaced wish to return.

229. In respect of forced returns of failed asylum-seekers to Iraq, the respondent's position was that the UK was far from being alone in conducting them and UKBA was satisfied those concerned were being returned in safety.

230. The respondent noted that UNHCR had reiterated that it continued to stand by its April 2009 Guidelines, but these were now over a year old. It was clear from [12] and [13] of these that UNHCR had thought that there was an Article 15(c) issue risk only in the five central provinces. Reference was also made to [59] of the UNHCR submissions in QD to similar effect. The UNHCR had also said that if a person was from the five central provinces then they could not be expected to relocate elsewhere in Iraq, but this was also now a matter the Tribunal had to decide as of today. The Guidelines at [10] identified the number of IDPs as nearly 1.6 million people. It was accepted by the UNHCR that the position was more relaxed now.

231. As regards the UNHCR April 2009 Guidelines, even if it were assumed that there had been no significant improvement since then, this did not mean that what was said by the UNHCR had to be followed. The Tribunal might have had a different view from that expressed by UNHCR in 2009 and in any event it was not necessary to say that they were wrong to conclude that matters were different today. As regards the issue of what bodies were capable of offering protection in Iraq, it was argued that that was not relevant to Article 15(c) as it was concerned with indiscriminate violence, but insofar as it was relevant, there was not sufficient level of risk in any event. The case was put on the basis of return of all the appellants to Baghdad.

Part 5: Existing country guidance

232. As already noted KH has been found to be wrong in law. Since KH the Tribunal has issued several further country guidance cases, NA (Palestinians – risk) Iraq CG [2008] UKAIT 00046, SI (expert evidence – Kurd- SM confirmed) Iraq CG [2008] UKAIT 00094, SR (Iraqi/Arab Christian: relocation to KRG) Iraq CG [2009] UKAIT 00038 and ZQ (serving soldier) Iraq CG [2009] UKAIT 00048. None essentially concerned Article 15(c) although those promulgated before QD did refer to KH approvingly. As regards GS (Afghanistan), whilst we would observe that in one respect its approach

to indiscriminate violence was too narrow (see [71] above), we cannot see that this had any significant impact on its assessment of levels of violence in Afghanistan at the relevant time and we thus regard its country guidance as undisturbed by anything said in this case.

Part 6: Our Assessment: general

233. Although we did not have the benefit of argument and production of background evidence from the appellants, we consider that the materials produced by the respondent and UNHCR cover all the important reports and other sources of information relevant to the assessment we have to make. We would also observe that whilst we would no doubt have benefited from sight of the expert report originally planned for these appeals (from Dr Herring), the situation in Iraq is clearly one in respect of which any country expert would be bound to draw very heavily upon the major country reports and studies in the public realm (and indeed we note that in the report produced by Dr Herring for the Tribunal in KH, he based himself almost entirely on background materials in the public realm).

234. In deciding this case we have of course taken into account all of the evidence before us, which is set out in Appendix A.

235. So far as concerns existing Tribunal country guidance on Iraq, we have already noted that KH was found wrong in law. Whilst we see no reason why it does not remain a valid summary of the evidence relating to violence in Iraq up to early 2008, the effect of QD is that KH must be considered as never having given valid guidance. The other country guidance cases on Iraq post - KH, however, were not essentially concerned with Article 15(c) and in our view the guidance they contain remains unaffected save to the (minor) extent that they seek to rely on KH.

236. Article 15(c) is only one form of protection available to asylum applicants and it is important to note that Iraqis remain the largest group of persons granted refugee protection. In 2008/9 Iraq was the country of origin of most asylum applicants worldwide for the fourth consecutive year. (UNHCR, 21.10.2009). Where a national of Iraq is able to show some specific risk characteristic(s) over and above being a mere civilian, he or she will potentially be able to qualify for refugee status under the Refugee Convention and, if not, then both Article 15(b) and 15(c) may well assist. In respect of Article 15(c) for such persons it will not be necessary to show the existence of indiscriminate violence at a high level: see Elgafaji [39]; also [65(f)] above.

An inclusive approach

237. The respondent has argued that when analysing figures relating to Iraq we should regard the IBC figures as overstated because they include regular local police forces and members of military or paramilitary/militia forces in the numbers of civilian dead. The respondent also considers notable that the IBC justifies the inclusion of executed military and paramilitary/militia forces on the grounds that they acquire

"protected person" status under IHL, whereas QD has determined authoritatively that Article 15(c) cannot be viewed through the lens of IHL.

238. The respondent proffers a further reason why the IBC (and Brookings Institution) figures must be seen as including a greater number of individuals than those who are truly the victims of indiscriminate violence. The figures are expressed to include all those civilians killed violently in Iraq. Figures produced cover all deaths and figures for murders – which are not limited to those associated with indiscriminate violence from the armed conflict:-

> "This means that the figures include not only those who are the victims of indiscriminate violence within the scope of Article 15(c) but also those who are victims of targeted violence. Such targeted violence could stem from allegiances relating to the armed conflict or it could simply be the result of criminal action common to all societies and states. Neither of these scenarios would fall within the scope of Article 15(c). To the extent that the IBC figures include both categories, they present an elevated picture of the true risk to ordinary civilians in Iraq."

239. We have already explained why we disagree with this approach and why we consider that Article 15(c) ordinarily requires decision-makers to adopt an inclusive approach when seeking to determine the levels and extent of indiscriminate violence, subject only to there being a sufficient causal nexus: see [77] above. We make five general observations relating to the Iraq evidence.

240. First, we agree with the observation of Hannah Fischer ([235] above) that none of the figures can be treated as airtight or having great precision and they have been derived by use of differing methodologies. (As regards the ongoing debates about whether some of the organisations producing figures over report or underreport, we would recall that it was the view of one of the experts who furnished reports in the KH case – Dr Herring – that there was significant underreporting of violence in Iraq (see KH, [160])).

241. Secondly, it would be wrong to equate civilian "victims of indiscriminate violence" with those killed: see [71-91] above. Even many attacks that are targeted seem to be carried out in circumstances that inevitably result in collateral damage, not just in the form of killings but also of injuries, kidnappings etc. On the basis of the figures we have already analysed it would appear that the ratio of "wounded" to "killed" can be from between 2-5 times higher.

242. Thirdly, as noted earlier ([74]), we are concerned in the context of Article 15(c) not just with threats to life but also to person and these must encompass significant physical injuries and also to serious mental traumas. In that regard, it is salient to recall that according to the 2010 Humanitarian Action Plan, [3.1]:

> "Six years of violence have visibly affected the fabric of Iraqi society. Casualties among civilians have had a direct and long-term effect on families through loss of livelihoods, particularly in conservative parts of the country where women's participation in the workforce may be low in some areas. Loss of parents and family members has had a

> devastating effect on the lives of thousands of children and the subsiding conflicts continue to harm the mental health of the population in conflict-affected areas. Almost half (48%) of the population has experienced a war-related trauma."

243. Fourthly, as regards the interrelationship between criminal and military violence in the context of Iraq, it is clear that there is a very significant overlap. As acknowledged by the UNAMI report for 1 Jan-30 June 2009 at [15]:

> "With regard to the motivations behind these attacks, it is often difficult to draw a line between ideologically-driven insurgents operations and criminal acts committed by organised gangs as there is frequently overlap between the two".

244. We would accept of course that even if Iraq were entirely peaceful there would be a significant number of intentional homicides and other acts of violence that are a far remove from the violence in contemplation in Article 15(c). At the same time, given that in fact many areas of Iraq continue to be affected by armed conflict it is in practice hugely difficult for observers safely to demarcate the two types of violence, particularly given that the tactics of the insurgents can mirror criminal methods (e.g. kidnappings) and vice versa.

245. Fifthly, when regard is had to the different strategies being pursued by various actors in the current conflict, it is clear that a number of the insurgent groups deliberately seek to exploit fault-lines and can from time to time intend that the resultant violence they provoke (e.g. along ethnic or tribal lines) will cause death and injury not just to those particular groups but to the civilian population at large. Put another way, the current "drivers" of conflict such as sectarian divisions have the capacity, in the hands of insurgents ready to use terrorist methods, to result in further higher levels of violence significantly affecting civilians generally.

246. In view of the above considerations we consider it is simplest and fairest to adopt an inclusive approach that takes into account all the different types of violence in Iraq without subtracting any. We accept of course that the category of civilian deaths cannot strictly be taken to include combatant deaths, but it seems to us that since in other respects the number of deaths recorded by IBC and some other sources is likely to be lower than they actually are (e.g. because of underreporting), we should take them as they stand.

Levels and extent of violence

247. We need to say a little more about the significance of the fact that the various surveys of violence in Iraq do not all come up with the same figures and several employ differing methodologies. Even discounting the much-criticised <u>Lancet</u> study and the dubious ORB survey, there are significant disparities between some of the surveys for example, in relation to the number of civilian deaths. The methodological difficulties are various. The Iraq Ministry of Human Rights report of October 2009, for example, gives figures of civilian deaths that do not include those that may have been due to coalition occupation or fighting between militias. IBC figures are based on media

reports and so do not include deaths that have gone unreported. It would appear that IBC's definition of civilian is extremely broad. At section 3.3 of its "Methods" it states that:

> "The range given in the IBC count refers to civilian deaths. Use of the term "civilian" by definition involves making a distinction between some people and others. We determine this distinction on a case-by-case basis through careful and systematic scrutiny of the data sources we consult.
> […]
> Excluded from IBC are those aged 18 and over who, at the point of death, were reported as initiating deadly violence or being active members of a military or paramilitary organisation. We also exclude overseas 'contractors' providing security and other private services related to the occupation of Iraq. Included are all others killed violently, including regular local police forces.
>
> As every society, at war or at peace, has police forces who live and work among the civilian population, we consider such police forces to be a customary part of civil society, and therefore include them in our civilian count. However we do not include police 'commando' units who work under the Interior Ministry and are best described as paramilitary.
>
> Under one special circumstance we also include members of Iraqi military or paramilitary / militia forces in our database, namely when they are killed – i.e. summarily executed – after capture. Under those conditions even military personnel automatically acquire 'protected person' (effectively, POW) status under International Humanitarian Law, and this distinction is respected by IBC."

248. According to Hannah Fischer in her February 25, 2010 report at pp.4-5, when referring to the MNF-I SIGACTS III Database (Coalition and Iraqi Reports) of security incidents, statistics by the Iraqi Ministries of Interior, Health and Defence have been consistently somewhat higher than those given by several other surveys. We are aware from a Brookings Institution note of recent differences between the US military and the GoI as to the number killed in July 2010 as between some 250 and 550**.** On the other hand, we are also aware that some commentators have suggested that Iraqi government statistics significantly downplay civilian casualty figures. Sharp differences of this kind 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.

249. In the Brookings Institution studies "security incidents" are defined as incidents involving the death of more than one person. Civilian deaths do not include deaths due to accidents unrelated to friendly or enemy actions.

250. The Wikipedia entry containing a list of countries by "intentional homicide rate" [accessed 8 June 2010] to which we made reference earlier (showing Iraq's rates per hundred thousand as being 101 in 2006, 89 in 2007, 21 in 2008 and "most recent" 9.99), is a significant piece of evidence, but it does not furnish enough information

about the methodologies involved in arriving at the figures given and we bear in mind that Wikipedia is far from being an authoritative source.

251. It is also clear that when looking at trends shown by different graphs it is important to avoid oversimplification. For example, the SIGIR report reminds us that whilst in Iraq as a whole the average number of security attacks has gone down, in some provinces they have risen: according to the IISS report, whilst the level of casualties in Iraq has gone down, 2009 saw a 36% increase in "violent actions"(kidnappings, robberies, homicides).

252. Further, it cannot be assumed that because the trends measured in terms of civilian deaths, security incidents and the like are down that they will necessarily continue to fall. The CSIS report of February 2010 considers that violence is unlikely to fall below current levels. The US Department of Defence assessment of March 2010 Measuring Stability and Security in Iraq refers to violence having come near to reaching an "irreducible minimum" for the foreseeable future. In terms of the insurgent strategies, various groups are noted to shift their targets and methods depending on where they think they can best exploit existing or developing fault-lines.

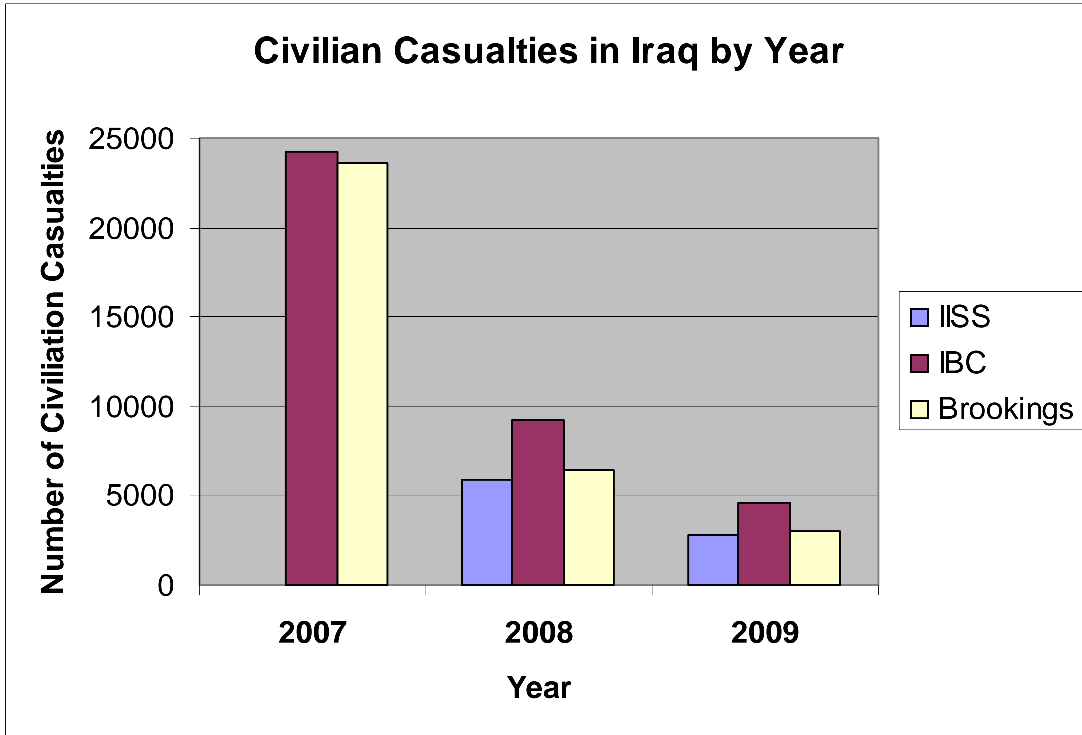
253. In view of these difficulties, we consider that as far as possible (leaving out of consideration the heavily criticised Lancet figures and the dubious ORB figures) we should not seek to rely on any particular set of figures but rather to have regard to them all. Figures of deaths and injuries are in any event only part of the picture; our overall assessment of Article 15(c) risk has to be a holistic one looking at a range of variables, including those mentioned by Lambert and Farrell. At the same time, having regard to all these figures, we should take particular note of the highest ones. To illustrate what we mean in more concrete terms, from three of the most commonly cited sets of figures dealing with Iraq, those published by IISS, IBC and Brookings (we have not covered the Wikipedia figures but note that they are broadly similar), we are able to construct the following graphs (by casualties is meant deaths):

Figure 1
Table of Civilian Casualties in Iraq

		Year		
		2007	**2008**	**2009**
Source	IISS	-	5886	2800
	IBC	24295	9219	4644
	Brookings	23600	6400	3000

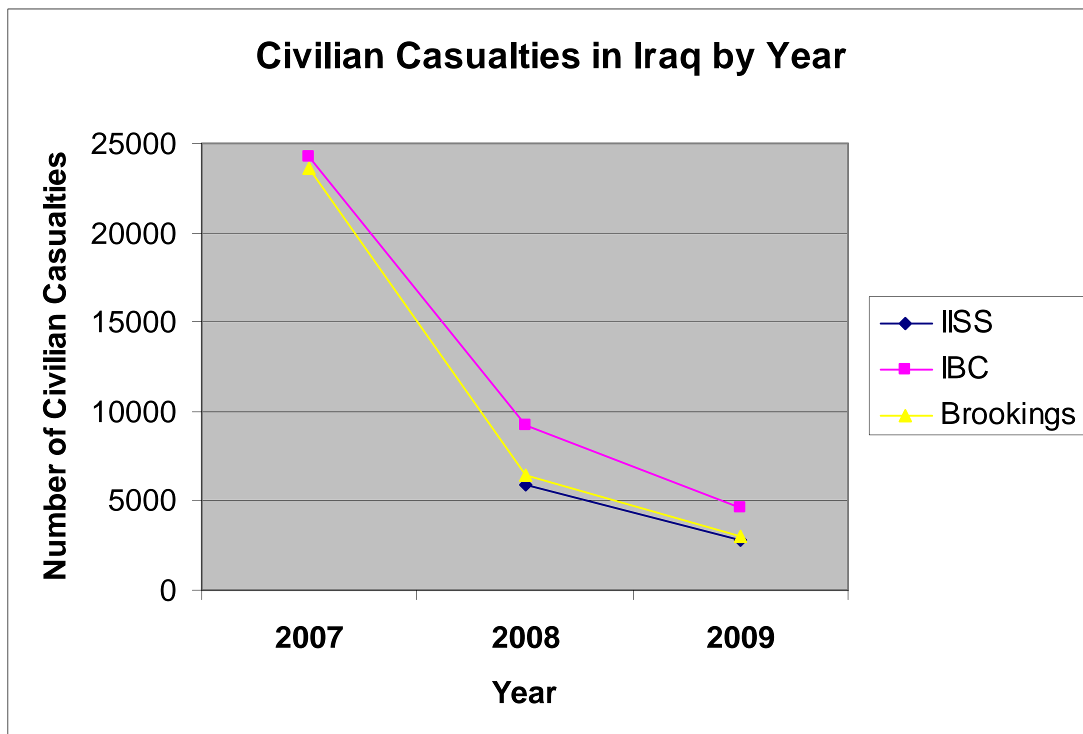
IISS – International Institute for Strategic Studies
IBC – Iraqbodycount.org

Figure 2



IISS – International Institute for Strategic Studies
IBC – Iraqbodycount.org

Figure 3



IISS – International Institute for Strategic Studies
IBC – Iraqbodycount.org

254. If taking the highest (IBC) figures (and having considered the wider picture) the answer to the general Article 15(c) question is that there is no real risk of serious harm to civilians as such, then that is the end of the matter. If however such figures disclose such a real risk, then it may be necessary to scrutinise them more closely, but not otherwise.

Iraq as a whole

255. It is not our task here to re-evaluate what the Tribunal in KH should have concluded as to the level of risk to civilians in Iraq in early 2008, if it had not made an error of law and had applied the same analysis as we have done. Nevertheless the levels of violence in the peak years of 2006 and 2007 were very high, and suggest that Article 15(c) was engaged in those parts of Iraq where this level of violence (or a higher level) was occurring. However, we agree with the respondent that the contrast between 2006/2007 and 2009/2010 in terms of the level of violence is substantial. The figures for civilian deaths for 2009 range between 3,000 and 4,644 (the latter being the IBC figure), compared with figures for 2007 of over 20,000.

256. The respondent also sought to argue that current levels of violence in Iraq are similar to those existing in Afghanistan at the time when the Tribunal decided the case of GS (Afghanistan). The respondent notes that the case presented in the Secretary of State's skeleton argument in GS (Afghanistan) relied on the following figures:

Figures for 2007		Figures for 2008		Figures for January-May 2009	
1,523		2,118		800	
Caused by Anti-Government Elements	Caused by Pro-Government Forces	Caused by Anti-Government Elements	Caused by Pro-Government Forces	Caused by Anti-Government Elements	Caused by Pro-Government Forces
700	629	1,160	828	440 (55%)	264 (33%)

[Source: United Nations, Report of the Secretary-General, 10 March 2009, [66-67]; United Nations Assistance Mission to Afghanistan ("UNAMA"), Annual Report on Protection of Civilians in Armed Conflict 2008, 17 February 2009, [4-5]; UN Secretary-General's Report of 23 June 2009, [48]].

257. The respondent concludes from this that the figure of 3,000 in 2009 and 2,360 annualised for 2010 are close to the 2,118 deaths in Afghanistan in 2008. That is said to be significant because of the fact that the estimated populations for both countries are very similar: The US Department of State Human Rights Report of 11 March 2010 for Afghanistan estimates the population as between 24 and 33 million, whilst the report for Iraq estimates the population as around 29 million. Thus, says the Secretary of State "the similarity in relation to levels of civilian deaths is nonetheless striking".

258. Although we would agree that in principle it should be possible to achieve objective indicators of violence that can be applied in a comparative fashion across different countries, we have some doubts that current studies/surveys have yet resolved problems of different methodologies. Figures in any event only furnish a part of the overall evidence needed to assess Article 15(c) risk. So at best we would regard this particular comparison (which of course is only valid if at all in relation to the levels of violence in Afghanistan at the time GS was heard, not now) as a very rough guide and not one to which we should attach any significant weight).

259. According to the respondent, two recent developments in the patterns of violence - a shift in the focus of attacks away from indiscriminate violence against civilians to isolated high-profile attacks aimed at the state, either through large-scale car bombings or assassinations or other types of political violence; and a significant reduction in the use of inherently indiscriminate methods - demonstrate that there is less potential as well as actual indiscriminate violence.

260. Like UNHCR we are wary of assuming that various insurgent groups will not, once again, when it suits, revert to tactics such as the bombing of market places that maximise civilian casualties and deploy methods suited to achieving that. However, we do think that it can properly be said that in August/early September 2010 the various insurgent groups, AQI included, are weaker organisationally and militarily and that the evidence does not suggest that this will change in the foreseeable future. To that extent we do think it is correct to regard the levels of indiscriminate violence as being not only lower presently but likely not to revert to anything like the levels

they reached in 2006/2007. Whilst the US is committed to a responsible "draw-down" it is clear that there continues to be a great deal of US and international involvement in, and support for, the Iraqi government. The main Sunni and Shi'a parties and organisations appear increasingly committed to distributing power through civil rather than military means.

261. The respondent considers significant the fact that concerns about violent disruption to the Iraqi elections – an exceptionally high profile event – proved to be largely unfounded. The respondent also notes that the latest figures as set out by the IBC's Documented civilian deaths from violence for April 2010, and Iraq Coalition Casualties Count, figures for May 2010 (up to and including 15 May 2010) for deaths in April and May 2010 do not suggest any particular spike in the death rate following the elections. That may be so but from recent reports in established media it would appear that there has been a spike in the levels of violence in July and August. For example, the IBC under a heading recent news" (accessed 14 September 2010) records 379 deaths for June, 421 deaths for July and 412 deaths for August. The Brookings Institution states that there were 535 Iraqi civilian deaths in July, albeit also noting that the US military disputed that and considered the true number to be 222. At the same time (and even allowing for variations) these figures are still broadly comparable to 2008-2009 levels. In any event, it seems to us that it would be wrong to focus on spikes (upwards or downwards) over a short time period. The main test yet to come relates to whether the ISF can maintain roughly the same or improved levels of security in the post-31 August 2010 era - in which less than 50,000 US troops remain in Iraq - and further on when final withdrawal occurs at the end of 2011. On the current evidence it seems to us that the ISF will be able to maintain something near to the same levels of security as before, but this is obviously a matter that the Tribunal will need to keep under close review.

Mosul/ Ninewah

262. Although none of the appellants is from the city Mosul or Ninewah, the governorate, we set out earlier relevant evidence in this regard since this region is identified as being the most problematic in Iraq and may be of value by way of comparison in respect of the areas from which the appellants come.

263. As can be seen, the above evidence shows that the Ninewah governorate and the city of Mosul are experiencing especial problems, perhaps in particular due to a combination of the ethnic mix of the region, its geographical position and AQI's base there. We do not make a definitive finding on whether the levels of violence there are currently high enough to engage Article 15(c), as it is not a specific issue in these appeals. On the one hand the CSIS figures given for the number of daily executed attacks in Ninewah has gone down from between 5 and 6 in the period June 1, 2009 – August 31, 2009 to between 2 and 3 for the period Dec 1 2009 to Feb 28, 2010; and the recent figures cited for Mosul (756 recorded deaths for 2009, 556 of these being civilians) are still very significantly below the high rates experienced in Baghdad during 2006/2007. On the other hand, the figures for that still-recent period of June-August 2009 figures relating to the number of daily executed attacks per day in

Ninewah (of between 5 and 6 a day) are troubling. So are those showing the numbers of deaths in Mosul per head of population of approx 2,300 for 2009 (Mosul, we remind ourselves, has a population of approx. 1,800,000), albeit both the attacks and casualty figures appear to include a significant number of Christians targeted by AQI. Claims by Christians from Ninewah or Mosul would be a prime example of civilians who would be able to point to additional risk characteristics and so would not be required to show the same levels of indiscriminate violence in the area as mere civilians: see Elgafaji [39].

264. In respect of Kirkuk/Tameem, Diyala, Baghdad it is convenient if we set out our conclusions on these areas in the context of dealing with the appellants' particular cases: see below Part 7.

Documentation

265. We do not find it at all easy to reconcile the conflicting evidence we have regarding ongoing difficulties faced by IDPs and returnee families. On the one hand several sources describe very significant numbers of such persons as effectively left undocumented and cut off from basic services for some time as a result. On the other hand several sources (sometimes the same ones) describe such difficulties as in the process of being resolved, emphasising that there are sources of help which IDPs and returnee families can turn to if they face problems, including the Iraqi MoDM and several UNHCR Protection Assistance Centres and Returnee Centres, as are mentioned, for example, in Mr Walker's evidence. According to the US Embassy, Baghdad, by the end of 2009, roughly half of some 64,000 registered returnee families had received a promised lump-sum payment of roughly $850 from the GoI (SIGIR, April 30, 2010 report). The paper dated June 2009 from the Brookings Institution entitled "Internal Displacement in Iraq: the Process of Working Toward Durable Solutions", notes that about 60% of IDPs and returnees stated that they resided in governorates where registration was required and around 78% of those required to register had done so. Thus, although there are the concerns we have referred to earlier about the obstacles to registration, it seems that a very significant percentage of those required to register had done so, and if the main need of a birth certificate is to obtain a nationality certificate, it would seem that for example in the Baghdad Ninewah and Basra figures quoted above, a very high percentage indeed of people have national (we take it that this means nationality) certificates. However, even if the former rather than the latter view is taken of documentation difficulties, we do not consider that this entails that any *UK* returnees would face serious harm for three reasons: first, enforced returnees from the UK are given some financial assistance (in addition to travel costs), second, UKBA undertakes to grant assistance with accommodation for up to a month for those likely to face accommodation problems; and third, it is clear that UK returnees are signposted to relevant agencies that assist with documentation problems. (It would also appear possible – although we do not rely on it here - that returnees from wherever they come would qualify for Iraqi government grants).

266. Bringing this evidence together, whilst we do not reach any definitive conclusion on the position with returnees in general, we consider it has not been shown that UK returnees in particular would be unable to obtain the necessary documentation or access to various services and facilities that that documentation requires. We have not been made aware of any particular documentation-related difficulties experienced by the appellants in this case and it seems to us that the evidence does not show a reasonable degree of likelihood of difficulty for a returnee to Iraq in this regard.

The June 2010 charter flights

267. We have not found the evidence concerning the June 2010 charter flights entirely satisfactory, not least because it is incomplete. It would appear that investigations within UKBA and inquiries by UNHCR are ongoing. As things stand before us there has still not been any formal complaint lodged with UKBA or the FCO (or, in relation to the voluntary returnees involved, IOM). UNHCR has confirmed that it is not conducting its own investigation although it continues to make inquiries. There are clearly polarised accounts: those we have indirectly from some individuals who were said to be on the June 9th or June 16th charter flights who allege mistreatment by either or both UK and Iraqi officials and that indirectly from Mr Walker which maintains there was no mistreatment by UK officials and none observed by UK officials on the part of Iraqi officials during the handover process on either occasion. We bear in mind UNHCR's explanation for why they were not able to follow their normal procedure in taking details and obtaining statements from the 5 or so individuals they interviewed involved in the 16th June charter. Equally we bear in mind, as has been noted by the Tribunal in other cases in which there is evidence adduced relating to the experiences of failed asylum seekers on return (see BK (Failed asylum seekers) DRC [2007] UKAIT 00098, [191-243], [334-389] that some if not most of the returnees are persons who may have been found not credible in their asylum claims. Also of significance is the fact that as far as we are aware, neither UNHCR, the Red Crescent nor any other international body involved with returnees has sought to view the camcorder and CCTV footage held by UKBA, evidence which potentially would go a long way to clarifying whether the allegations relating to UK officials' conduct had any credence. Certainly so far as concerns the involvement of UKBA and G45 officials with the two sets of returnees, we consider that the allegations made have not been substantiated.

268. The state of the evidence is virtually the same in respect of the treatment of the two sets of returnees by Iraqi officials. There is considerable correlation between the anonymous returnees' and UKBA's accounts in terms of the dates and times concerned and the fact that the Iraqi procedures for checking identity and nationality are cumbersome. For those who do not have a passport or another secure Iraqi identity documentation, checks entail at least one period of detention (whilst waiting to come before a judge) and, in the case of persons from the KRG or whose home area is in the vicinity of the KRG, a further period of detention whilst arrangements are made to fly them to Erbil. As regards the allegations of mistreatment (whether in the

form of beatings and threats), we consider that these too must stand as equally unsubstantiated.

269. In respect of the allegations made by the individuals interviewed about the conditions of detention for returnees in Iraq, however, we note that there has been no statement by Mr Walker to rebut the descriptions of overcrowding and inadequate facilities. And whilst his statement explains the unusual circumstances behind the periods of time during which those concerned were detained he does not dispute that they were of the length described. At the same time we note that UKBA has commenced an investigation of the events and makes clear that steps are in hand to improve all aspects of the process.

270. In light of the above, whilst we have some concerns about the events surrounding these two charter flight returns, centred on the length of detention that can be involved and the conditions in the detention facilities, we certainly do not consider that these demonstrate that enforced Iraqi returnees are likely to experience ill treatment in the course of the returns process. We note that UKBA is committed to further streamlining the process. In our view to do so is highly desirable, since it is curious that nationality clearance by Iraqi officials visiting London seemingly counts for nothing when it comes to checks made of returnees upon return and it must be possible to shorten considerably the periods of detention deemed necessary while checks are being made.

Conclusions

271. We should now draw together our main reasons for differing from UNHCR's position as set out in its April 2009 Guidelines and then seek to summarise our own conclusions.

272. Since more than 16 months have elapsed since these Guidelines were finalised, the assessment they contain does not necessarily answer the question for us as to the current situation, although we know from UNHCR's written submissions and July 2010 interim advisory Note that it continues to regard them as viable. We believe we should attach considerable weight to these Guidelines, particularly bearing in mind that UNHCR has a strong presence inside Iraq and hence its assessment is able to draw on front-line sources. That said, we consider we must also have regard to the fact that UNHCR's concerns in respect of Iraq go far wider than the issue of risk on return for asylum-seekers but also embrace the giving of assistance to broader UN-related efforts to help Iraq, as evidenced for example by its involvement with the ICAP 2010. From the ICAP 2010 document (at n.3) we learn that UNHCR has a comprehensive 2010 country programme for Iraq with a total budget of $264.3 million, comprising $87.7 million for refugees (inside Iraq) and returned refugees, $1 million for stateless people, $311 million for reintegration and $144.5 million for IDPs. Additionally, as a result of its multiple levels of involvement, UNHCR's assessment of risk on return must inevitably be influenced by its own strategic concerns about the viability of returning refugee flows. (We note its concerns about Syrian and Jordanian reactions to the increase in voluntary returns).

273. In our judgment (subject only to what we say below about Ninewah) the situation in Iraq currently is not one in which it can be said that failed asylum-seekers from the five central provinces (governorates) would face a real risk if returned of serious harm contrary to Article 15(c). One main reason UNHCR gives for its contrary view is that inside these five provinces levels of violence are/remain sufficiently high to result in a situation where all civilians can be said to face a real risk of serious harm. It cites in support various statements, including the UNSC July 2008 statement that civilian casualties as a result of violence "remain unacceptably high". We do not see, however, that such statements easily translate to a statement about thresholds of violence for the purposes of Article 15(c) where the test as formulated by Elgafaji is to consider whether simply by being a civilian a person is exposed to a real risk of serious harm.

274. Another main reason UNHCR gives is that so far as trends in levels of violence are concerned, there have been various setbacks and there are likely to be more. That is no doubt true (and indeed between April 2009 and August 2010 there have been), but it remains that all studies agree the trends relating to levels of violence are generally down, albeit with some local variations. There is no unilinear downward trend and indeed there are some signs of a levelling off but it remains that even the spikes in the various charts (and also taking into account the latest IBC figures for July/August 2010) are dramatically below what the levels were in 2006/2007. Further, the preponderance of the evidence indicates that one of the main insurgent groups causing significant levels of indiscriminate violence – AQI - has been significantly degraded from its previous levels of strength in terms of its infrastructure and in terms of the number of its bases in the country. Despite ongoing uncertainties arising out of the recent elections and with the further drawdown of US troop levels, now just below 50,000, it does seem that most of the main Sunni and Shi'a parties continue to have a strong investment in government through a civil rather than a military process. Whilst there is every reason to expect significant numbers of attacks to continue, such evidence as is presently to hand does not indicate that it will lead to levels of violence reverting to anything like previous levels.

275. Another reason given by UNHCR is that the levels of violence in the five provinces are significantly higher than elsewhere. However, in Tameem the average number of attacks a day is two a day whereas in Diyala they are one a day. As a point of comparison, in rough terms it would appear that the average number of daily executed attacks per province is slightly over two a day (adding up the number of daily executed attacks in each province gives 28; dividing the number of provinces/governorates (18) by the population of Iraq (approx. 30,077,000) the figure then comes to 2.14). We have already noted, however, that the situation in Ninewah and Mosul appears to call for closer scrutiny.

276. A further main reason given by UNHCR is that there continue to be displacements of Iraqi nationals caused by ongoing violence. However, such continuing displacements as there are appear largely to consist now of persons who fall into particular risk categories by virtue of their ethnic, religious or tribal origins. They do not appear to

be movements undertaken by members of the civilian population generally. Additionally the continuing displacements are clearly at much lower levels than they were and appear to be significantly less than the number of returns being made by IDPs and refugees.

277. There is another consideration relating to these returns; it is also one that arose in the case of KH. In the context of our assessment we cannot exclude as a relevant consideration the significance of the fact that UNHCR itself has been involved in voluntary return programmes for Iraq. We acknowledge that in 2009 UNHCR expressed reluctance to encourage enforced returns because of the fragile security situation. At the same time, UNHCR continues to assist with voluntary returns and, whilst not all returns to Iraq can be assumed to be wholly voluntary (e.g. because of pressures placed by the Syrian authorities on Iraqis who have fled to that country), there has been no UNHCR statement suggesting or declaring that voluntary returnees in general should be considered as having returned to face persecution or serious harm. UNHCR has documented incidents of persecution to some returnees (see e.g. [93] of the April 2009 Guidelines, but it is not suggested anywhere that this is what is generally happening to IDPs. (Indeed it would be most surprising that UNHCR would continue to involve itself in voluntary return programmes if its experience was that in general returnees were facing persecution on return. As stated by the Tribunal in KH: "If such persons were facing persecution or serious harm on return we would have expected that UNHCR would have been the very first body to have said so, for otherwise they would be acting contrary to their own mandate and contrary to their supervisory responsibilities both under their own Statute and the Refugee Convention" ([211]). In addition, the latest evidence indicates improvements in the lot of IDPs since March 2009.

278. We have already addressed the concerns of UNHCR and others about problems of access and residency: see [283-291] and [263]-[264] above. As we have seen, various paragraphs of the UNHCR Guidelines also deal with internal travel and internal relocation. It is convenient if we deal with their relevance when looking at these matters separately below. Our principal conclusions, therefore, are as follows:

i. Although Iraq is still a "weak state" afflicted by many problems, the GoI armed forces have demonstrated the capacity to maintain the improved levels of security that have been present since 2008 and the present evidence does not suggest that that capacity will collapse now there has been withdrawal of all but around 50,000 US troops on 31 August 2010 (the latter principally concerned with training).

ii. We do not find that the degree of indiscriminate violence characterising the current armed conflict taking place in Iraq reaches such a high level that substantial grounds are shown for believing that any civilian returned there, would, solely on account of his presence there face a real risk of being subject to that threat. However, we do not rule out that if in certain areas the figures rise to unacceptable levels (relative to the size of the population in that area) that Article 15(c) might be engaged, at least in respect of the issue of risk in the home area, although we would emphasise that any assessment would be one that was both quantitative and

qualitative and took into account a wide range of variables, not just numbers of attacks or deaths. For example, it is necessary to bear in mind that both in Ninewah (which is the second largest governorate by population (approx. 2,800,000) and in Mosul (which has a population of approx. 1,800,000) the population is experiencing particular problems: see [261] above.

iii. But even if there were certain areas where the violence reached levels sufficient in our judgment to engage Article 15(c) we consider that there is likely to be considerable scope for internal relocation that achieves both safety and reasonableness in all the circumstances. We consider UNHCR's submissions on internal relocation are tied in with general policy considerations (e.g. about managing the rates of return) deriving from their general and Iraq-specific remit; we do not consider that in the light of the evidence taken as a whole that their submissions establish for mere civilian returnees a real risk of persecution under the Refugee Convention or of serious harm under either the Qualification Directive or Article 3 ECHR currently.

iv. The current levels of violence in Iraq are unacceptably high but the consensus of the evidence is that a very significant proportion of the violence is targeted against persons with specific characteristics over and above being mere civilians: government officials, security personnel, civil servants, religious and political leaders, members of professional groups such as journalists, educators, medical doctors, judges and lawyers and attacks also are directed against persons based on their perceived sexual orientation, with violence against women and "honour" – related homicides (at least in certain parts of Iraq) being a serious concern: see above [97]**.** Whilst civilians as such are adversely affected by such targeted violence, that is clearly not the same as being the actual targets. Such persons – persons who are at greater risk – are very likely to be eligible for either refugee protection or subsidiary (humanitarian) protection under Article 15(b), as well as under Article 15(c) of the Qualification Directive under the sliding scale set out in Elgafaji at [39].

v. The assessment is not purely quantitative but if every increased risk factor (linked to one or more of the above characteristics) is stripped out of the equation, that means that the risk facing those who are mere civilians are considerably less.

vi. The evidence relating to UK returnees to Iraq in June 2010 does not demonstrate that the returns process will involve serious harm. It is significant that UKBA is already taking steps to improve procedures in the light of concerns expressed by UNHCR and others over the two charter flights in that month.

vii. So far as concerns UK enforced returns, we are satisfied that such problems would not result in serious harm.

viii. In short, the risk for mere civilians of being the victim of indiscriminate harm is not so substantial, the ability of the GoI to protect is not so negligible and the willingness of the displaced populations of Iraq is not so compromised that return to that country would require international protection.

Part 7: Our assessment: the appellants

Risk in home areas

The M brothers (RM and HM) and Kirkuk

279. Clearly problems remain in Tameem governorate/province. However, we consider that there has been a level of improvement there, perhaps not as marked as that in Diyala but nevertheless one of clear significance by comparison with the recent past, and that again it reflects the general situation of improvement in the security situation in Iraq. We note that there is now in place an interim joint security plan for Kirkuk and other internally disputed areas by the USF-I involving joint action and coordination by the Iraqi Army and Police as well as the KRG Peshmerga. This plan has resulted in the establishment of a network of checkpoints and joint patrols around major cities and the training of security personnel, including in Kirkuk.

280. We consider that the M brothers have not shown that they face a real risk of serious harm as defined in Article 15(c) of the Qualification Directive in the light of our assessment of the evidence above and its application to them as returnees to Iraq without any particular profile.

ASA and Diyala

281. We consider that the Diyala governorate in general shows a continuing improvement in the security situation. Clearly AQI have been pushed back to the mountains essentially, and the improved security situation is reflected in the significant number of returnees. Problems still exist, but the situation in Diyala broadly reflects the very significant fall in security incidents that we have seen in the evidence concerning Iraq as a whole. This has clear significance for Mr ASA. Quite apart from what we have had to say about the current situation in Iraq generally, we consider he has not shown that he faces a real risk of serious harm as defined in Article 15(c) of the Qualification Directive.

AA and Baghdad

282. We have seen that even though the figures for security incidents and civilian casualties in Baghdad are higher there than elsewhere in Iraq, there has been a significant fall in levels of violence, and AQI's presence in the capital has declined somewhat. There have been quite large numbers of returnees, though post-election political uncertainty has led to an increase in violence. There is assistance from MoDM there, as elsewhere, for returnees. Taken overall, we do not think Baghdad is currently experiencing sufficiently high levels of violence to engage Article 15(c) for those, like AA and indeed the other appellants involved in these appeals, who are mere civilians.

283. Taking this evidence as a whole, we consider that the situation on return for any of the appellants is not such as to show a real risk of serious harm coming within the definition in Article 15(c). Plainly there is some level of risk on return, civilians can sometimes be targeted or find themselves in the vicinity of an attack which is targeted on some other entity. But we consider there have been significant improvements in recent years, including between the time of the UNHCR April 2009 Guidelines and the more recent period, and as a consequence we conclude that none of the appellants has made out his claim to be at risk of serious harm under Article 15(c) purely by virtue of being a civilian. The fact that all are young male Iraqis who hail from Kirkuk, Diyala and Baghdad respectively are not additional characteristics that add anything to the issue of risk on return.

Internal travel

284. Even assuming we are correct that none of the appellants faces a real risk of serious harm in their home areas, there still remains the question of whether they can safely access those areas, the routes from Baghdad-Kirkuk, Baghdad-Diyala in particular.

285. It is clear that Iraq has a developed road network. According to IOM:

> "During the Iran-Iraq war a major network of roads was constructed throughout Iraq to facilitate the movement of troops and supplies. Tarmac roads connect most main towns, with the network spreading from Baghdad, at the centre of the country. The most important roads extend from Baghdad to Iraq's various borders: Kotchuk (521km) and Rurba (555km) on the Syrian border; Zakho (544km) on the Turkish border; Basra (586km) near the Kuwaiti border; and Khanaqin (about 150km) on the Iranian border. By June 1990, most sections had been completed on the six-lane 1,264km international Express Highway linking Safwan on the Kuwaiti border with the Syrian and Turkish borders. All these roads take in major towns along their routes."

286. We note that in her skeleton argument it was confirmed that it was the Secretary of State's position that once returned to Baghdad, it would be for the appellants to make their own way back to their home areas (namely, Kirkuk for the M brothers; Baquabah, Diyala for Mr ASA; and Baghdad for Mr AA) or to an area of relocation. In point of fact, so far as concerns the M brothers, it would appear from the statement produced by Mr Walker subsequent to the hearing that the current practice is that persons returned by the UK who are from Kirkuk are flown from Baghdad International airport to Erbil and travel from there by road to Kirkuk, a relatively short distance. That reduces further the likelihood that those from Kirkuk will encounter difficulties en route. However, we shall assume that the position remains the same as Mr Staker described it in his submissions.

287. Having considered the evidence as a whole our assessment is that internal travel along the routes concerned in these appeals cannot be said to reach the threshold of Article 15(c) risk. Our principal reasons for arriving at this conclusion are as follows. First, the figures for roadside bombs and security incidents along the roads concerned are significantly down on what they were previously and appear to be

below the figures that UNHCR April 2009 Guidelines were examining in April 2009. SE

288. Second, albeit the April 2009 Guidelines state that "…all roads remain potentially dangerous", they also accept in the same sentence that nonetheless "[t]ravel by road within the Central and Southern governorates has become fairly safe in many areas…" ([40], [98]).

289. Third, it is clear from the SIGIR reports of 30 January 2010 and 30 April 2010 (pp.61-75) that, the government with assistance from the international community has been able to carry out significant improvements in the transport infrastructure in Iraq in recent years notwithstanding roadside attacks and the like, specifically in relation to roads and bridges, railways and aviation.

290. There are no reports of any violence having been successfully directed towards air or rail services. As regards civil aviation, the evidence is that there are now a number of civilian flights running between major Iraqi cities. Details of the five international airports are provided in Jane's Sentinel Security Assessment of 22 May 2009 as well as on the website of the Iraqi Civil Aviation Authority. As posted on 19 May 2010, the Ministry of Transport provides recent statistics for the use of the airport:

> "The state establishment of Civil Aviation – one of the Ministry of Transport formations issued a report on the movement of aircraft and passengers at Iraqi civilian airports for the period from 1-5/7/2010 the number of flights coming into Baghdad International Airport were 134 flights arrived on its board 13,078 passengers and departing flights were 134 journey left on board 10,896 passengers. While the number of flights coming to Basra International Airport were 28 flights arrived on its board 1161 passengers and 28 left on its board 1,390 passengers. While [sic] Mosul International Airport has reached flights arrived on its board 751 passengers and 6 departure flight left on board 6,186 passengers. It is noteworthy that the number of flights mentioned above include all airlines operating."

291. In its April 2009 Guidelines at [98] UNHCR confirmed that:

> "Travel by air from Baghdad International Airport has also relatively improved. Though there have been no recent attacks on civilian aircraft, the potential threat still exists."

292. These sources indicate that there are transport options available for internal travel within Iraq. The available evidence does not demonstrate anything approaching an Article 15(c) level of risk associated with any of these modes of transport.

Part 8: Internal Relocation

293. From the above it will be clear that we have not found that any of the appellants faces a real risk of serious harm (or persecution or ill treatment contrary to Article 3) in

their respective home areas. As such we are not strictly speaking required to consider internal relocation but we shall go on to consider this in the alternative as the general level of our Article 15(c) examination necessitates that we map out the main possibilities for civilian returnees generally.

294. We cannot accept UNHCR's analysis of the issue of internal relocation material to the present appeals. At [90] they state that with respect to refugee claims of Iraqi asylum-seekers from the Central and Southern governorates who are fleeing persecution from non-state actors, no internal relocation alternative within these five provinces is available generally because of "(i) the ability of non-State agents of persecution to perpetrate acts of violence with impunity...". In brief, we cannot see how targeted pursuit to otherwise safe areas is relevant to fear of indiscriminate violence in unsafe areas.

295. So far as concerns internal relocation from persons who originate from the five central provinces to other areas of Iraq other than the three northern governorates, it follows from our earlier analysis that except possibly in the region currently considered the most dangerous in Iraq, Ninewah/Mosul, that the rest of Iraq can be considered as safe for such relocation.

296. As regards relocation to the KRG, the UNHCR Guidelines when dealing with the three northern governorates consider that (in addition to the difficulties in travelling to them) strict security measures have been introduced by the Kurdish authorities at their checkpoints. Reference is made to the need to have an acquaintance in order to legalise a person's stay and the need either to establish political links to the region or provide evidence that the person in question has fled violence or persecution. The need for a sponsor is also referred to.

297. We note at this point that in earlier decisions the Tribunal made very similar observations - for example in LM [2006] UKAIT 00060 the Tribunal noted the need for sponsorship for those wishing to enter the governorates of Kirkuk, Sulaymaniyah and Dohuk or for people to have a proven link to the territories. Similar difficulties were noted subsequently in NS [2007] UKAIT 00046 and SR [2009] UKAIT 00038. These essentially mirror UNHCR's position in UNHCR guidelines in force at the relevant times.

298. However, we now have a report of the Danish Immigration Service dated April 2010. This is entitled: Entry Procedures and Residence in Kurdistan Region of Iraq (KRG) for Iraqi Nationals. It was made following a fact-finding mission to Erbil, Sulaymaniyah, Dohuk, KRG and Amman in Jordan. It is clear from the report that any Iraqi national with an Iraqi ID is free to enter the KRG and free to reside there after registration at a local Asayish office in the KRG. There is no demand for a sponsor or guarantor to be present at KRG checkpoints in order for an Iraqi national to be allowed entry into the KRG. There are no accounts of Iraqi nationals, irrespective of religious or ethnic background, or place of origin in Iraq, being discriminated against at KRG checkpoints or in the KRG, nor of any such people having been deported from the KRG to the GoI area or to the disputed areas.

However, Iraqi nationals who are registered on the so-called list of suspects which is also called the blacklist, will not be permitted entry to the KRG. The entry and identification procedures at KRG checkpoints are solely for security purposes. Iraqi nationals who wish to stay for an extended period of time in the KRG have to register at a local Asayish police office after entering the KRG and if an Iraqi national wishes to stay for an extended period of time in the KRG they need a sponsor or guarantor.

299. There are no accounts of Iraqi nationals having been deported from the KRG to the GoI area or to the disputed areas for not having a sponsor/guarantor and although such a person is legally responsible for the person he or she is sponsoring, there are no accounts of any sponsor/guarantor having been arrested or detained by KRG authorities. Iraqi nationals, including IDPs, in the KRG have access to housing and employment, free public health and schooling and are free to move throughout the KRG if they have registered with the Asayish. The KRG entry procedures are uniform in all the governorates of the KRG. It was said by the Head of Political Department, Security Services, Asayish, KRG Erbil, that it was very unlikely that an Iraqi could not find a sponsor/guarantor and he had never heard of cases where this had not been possible. He said that every Iraqi knew someone and it was impossible to think of an Iraqi arriving in the KRG without having a relative, a friend or acquaintance in the region. If this were the case, and the person was unable to find a sponsor/guarantor, their case would be filed at the Asayish anyway, and he said that the person would eventually find a sponsor/guarantor either in Erbil, Dohuk or Sulaymaniyah.

300. We have not had the benefit of any expert evidence commenting on the recent Danish Immigration Service report, but if its conclusions are right, then the need to have a sponsor to enable a person to stay in the KRG (identified in existing Tribunal country guidance) seems to have become somewhat nominal, albeit it remains a formal requirement.

301. We have already addressed UNHCR's concerns about access and residency restrictions in [283-291] and [263-264] above. As regards UNHCR's concerns about the hardship faced in ensuring even basic survival in areas of relocation (we shall call the latter the "economic hardship" question), it is relevant to note the points made in the Secretary of State's skeleton argument as to the range of assistance available to returnees generally. The GoI currently offers a 1 million Iraqi dinar grant to eligible returnee families, and the IOM provides assistance through its Voluntary Assisted Return and Reintegration Programme (VARRP) under which financial support towards vocational training, education for adults and children, small business set up or job placements is provided in order to ensure that their return is sustainable. In respect of irregular migrants in the UK without legal documentation, support is provided from the IOM's Assisted Voluntary Return for Irregular Migrants Programme (AVRIM) which enables assistance to be provided for obtaining travel documentation, paying for flights home and assisting each returnee at the airport on arrival and departure, as well as providing all necessary support with onward transportation to a returnee's home town if necessary. The IOM has a number of programmes which are designed to assist returnee families in Iraq, including the

Programme for Human Security and Stabilisation (PHSS) which provides income generation assistance through business start-up tools and training. Between January and March 2009 PHSS provided income grants to help 200 returnee families start their own businesses, and between July and September of that year PHSS helped an additional 300 returnee families in Baghdad and Diyala with in kind grants for businesses. In addition IOM Iraq targets returnee families for assistance with emergency food and non-food item distributions and Community Assistance projects (CAPs). There is evidence from the IOM concerning assistance towards returnees to Diyala, in which a number of international organisations, including the IOM, UNHCR and the World Food Programme (WFP). Assistance provided includes water, food, health, education and housing.

302. We would add that we do not consider we should attach any weight to the fact that in July 2010 UNHCR sent information to the Tribunal which described some of the person interviewed who had returned on the June charter flights as not having access to health or education. When they were interviewed they had only been back in Iraq a short while and as such their experiences do not assist as to what happens to returnees in the longer term.

Internal relocation: the appellants

303. Looking in turn at how the appellants in this case would fare if we had accepted they faced a real risk of serious harm in their homes areas.

304. As to the general evidence relating to internal relocation to Tameem/Kirkuk (which is of relevance to Mr ASA and Mr AA), to Diyala (of potential relevance to all but ASA), and to Baghdad (which would be of relevance to Mr AA and the M brothers) we simply refer to what we have stated at [277]-[281] above, adding only that we take into account as well that each of the appellants is male, relatively young and does not have any particular health difficulties.

<u>KRG</u>

305. In any event, even if internal relocation within central and southern Iraq were problematic, we consider each of the appellants would be able to relocate in safety and without undue hardship to the KRG. It is clear from our earlier assessment at [296]-[305] above that the security situation in the KRG is better than anywhere else in Iraq, for example it is said in the USSD report, <u>Measuring Stability and Security in Iraq</u>, of March 2010 that the KRG remains the safest and most stable region of Iraq, although isolated acts of terrorism occasionally occur. On the strength of the recent Danish Immigration Service report it seems to us that the requirement for a sponsor has become increasingly nominal. We do not think it can properly be argued that relocation to the KRG would be unduly harsh bearing in mind the test set out by the House of Lords in <u>Secretary of State for the Home Department v AH (Sudan) & Others</u> [2007] UKHL 49. We consider that any of the appellants (who, we repeat, are male, relatively young and do not have any health difficulties) would be able to live a relatively normal life in the KRG judging by the standards prevailing in Iraq

generally, and also that the evidence shows that it can be reached without undue hardship. The evidence shows that there are now a number of civilian flights running between major Iraqi cities leading from Baghdad to the northern governorates, and that, as was said by UNHCR, travel by road within the central and southern governorates has become fairly safe in many areas, albeit that all roads are said to remain potentially dangerous. Accordingly we conclude that even if we had found there was a risk on their home areas, there is an internal flight alternative for each of these appellants and it would not be unduly harsh or unreasonable for them should it be necessary to do so, to relocate to one of the three northern governorates.

306. For the above reasons, in all four appeals the immigration judge materially erred in law. However, the decision we re-make in respect of each appellant is to dismiss his appeal.

Signed Date

Mr Justice Blake
President of the Upper Tribunal,
(Immigration and Asylum Chamber)

APPENDIX: LIST OF DOCUMENTATION CONSIDERED

Item	Document	Date
1	Iraqbodycount.org/database website	Accessed 15 September 2010
2	www.brookings.edu website	Accessed 15 September 2010
3	UNHCR "Note on the Continued Applicability of the April 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers"	July 2010
4	Uruknet.info report	19 June 2010
5	WFP: "WFP launches cash for work programme in Iraq"	19 May 2010
6	Ministry of Transportation: "Aircraft and passengers movement activities at the Iraqi civilian airports"	19 May 2010
7	Ministry of Transportation, Iraq "Minister of Transport travels from Baghdad to Basra on a passenger train"	12 May 2010
8	United Nations and Iraq Sign Historic Agreement to Boost Development and Restore Services and Economic Growth	11 May 2010
9	Amnesty International: "Killings of civilians in Iraq condemned as war crimes"	11 May 2010
10	Bureau of Near East Affairs, USSD, Iraq Status Report	5 May 2010

Item	Document	Date
11	Iraq Body Count: 'Exaggerated claims, substandard research, and a disservice to truth'	5 May 2010
12	Home Office (RDS) statistics Asylum Applications for 2008 – 2009	May 2010
13	Home Office (RDS) statistics on returns – voluntary and enforced 2004 – 2009	May 2010
14	Special Inspector General for Iraq Reconstruction, Quarterly Report to the US Congress	30 April 2010
15	Amnesty International, Civilians Under Fire	27 April 2010
16	Brookings Institute Iraq Index, 27 April 2010	27 April 2010
17	US Central Command: "Iraqis make security progress as war winds down"	21 April 2010
18	Centre for Strategic & International Studies: "Q&A, Iraq after the death of Al-Qaeda in Iraq's Leadership"	19 April 2010
19	IOM emergency needs assessments four years of post-Samarra displacement in Iraq	16 April 2010 (based on news brief for report, as report itself is undated).
20	FCO Travel advice: Iraq	15 April 2010
21	Brookings Institute, April 2010 Index Update: A look into Afghanistan, Pakistan and Iraq Index	5 April 2010

Item	Document	Date
22	IRIN, State food aid package slashed	1 April 2010
23	Economist Intelligence Unit, EIU, Iraq	April 2010
24	Danish Immigration Service: "Entry Procedures and Residence in Kurdistan Region of Iraq for Iraqi Nationals"	April 2010
25	IOM "UK's Reintegration Assistance to Returnees under VARRP's New Approach (2007 – 2009)"	April 2010
26	UNHCR "Diyala Initiative"	April 2010
27	IRIN, "Leading Politician Allawi promises to help refugees, IDPs"	30 March 2010
28	Refugee International, Field Report, 17 March 2010	17 March 2010
29	USSD: "Human Rights Report 2009"	11 March 2010
30	Center for Excellence, Iraq Humanitarian Assistance Report	10 March 2010
31	Iraq: IDPs returning to Diyala Province in increasing numbers	9 March 2010
32	IDMC, Iraq: Little New Displacement but in the region of 2.8 million Iraqis remain internally displaced	4 March 2010
33	ICRC, Iraq Making the Best of a bad situation	2 March 2010
34	USF website: "Prism Interview with USF-I Commanding General, Gen. Ray Odierno"	2 March 2010
35	Amnesty International: "Iraq Human Rights Briefing"	1 March 2010

Item	Document	Date
36	UNHCR, Monthly statistical return update	March 2010
37	Centre For Strategic & International Studies, "Iraq: Meeting the Challenges of 2010"	March 2010
38	UNHCR, Iraq Fact Sheet	March 2010
39	US Department of Defence, "Measuring Stability and Security in Iraq, March 2010"	March 2010
40	Danish Refugee Council, "Quarterly Report Jan – March 2010"	March 2010
41	Council on Foreign Relations, "No place like home: Iraq's Refugee Crisis Threatens Iraq"	26 February 2010
42	Congressional Research Service, "Iraq Casualties: US Military Forces and Iraqi Civilians, Police and Security Forces"	25 February 2010
43	US State Department, Travel Advice	25 February 2010
44	Returnees and IDPs face difficulties in registration and obtaining documentation required (2005-2009)	25 February 2010
45	Centre For Strategic & International Studies, "The uncertain security situation in Iraq: Trends in Violence, casualties, and Iraqi Perceptions"	17 February 2010
46	Report of the UN Secretary General to the Security Council	8 February 2010
47	IOM Governorate Profile, Diyala	February 2010
48	IOM Governorate Profile, Kirkuk	February 2010
49	IOM Governorate Profile, Salah al Din	February 2010

Item	Document	Date
50	UNHCR, "Returns to Iraq March 2009 – February 2010"	February 2010
51	UNHCR, "Returns to Baghdad March 2009 – February 2010"	February 2010
52	Special Inspector General for Iraq Reconstruction, "Quarterly and Semi-annual report to the US Congress"	30 January 2010
53	UK Home Office Country of Origin Information Service, Iraq COI Report, January 2009	12 January 2009
54	IRIN, "Squatters moved out of nearly two thirds of returnees' homes"	10 January 2010
55	IRIN, "Iraqis welcome WFP in state food aid system"	6 January 2010
56	Human Rights Watch, "Annual Report covering events in 2009"	January 2010
57	IOM Newsletter 2010	Jan – March 2010
58	UNHCR, "Protection and Assistance Centres in Iraq Jan – March 2010"	Jan – March 2010
59	Armed Conflict Database (IISS)	January – February 2010
60	UNHCR "Significant achievements in 2009"	Undated, 2010
61	Iraq Body Count, "Civilian deaths from violence in 2009: Analysis of the year's toll from the Iraq Body Count Project"	31 December 2009
62	Council on Foreign Relations, "Iraq Bombings: Manipulating the Political Scene"	12 December 2009
63	OCHA, "Iraq 2010 Humanitarian Action Plan"	December 2009

Item	Document	Date
64	IDMC, "Resolving Iraqi Displacement: Humanitarian and Development perspectives"	18-19 November 2009
65	IOM Assessment of Returns to Iraq	3 November 2009
66	IRRICO Country Sheet for Iraq	November 2009
67	UNHCR, "Protection Monitoring Assessments Summary Jan – October 2009"	October 2009
68	IZDIHAR, "Iraq Private sector growth and Employment Generation"	10 August 2009
69	UNAMI "Human Rights Report"	June 2009
70	Brookings Institute Paper, "Internal Displacement in Iraq: The process of Working toward durable solutions"	June 2009
71	Jane's Sentinel Country Risk Assessments	22 May 2009 [last updated]
72	UNHCR: Eligibility guidelines for assessing the International protection needs of Iraqi Asylum- seekers	April 2009
73	Iraq Body Count, "Civilian deaths from violence in 2008: Analysis of the year's toll from the Iraq Body Count Project"	28 December 2008
74	Country of Origin Information Service, Report on Iraq	10 December 2009
75	United Nations Assistance Mission for Iraq (UNAMI), "Human Rights Report: 1 January - 30 June 2008"	2 December 2008

Item	Document	Date
76	UK Home Office Border Agency, "Operational Guidance Note: Iraq"	29 October 2008
77	European Legal Network on Asylum: "The Impact of the EU Qualification Directive on International Protection"	October 2008
78	Country Assessment Documents for Iraq	15 August 2008
79	Amnesty International, "Iraq: Rhetoric and Reality: The Iraqi Refugee Crisis"	15 June 2008
80	UNHCR briefing Notes "UNHCR cautious against European deportees to Iraq"	8 June 2008
81	Immigration and Refugee Board of Canada, "Response to Information Request (RIR), Issuance and format of Iraqi ID documents"	2 May 2008
82	US Department of State, "Country Reports on Terrorism 2007: Iraq"	30 April 2008
83	Iraq Updates 'Kirkuk attack Casualties up to fourteen'	1 March 2008
84	Iraq Updates 'Parliament rapporteur blames army for Kirkuk attack	1 March 2008
85	BBC News 'Iraq violence jumps in February'	1 March 2008
86	Report from Dr. Rebwar Fatah Associates- Middle East Experts	29 February 2008
87	Iraq Updates 'Unknown gunmen kidnap two workers, trucker in Kirkuk'	28 February 2008
88	Iraq Updates "Police Chief escapes attempt on his life"	28 February 2008

Item	Document	Date
89	Iraq Updates "Civilian wounded in explosion in Kirkuk"	25 February 2008
90	BBC News "Assault looms in Iraq's 'worst place'"	7 February 2008
91	The Independent "Sunni vs Shia: The real bloody Baghdad"	5 February 2008
92	IRIN "'Iraq': More relief aid needed in Mosul after blast"	28 January 2008
93	UNAMI-UN Assistance Mission for Iraq- Human Rights Report- Iraq	Jan - Mar 2008
94	Brookings Institution Index of State Weakness in Developing World for 2008	2008
95	UNHCR "Addendum to UNHCR's Eligibility Guidelines for Assessing the International Protection needs of Iraqi Asylum-Seekers"	17 December 2007
96	UNHCR: "Eligibility Guidelines for Assessing the International Protection needs of Iraqi asylum-seekers"	August 2007
97	Human Rights Watch: "Caught in the Whirlwind, Torture and Denial of Due Process by the Kurdish Security"	July 2007
98	US Department of State Report, "Iraq, Country Reports on Human Rights Practices - 2006"	6 March 2007
99	Operational Guidance Note: "Iraq"	12 February 2007
100	IOM UK: "Stories of Return"	February 2007
101	Pre-trial chamber in *Prosecutor v Lubanga (ICC – 01/04-01/06-803*	January 2007

Item	Document	Date
102	The New York Times: "To stay alive, Iraqi's change their names"	5 September 2006
103	Letter from ECO, Jordan: Applications by Iraqi nationals in Jordan	16 June 2005
104	Letter from Iraq Directorate, Foreign and Commonwealth Office, Iraqi Visa applications from Jordan	20 March 2005
105	Kurdistan Observer 'Independent Kurdistan will benefit everyone' by Sardar Pishdare	24 February 2005
106	Letter from Iraq Directorate, Foreign and Commonwealth Office	10 March 2004
107	Iraq Bulletin	July 2003
108	Extract from one CIPU militia in Iraq	October 2002
109	Letter from JA Keller, Secretary of good offices group of European lawmakers to Mr Talabani	3 May 1992
110	Letter from Henrik Olesen, United Nations to Sardar Pishdare	19 November 1991
111	UNHCR: General Assembly Resolution 428(v), Annex UN Doc A/1775	1950
112	IBC, Database	Ongoing
113	ICasualties.org	Ongoing
114	IAU Attacks and Casualties online database	Updated daily
115	IOM, UK activities	Undated

Item	Document	Date
116	IOM Iraq, The Story of Zahra'a	Undated
117	IBC, Methods	Undated
118	UNHCR, Iraq country operations profile	Undated
119	USA Today "U.S Scrambles to keep Kirkuk from Igniting"	Undated
120	Wikipedia extract "List of Countries by International homicide rate"	Undated
121	Project backdoor - Editors Introduction 'on some loose ends of the gulf conflict'	Undated
122	International Relief Fund for Iraq website	Undated
123	Kurdistan regional government website: Travelling to Kurdistan	Undated
124	Iraqi Railways, Railway map	Undated
125	Iraqi Railways, Projects	Undated
126	Europa Online, Iraq	Undated
127	Iraqi civil aviation authority	Undated
128	USF website, press briefing with Major general	Undated
129	Brookings Institute, Iraq Index	Undated, webpage
130	CHF International, Revitalising Iraq through Microfinance	Undated, website article
131	US AID: "Success story: Entrepreneur tastes sweet success"	Undated, website article
132	US AID: "Success story, Improving Communities and Livelihoods"	Undated, website article
133	Foreignpolicy.com	Undated