

Heard at: Field House

SL and Others (Returning Sikhs
and Hindus) Afghanistan CG
[2005] UKIAT 00137

On 7 March 2005

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

07th October 2005

Before:

**Mr J Barnes (Vice President)
Miss B Mensah (Vice President)
Mrs W Jordan**

Between

APPELLANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the 1st and 2nd appellants: Ms Amanda Jones of Counsel, instructed
by Bhogal Lal, Solicitors
For the 3rd appellant: Mr M Saleem, a Solicitor of Malik & Malik
(232 High Road)
For the respondent: Mr J McGirr, a Home Office Presenting
Officer

Afghanistan – country guidance as to whether as a class Afghan Sikhs and Hindus are entitled to international surrogate protection – Held: (1) there is no evidence to support the claim that the Afghan Sikh and Hindu minorities in Afghanistan are persecuted or treated in breach of their protected human rights under Article 3 of the European Convention by the State or that the degree of societal discrimination against them is such as to give rise to any such persecution or treatment of them as a class (2) following UNHCR guidance their status as Afghan Sikhs and Hindus is a factor to be taken into account in assessing individual claims on a case by case basis

DETERMINATION AND REASONS

1. This determination gives country guidance in relation to the situation of Sikhs and Hindus who are citizens of Afghanistan and is based upon objective evidence from a number of international sources including the Country Information and Policy Unit (CIPU) report of October 2004 (which summarises or extracts information from a number of the other international sources), United States State Department report for 2003 published in February 2004, the United Nations General Assembly Security Council Report of 12 August 2003, the ECRE Report of April 2003 giving guidelines of treatment of Afghan Asylum Seekers and Refugees in Europe, and various Amnesty International and Human Rights Watch Reports. In addition, there were a number of statements from a Sikh leader in Kabul to whom we shall refer simply as RS. We do this because Ms Jones requested that his name should be anonymised, although we observe that he makes it clear that he has in the past given statements to various bodies and none of his statements before us contained such a request. Nevertheless it seems to us to be in accordance with the general willingness on the part of the judiciary as a matter of policy to grant anonymity to parties in asylum and human rights appeals. These statements are dated respectively 3 December 2003, 23 April 2004, 14 June 2004, 9 February 2005 and 25 February 2005. There are finally a report dated 13 December 2004 of an interview with RS by a member of the British Embassy in Kabul supplemented by a further statement dated 1 February 2005 as to the methodology employed in that interview.

2. In the course of argument, there has been extensive reference to three recent reported Tribunal decisions concerned with the situation of Afghan Sikhs in which the evidence of RS, as it then stood, was considered. These decisions are respectively *IB and TK (Sikhs – risk on Return – Objective Evidence) Afghanistan* [2004] UKIAT 00150, *KK (Evidence – Late Filing – Proper Notice) Afghanistan* [2004] UKIAT 00258 and an unreported decision of the Tribunal in the case of *Sarla and Others (AS 58985 -03)* heard in December 2004. We mention this latter case only in the context that there was then reference to the report of the interview of RS by a British Embassy official which the Secretary of State was unable to produce so that the Tribunal in that and the three other appeals associated with it saw no reason to differ from the approach which had been established in the preceding two reported cases. We shall later in the course of this determination refer more extensively to the reported cases and, in particular, that of *IB and TK* heard in March 2004 where there

was extensive consideration of the then existing objective evidence.

3. We turn now to summarise the claims of the three individual appellants and the findings of the Adjudicators in respect of them.

The claim of the first Appellant – Mr L

4. The first appellant, to whom we shall refer as Mr L, is a citizen of Afghanistan born on 25 April 1980 and is of Sikh ethnicity and religion. He originates from Jalalabad and arrived in the United Kingdom on 8 June 2002 when he applied immediately for asylum. That application was refused for the reasons set out in a letter dated 29 July 2002 and on 31 July 2002 the Secretary of State issued directions for his removal to Afghanistan following refusal of leave to enter after refusal of his asylum application. He appealed unsuccessfully against that decision to an Adjudicator and his appeal was heard and dismissed on 27 February 2003 by Ms G Elliman, an Adjudicator. She found his account of his past history in Afghanistan credible but the appeal was dismissed because there had then been a change in the circumstances in Afghanistan following the overthrow of the Taliban and the effect of that change was, she held, that the appellant no longer had any basis for claiming a well-founded fear of persecution or of breach of his protected human rights if returned. There was no appeal against that decision but new representatives subsequently applied on 16 June 2003 for discretionary leave and, although initially refused, there was then an application for judicial review. The upshot of this was that the certificate that the fresh claim was manifestly unfounded was withdrawn by the respondent and a fresh refusal notice of 19 November 2003 substituted, giving a right of appeal which has led to the present appeal on human rights grounds only. It was heard on 3 March 2004 by another Adjudicator, Mrs S Kebede. She, too, dismissed his appeal on the basis that the objective evidence before her did not show that the situation of Sikhs had changed from that which applied at the previous hearing before Ms Elliman and that in consequence there were no substantial grounds to believe that he would be subjected to torture or to inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention. His appeal under Article 8 concerned with whether or not he had established a family life in the United Kingdom, following a late marriage to an Afghan Sikh who had subsequently been granted refugee status, was also dismissed on the alternative grounds that the Adjudicator did not consider that he had established a family life in the United Kingdom but that, if she was wrong in that respect, removal would be proportionate having regard to the ratio in *Mahmood v SSHD* [2001] Imm AR 229 because he would be able

to make an appropriate application for leave to enter as a spouse if now returned.

5. Mr L then sought permission to appeal against that decision which was initially refused by the Tribunal but subsequently allowed by Silber J on statutory review in the following terms:

"The Immigration Appeal Tribunal did not consider the applicant's ground of appeal that the Adjudicator did not consider the risk of persecution in the applicant's home area of Jalalabad as the Adjudicator appeared to focus on the position in Kabul (see paragraph 19 of the determination)."

6. At an earlier hearing Miss Jones had applied for permission to vary the grounds of appeal before the Tribunal to those contained in the application for statutory review in substitution for the original grounds which would otherwise have stood following the statutory review decision. Those grounds included challenges to the Article 8 decision and a complaint that there had been a failure to consider other articles of the European Convention raised, especially Article 9. In both her written skeleton argument filed in advance of the hearing and in her oral submissions, however, Miss Jones relied exclusively on the challenges under Article 3, making no reference to any other articles of the European Convention so that we consider her effectively to have abandoned those challenges. This seems to us to be entirely appropriate since, on any approach, we take the view that we would be required to find that removal was proportionate even if in breach of Article 8 rights by reason of the application of the ratio in *Mahmood*, and there is no evidence that there is such a flagrant denial of the right of Sikhs or Hindus to practice their own religions in Afghanistan as would support a successful claim under Article 9 of the European Convention. We have therefore confined our review to Article 3 issues and the grounds of appeal taken from the grounds of application for statutory review which are relevant to such issues. The challenges raised in the grounds of appeal may be summarised as follows: (a) that the background evidence in existence at the date of the hearing before the second Adjudicator was such that her findings as to lack of risk were unsustainable as a matter of law; (b) that the Adjudicator erred in failing to address herself to the situation in the home area or to consider internal flight; and (c) that the second Adjudicator wrongly and unnecessarily limited her consideration of the background material to that which had come into existence after the first Adjudicator's determination.

7. We now summarise the factual basis of Mr L's claim.

8. The first Adjudicator summarises the basis of his claim at paragraph 2.1 of her determination in the following terms:

"The basis for the appellant's claim is set out in the SEF, a separate statement and in the interview. He says that, as a Sikh, he has a fear of persecution in Afghanistan because of his religious beliefs. He is from Jalalabad and he ran a shop there selling textiles and other goods. The appellant, in his statement, details problems that Sikhs have had for many years at the hands of the Muslims in Afghanistan, including lack of access to education, lack of religious freedom, and attacks on the Gurdwara. The appellant says that his father was arrested, beaten, tortured and detained in 1995 by the Mujahideen who were in power at the time (now the Northern Alliance Forces). The appellant's father was held for 15 days and the family had to pay a large amount of money for his release. The appellant himself was, he says, beaten and tortured by the Taliban in 1998 whilst he was returning from Kabul and they also took his money and possessions. He had problems again in 2001 when he was beaten because he had not locked up his shop during Muslim prayers and the shop was closed for 15 days as a punishment. In April 2002 (after the Northern Alliance had taken power in the country following the fall of the Taliban) the appellant says that his brother, [JS] and [J]'s son were beaten and detained by the Northern Alliance Forces, the brother was killed and the appellant's nephew disappeared but this incident triggered the appellant's departure from his country – in his interview he states that this incident was in March not April. The appellant left in May 2002 and travelled with an agent via Pakistan and other countries."

9. At paragraph 6.1 in her determination the first Adjudicator deals with her findings saying that she accepts that the appellant's account of past problems because of his religious beliefs is credible. She accepts that his father was arrested by the Taliban in the past but the situation had subsequently changed and then deals with the current situation of the appellant as at the date of his departure as follows:

"The appellant's claim in relation to the more recent events was that he himself was attacked and forced to close his shop at some stage and that in April 2002 his brother was detained and killed by the authorities. I accept that the appellant may have had some problems and may have been approached, as he claims, by people and harassed by them. However, there is no evidence at all that his problems were at the hands of the authorities nor that they were necessarily related to his religious beliefs. The

appellant was sure in his evidence that those who visited his shop were from the Northern Alliance but, asked how he knew, his answer was that "they are all the same – they come and say these people from the government – grow beards and say they are Mujahideen..."

This is plainly an assumption on the appellant's part, it may have been correct but in the absence of any evidence in the background material that there is continued harassment of Sikhs from the authorities I cannot find that the appellant's assumption is necessarily true.

The CIPU report notes that there are still concerns over security in the country, but the situation is volatile and the crime rate is high – in the absence of any evidence of particular religious persecution or evidence from the appellant as to who was causing him problems after November 2001, I cannot find that it was necessarily the authorities who were harassing him nor that his problems were because of his religious beliefs at all. The appellant has failed to state properly what happened to him, his only assertion is that his shop was closed and he states that he was beaten but it is difficult to ascertain what really occurred, how badly he was beaten, by whom and how and thus I cannot conclude that the appellant has been subjected to any persecution for a Convention reason. The problems he has had have not, on a lower standard of proof, been proven to amount to persecution for a convention reason.

The same conclusion can be drawn from the evidence about the appellant's brother. I do accept that the appellant's brother was killed in April 2002 (his evidence, although rather muddled did seem to be a true account). The appellant initially gave the impression that his brother's body was dumped at their home but later it became apparent that it was his sister-in-law's home where he was left, after a short disappearance. The brother and sister-in-law had lived in Kabul and this again is where I find that the evidence presented simply does not prove that the appellant's brother's death was related to his religion or that it was necessary [sic] carried out by the authorities. The appellant's beliefs may be correct but there is evidence of serious criminal offences in Kabul and there is no evidence at all that there is any sort of systematic persecution, detention, abduction or killing of Sikhs in Kabul or elsewhere. I cannot accept that the appellant's brother's death is any way evidence that the cause of death was religious persecution.

I find, therefore, that although the appellant and his family may have had problems in the past, any problems that they have suffered under the current regime are not necessarily perpetrated by the regime or its agents not is it related to the appellant's religion in any way."

10. The second Adjudicator, properly applying the principles of *Devaseelan v SSHD* [2002] UKIAT 00702, took the first Adjudicator's determination as her starting point and adopted those findings which we have set out above, holding "that the appellant was not at any risk of persecution as a Sikh or otherwise at the time of his departure from Afghanistan". The second Adjudicator then says that the issue is whether the updated objective evidence shows a changed situation for Sikhs to an extent which would establish a risk of Article 3 treatment and expresses her conclusions in this respect as follows:

"25. Mr Tattersall [who appeared for the appellant before her] did not refer me to any evidence which supported such a claim and I note that the document to which he referred me as specifically relating to Sikhs, at page 26 of his bundle was dated prior to the previous appeal hearing and does not, in any event, appear to represent an independent and objective view of the situation for Sikhs in Afghanistan. I also considered the documents referred to in the written representations from the appellant's representatives which appear in the respondent's bundle and have considered the documents in the appellant's Court bundle, but again find no evidence to support the claim that the situation for Sikhs in Afghanistan is such that to return any Sikh there will amount to inhuman or degrading treatment nor that the security situation in Afghanistan is such that to return anyone there would breach Article 3 of the ECHR. I have considered the latest UNCHR report, at page 195 to 197 of the appellant's bundle, but note that, whilst the UNCHR considers that Sikhs and Hindus face discrimination in Afghanistan, their opinion goes no further than to say that Sikhs and Hindus are amongst those who *may* qualify for protection. Given the findings of the Adjudicator in the previous appeal, that there was no evidence that the appellant had experienced problems from the authorities in Afghanistan as a result of his religion, I do not find that this document takes the appellant's case any further.

26. In the circumstances, given the absence of any evidence of the change in the situation for Sikhs from that considered by the Adjudicator in the appellant's previous appeal, I find no reason to depart from the Adjudicator's findings in her determination of that appeal. I find, therefore, that there are no substantial grounds to believe

that the appellant would be subjected to torture or to inhuman or degrading treatment or punishment pursuant to Article 3 of the ECHR or that his human rights would be infringed on any other grounds, either due to his religion or otherwise, if he were returned to Afghanistan."

The claim of the second Appellant – Mr T

11. We turn now to the factual basis of claim of the second appellant to whom we shall refer as Mr T in this determination.
12. Mr T, who is also a citizen of Afghanistan of Sikh religion and ethnicity, was born on 13 January 1981 in Jalalabad which is his home area in Afghanistan. He arrived in the United Kingdom on 1 March 2002 and applied for asylum on arrival. Following submission of the statement of evidence and interview, the Secretary of State refused his application for the reasons set out in a letter dated 24 November 2003 and on 28 November 2003 issued directions for removal to Afghanistan following refusal of leave to enter after refusal of his asylum application. He appealed against that decision on both asylum and human rights grounds and his appeal was heard on 6 May 2004 by Mr P A Grant-Hutchison, an Adjudicator, who dismissed his appeal in a determination promulgated on 7 June 2004.
13. The basis of Mr T's claim was summarised at paragraph 7 of the reasons for refusal letter in the following terms:

"... You claim that since you were a child you have been harassed by Muslims in your area on account of your Sikh religion. You claim that the Mujahideen made problems for your family and then when the Taliban took power things got worse. You claim that the Taliban began making problems for you. You claim that the Taliban took your brother and tortured him for 2 days. You claim that the Taliban used to assault you on a regular basis. You claim that every time you went outside they would hit you with rifle butts. You claim that the Taliban would come to your home and drag you from the house and beat you stating that it was a Muslim country and non-Muslims are not allowed to live. You claim your home was bombed during the Taliban rule, however you do not know who dropped the bomb. You claim that you have problems with your neighbours who would mistreat you because of your religion. You claim that you were seen as non-Muslims in your area. You claim that your neighbour's young son was taken by the Taliban to make him convert to Islam. You claim that because of this and to protect you and your faith, your father arranged for you to leave

Afghanistan. You fear you will continue to receive this discrimination on account of your religion if you return."

14. The Secretary of State challenged those claims, at least in part, on the basis (paragraph 11) that the account given of constant harassment by the Taliban was not consistent nor credible according to information on Afghanistan gathered from a variety of sources, some of which were quoted in that paragraph, as demonstrating that the Taliban did not target or mistreat the Hindu or Sikh community, but it was accepted that the bombing referred to might have taken place in a time of fighting although it was an isolated event which had not led to the claimant leaving Afghanistan. Beyond this the Secretary of State relied on the change in the situation since the fall of the Taliban. Whilst accepting that there had been difficulties in the enforcement of law and order outside Kabul, the letter points out that the claimant would be returned there where there was no reason to think he would not be safe.
15. The Adjudicator does not make any clear findings of fact. Such findings as there are are contained in paragraph 12 of his determination in the following terms:

"The appellant's oral account was contradictory in that he said that he feared for his life and yet every day for a considerable number of years the appellant's father and brother would go out to work in their two shops. The appellant also attended the Gurdwara (the temple) regularly. The most likely explanation is that although the appellant and his family were undoubtedly discriminated against while in Afghanistan, in reality he suffered no more than low level bullying which although unpleasant did not amount to persecution."

16. The Adjudicator made no finding as to whether or not Mr T might be at risk in his home area of Jalalabad on return but at paragraph 13, after reference to the UNHCR opinion that Sikhs and Hindus are among those who may qualify for protection under the Refugee Convention, says this:

"I accept the importance of such guidance although in the present circumstances of this case, I see no compelling reason as to why a young fit single man such as the appellant would have to return to his home area of Jalalabad rather than Kabul. It is not unduly harsh to expect him to stay in Kabul. Accordingly the question is whether or not he has a well-founded fear of persecution if he returns to Kabul. There is certainly some small risk to the appellant's human rights (see the appellant's bundle at page 40) and there is little on offer for minority groups in

Afghanistan (see the appellant's bundle at page 30 and page 57 in the CIPU report paragraph 6.88). However, the mere fact that returning minority groups such as Hindus feel that they can raise proceedings in the District Shura for the return of their land indicates how far things have improved (see CIPU 6.89). The CIPU report at 6.84 states that the EU's special representative and UNCHR, Kabul told a Danish Fact-Finding Mission to Afghanistan in September 2002 that they believed the situation for non-Muslim groups such as Hindus and Sikhs was generally good. Paragraph 6.90 shows that religious freedom has improved although there remain concerns for the future (paragraphs 6.91 and 6.92). Although the situation is not a happy one, it appears that it does not amount to persecution."

The challenges raised in the grounds of appeal are in summary as follows: (a) that the Adjudicator had failed to make clear findings of fact although apparently accepting the general factual credibility of the claimant at paragraph 12 of his determination; (b) that the Adjudicator had failed to have proper regard to the background evidence as to the situation in his home area of Jalalabad but, had he done so, must have concluded the Appellant was at risk in his home area as an ethnic Sikh; (c) that on a proper reading of the objective evidence internal relocation was not open to the claimant. Leave was granted on statutory review by Owen J on the basis that it was arguable that the Adjudicator had erred in his general approach to the risks faced by Sikhs in Afghanistan.

The claim of the third Appellant – Mr S

17. We turn now to consider the factual basis of the appeal of the third appellant to whom we shall refer in this determination as Mr S. He was born in Kabul on 6 December 1955. He is a citizen of Afghanistan of Indian ethnicity and a Hindu by religion. He claims to have arrived clandestinely in the United Kingdom on 10 February 2003 with his wife and three minor children who are his dependants in this appeal. He was, at all events, here on that date because he then claimed asylum. After considering a Statement of Evidence Form and conducting an interview, the Secretary of State refused his application for the reasons set out in a letter dated 19 May 2003. On 5 June 2003 the Secretary of State issued directions for his removal to Afghanistan as an illegal entrant after refusal of his asylum application. He appealed against that decision on both asylum and human rights grounds and his appeal was heard on 10 November 2003 by an Adjudicator, Mrs C M Graham. She says at paragraph 34 of the determination that she accepts the core of the appellant's account as credible and she sets out that core account at some

length at paragraphs 11 to 17 of her determination in the following terms:

- "11. The appellant is a practising Hindu and claims to have been persecuted in Afghanistan because of his religion. The appellant said that during his education he faced harassment from Muslim students causing him to leave school at an early age and continue religious studies at home. The appellant said that he was unable to attend higher education because he was a Hindu and there were no jobs for him at the end of his education. The appellant joined his father who was a herbal medicine doctor. The appellant joined the [A] Pharmacy, which his father owns.

12. In 1991 the appellant bought a shop from an Uzbek person who had left the country. The appellant said that his brother began running a business from the shop as a wholesaler. The appellant bought a pharmacy in 1993 and ran his business from there called the [K] Pharmacy. The appellant said that the Mujahideen used to take medicine from the pharmacy and cash by force. The appellant said that he would regularly dress as a Muslim and wear a Kula and shawl to protect himself from the Muslim authorities. At the beginning of 1994 the appellant was on his way home from Jalalabad where he had been purchasing stock when he was stopped by a group of Mujahideen. The appellant had forgotten to cover his hand, which had an Om sign (denoting the Hindu religion). The Mujahideen became angry that the appellant was dressed as a Muslim and beat him severely and took him to the mountains where he was detained for fifteen days. The appellant was released when his father paid a large sum of money to the group.

13. The appellant said that under the Taliban most of the temples were closed down except for one, which the appellant attended in secret. The appellant said that as a non-Muslim he had to display a yellow flag outside his house and wear a different type of clothing in order to signify a different religion. The appellant said that the Taliban were harassing the appellant and his family to convert to Islam or leave the country. The appellant said that his father did not want to leave the country and because he was an elderly person the appellant did not want to leave his father alone in

Afghanistan. The appellant said that the Taliban visited his house on many occasions and destroyed their religious books and statues.

14. Following the defeat of the Taliban the Northern Alliance took control of Afghanistan. In October 2002 whilst at his shop a group of Northern Alliance men came to the Appellant's shop with the Uzbek man from whom the appellant had purchased the shop. The appellant was told that the shop belonged to the Uzbek man and that he was to hand over possession of the shop to him. The appellant was told that the Uzbek man called Afzal was in possession of an order from the Court stating that the appellant should leave the property within the next fifteen days. The appellant appealed to the Court and produced the legal documentation showing his ownership of the shop to the Judge. The appellant said that the possession order in favour of Afzal was cancelled as a result.
15. A few days later the same men returned to the appellant's house armed with guns and demanded that the appellant hand over the Court Order. The appellant refused and was threatened. The appellant returned to Court to complain but the Judge that he saw refused to help him. The appellant says that he knows this was because Afzal had contacts with Rashid Dostrum, a powerful warlord. The appellant says that the Judge told him informally that if he converted to Islam then he would be able to help him.
16. Two days later, men came to the appellant's house and killed the appellant's brother Sanjay. Following the appellant's brother's funeral men arrived at the appellant's house. The appellant's sister-in-law was present and began to scream at the men that they had killed her husband. The armed men forcibly took the sister-in-law with them and began shooting at the rest of the family. A few days later the appellant found the body of his sister-in-law outside his house.
17. The appellant and his family left Afghanistan in November 2002 travelling from Kabul to Jalalabad by bus and then crossed into Pakistan by bus. The appellant remained in Pakistan for seventy days and then left the country via Karachi airport with the assistance of an agent. The appellant travelled to a

number of unknown countries before being placed in the rear of a lorry and arriving in the United Kingdom on 10 February 2003."

18. Subsequently in the determination in recording the evidence given at the hearing, the Adjudicator notes that the appellant stated in evidence that when he left Kabul there were not more than 100 to 200 families of Hindus there, probably a maximum of 1,500 Hindus compared with 50,000 to 60,000 during the communist regime. He agreed that he did not personally know Dostrum and had never been threatened by him but said that Afzal had contacts with him and this was why he could not obtain a fair Court hearing. Paragraph 27 of the determination records the evidence given in cross examination as to the incident when his brother was killed very shortly before the departure of the claimant and his family, as follows:

"The appellant said that when his brother was killed he was at his shop with his mother and father, two brothers and their families. The appellant agreed that his brother was the only person to be shot and killed and that the men did not take the papers concerning the shop on that occasion but returned a few days later. The appellant said that his brother was killed because of a number of factors including the dispute concerning the ownership of the shop and also because of his religion. It was put to the appellant that if the source of the dispute were religion then the men would have killed other members of the family. The appellant said that he had already lost his shop, his brother and sister-in-law and that if he had remained in Afghanistan then they would have taken one of his daughters. The appellant said that the precise cause of his sister-in-law's death was not known, there were no signs of torture or bullets and the family assumed that she had been strangled by her own shawl. The appellant said it was possible that she had committed suicide."

19. He claimed he would be at risk of further persecution in Afghanistan even though the former owner of the shop had now taken possession because they are influential people who were his enemies.
20. As we have already noted, the Adjudicator states at paragraph 34 of her determination that she accepts the core of the appellant's account as credible. She expresses the view that his difficulties under the Northern Alliance relate to a property dispute pure and simple and have no religious element.

21. Dealing with the question of whether he can seek redress from the Courts, the Adjudicator says this at paragraph 38 of her determination:

"The appellant says that he cannot seek redress from the Courts however, the first Judge rescinded the possession order obtained by Afzal and accepted the appellant's legal right to ownership. The second occasion the appellant went to Court, he went to complain about threats received by Afzal and was therefore seeking a different remedy from the Court, it may be that the Judge was unable to assist him on this occasion because the matter had become a criminal matter. In these circumstances, it may be that he should have first complained to the police authorities and the incident could have been fully investigated. I do not accept that the appellant has been denied a fair hearing in Court and do not accept that the second Judge refused to assist the appellant because of his religion."

22. The Adjudicator gives no reason whatsoever for the rejection of two elements in an account which she found generally credible as appears in the last sentence in paragraph 38. Nor does there appear to have been any consideration of the reality of the provision of protection by the authorities to people in the appellant's position in what she says earlier in that paragraph. The grounds of appeal may be briefly summarised as follows: (a) that the Adjudicator failed to consider that under Article 3 no Refugee Convention reason arises; (b) the Adjudicator failed properly to consider the objective evidence as to the failures in the justice system in Kabul, coupled with the degree of societal discrimination against ethnic minorities.

The Situation of Sikhs and Hindus in Afghanistan

23. It was the principal submission of both Miss Jones and Mr Saleem that Sikhs and Hindus formed a persecuted minority in Afghanistan because the level of discrimination against them is such as to engage both the Refugee Convention and Article 3 of the European Convention. On this argument, it would be a breach of the United Kingdom's international obligations to seek to return any Sikh or Hindu to Afghanistan.
24. For the Secretary of State, Mr McGirr did not dispute that Sikhs and Hindus as a class are the subject of discrimination in Afghanistan, as is amply demonstrated by the international background evidence including that summarised in the current CIPU report before us of October 2004. It was his case, however, that the UNHCR guidance was correct and that whilst members of these communities fell into the category of those who might

be in need of international protection, whether such surrogate protection was in fact required depended upon the individual circumstances of each claimant and not simply their membership of a potentially disadvantaged class.

25. We have already noted that the position of Afghanistani Sikhs has been the subject of consideration by the Tribunal in three recent cases of which two, namely *IB and TK* and *KK* were reported decisions of the Tribunal. In both those decisions the Tribunal accepted that RS should be treated as a reliable witness of fact in relation to the situation of Sikhs in Kabul. Although *KK* made it clear that this conclusion was reached absent any other evidence to the contrary, it was part of Miss Jones' submissions to us that it should not now be open to the Secretary of State to go behind those decisions and that the general reliability of RS should be taken to have been established by them.
26. That is, in our judgement, an unsustainable proposition. First, neither of those decisions was issued for the purposes of country guidance generally and so can lay no claim to the special cachet to be afforded to country guidance decisions of the Tribunal. Secondly, it ignores the clear restrictions on the scope of country guidance decisions of the Tribunal set out by the Court of Appeal in *SK v SSHD* [2003] EWCA Civ 841 which underlines that findings of fact in relation to a country situation must necessarily be related to the particular date at which they are made and be dependent on the scope of the evidence which was before the Tribunal in question. In the present appeals, the Secretary of State sought to challenge the credibility of RS as we shall set out below by way of later evidence and that is a course properly open to him. The purpose of country guidance cases is to avoid the necessity for fresh decisions on the same material in situations of common application in a particular country. They are not binding on Adjudicators but it will be an error of law for an Adjudicator to depart from country guidance issued by the Tribunal unless he can show proper reasons for so doing on an evidential basis in the specific appeal being considered, either because of later evidence or because he has before him relevant evidence which was not drawn to the attention of the Tribunal at the time they gave their country guidance.
27. In *IB and TK* the Tribunal noted that the evidence before it from RS (the statement of 3 December 2003) was not inconsistent with the general tenor of the international reports, to which detailed reference was also made, but that it served to flesh out that general evidence as regards the position of the Sikh community in Afghanistan.

28. The determination in *IB and TK* was promulgated on 20 May 2004 where the background evidence (summarised at paragraph 15 of the determination) was considered at length at paragraphs 20 to 40 of that determination and, subject as modified below, we adopt the analysis and reasoning in relation to that background evidence upon which reliance has also been placed in the current appeals.
29. In that case the Secretary of State had conceded that *IB*, who like the first and second appellants before us came from Jalalabad, had a well-founded fear of persecution in his home area so that his appeal turned on whether it would be unduly harsh to expect him to relocate to Kabul with his young family.
30. The Tribunal's general conclusions as to the situation of the Sikh community at that date were set out in paragraphs 38 to 40 of the determination as follows:

"38. Before we can consider the situation of each appellant, it is appropriate to give our views in respect of the situation of the Sikh community in Afghanistan generally. The evidence which we have considered above certainly points to a situation of general societal discrimination and of interference with economic and educational rights in respect of which the state does not appear to offer adequate protection or provision. Because of the concession made by the respondent in the case of *B*, we do not have to consider the evidence other than in relation to Kabul but there is no reason to believe from the evidence that the situation of Sikhs elsewhere in Afghanistan, in the limited areas in which they reside, is any better than in Kabul. It may be worse. In Kabul, SIAF might have the ability to provide a sufficiency of protection as KFOR does in Kosovo but it will not intervene unless asked to do so by the interim administration and there is nothing we can find in the evidence before us to demonstrate that the administration does make such requests in relation to the protection of members the Sikh community. Indeed, such evidence as we have been referred to would seem to be to the contrary. Nonetheless, we accept that the mere presence of SIAF is likely to have a practical restraining effect on overt public excess. Considering the high threshold to be reached before the Conventions are engaged, it does not seem to us that these matters, however hard and difficult it might make the lives of the Sikh community, will be sufficient to say that there is a

general risk of persecution or breach of Article 3 rights simply by being an Afghan Sikh. To that extent, we agree with Miss Jones' submission that it is the individual circumstances of each appellant which require consideration and that, as UNCHR accepts, it is not the case that Sikhs as such are entitled to recognition as refugees but rather that they form a class of whom individual members may, on the basis of their particular situation, properly qualify for international protection.

39. To that extent, the material before us does supersede that before the Tribunal in *Gulati* [[2002] UKIAT 02130] and suggests that *K* (Afghanistan) [2003] UKIAT 00057 also may be unsafe in so far as it considers on the evidence there reviewed that there is a sufficiency of protection in Kabul for those whose previous history points to past persecution or adverse interest by members or factions of the Mujahideen, who retain a position of influence in Kabul. They may now have directly conflicting interests with those of returnees seeking to recover their property. Evidence of a past personal animus against a specific asylum applicant would also be of potential relevance.
 40. We do not suggest that this picture of the current situation means there is a real possibility of or a reasonable likelihood of persecution in Kabul for all Sikhs but it is part of the background picture to be taken into account in considering the position of those to be returned to Kabul."
31. The next Tribunal decision relating to Sikhs in Afghanistan was that in *KK* promulgated on 16 September 2004. The evidence there differed from that before the earlier Tribunal in that there was an additional statement of 13 June 2004 by RS – it is not clear whether his statement of 23 April 2004 was also before the Tribunal - in which he set out details of eight specific cases of violence to Sikh or Hindu Afghans in Kabul which had taken place within the six weeks prior to that statement, and in which it was accepted that he was reporting first hand accounts from the victims. The effect of the evidence was summarised at paragraph 19 of the Tribunal's determination as follows:

"Each of these cases involves casual street violence by Muslim Afghans on a Sikh or Hindu. In each case, except for E, there is some indication in the conduct of the aggressors that they have either selected their victim on that basis, or that the victim's traditional dress (wearing a

Turban in the case of a man, or not wearing a veil in the case of a woman) has formed the basis for some particular humiliation. Mr Sheikh [the Presenting Officer] suggested that they amounted to no more than discrimination: we do not agree. While only D, a Hindu, was knocked out, and none of the victims suffered any serious physical injury, these were very nasty incidents of street hooliganism with a religious or racial pretext, which would have been regarded as a grave concern if they had happened in this country".

RS went on to say that the families of the victims were frightened to report what had happened to the authorities because they had lost trust and confidence in the new administration and because the police force consisted of former members of the Mujahideen.

32. The Tribunal in *KK* concluded:

"34. However, Mr RS's evidence, which for present purposes we have decided we ought to accept as passing the *Karanakaran* threshold, does appear to show three things. First, there is a reasonable likelihood of at least moderately serious violence against Sikhs because they are Sikhs; second, that is encouraged, and not guarded against by the perpetrators' perception of the authorities' attitude to it; third, there is nothing to show any specific commitment by either the international forces, or the Afghan authorities, to the protections of minorities generally, or the Sikhs in particular. In our view those add up to a real risk of persecution at the present time: that is certainly not to say that all Sikhs are being persecuted; but, on the evidence available to us (which was not in its present form before the Tribunal in *IB 150*), any of them who are identifiable as such run a real risk of it.

36. Until Mr RS's evidence has been authoritatively confirmed or disproved from some official source, it would be wrong to give our decision (which, so far as it differs from that in *IB 150*, relies on it entirely) the status of a "country guidance" case; but we do have to do the best we can with the individual case before us, and, for the reasons we have given at paragraph 34, we do think there was a real risk of Convention persecution or ill-treatment in this case, even on the minimal findings of fact made by the Adjudicator in the appellant's favour".

33. When the first and second appeals first came before us for hearing in January, the Presenting Officer produced a report by a Mr Neil Roberts, dated 13 December 2004, of his meeting with RS on 1 November 2004. This, on the face of it, suggested that what had been said in the two statements of RS was untrue. Leave was given to the respondent to adduce the report in evidence conditionally upon filing and serving a transcript of the interview referred to in the note or any contemporaneous notes made by Mr Roberts and the respondent was also directed to disclose for what purposes that report was written, who requested it and when such requests had been made. The appellants were given leave to file and serve any further evidence on which they sought to rely and, as a result, on behalf of Mr S there has now been filed a comprehensive statement by RS dated 9 February 2005 at the end of which it is made clear it has been "settled" by Counsel and translated to RS by a member of staff of Mr S's solicitors. This effectively incorporates and supersedes his earlier statements save that it is silent on population numbers, as well as explaining the nature of the interview on which Mr Roberts' report was based. On behalf of the other appellants, their solicitors have also procured RS's further statement of 25 February 2005. Finally, in response to those directions, the respondent filed Mr Roberts comments dated 1 February 2005 on his report of his meeting with RS.
34. It is convenient to deal first with the two reports of Mr Roberts filed on behalf of the respondent. His original report of 13 December 2004 recorded that he conducted an interview with RS on 28 October at the British Embassy having introduced himself as an Embassy official and a member of the Home Office. There was no interpreter as he says that RS spoke English well. He refers to his being the author of the statement of 14 June 2004 to which we have already referred. He records RS as saying that whereas the Sikh and Hindu population in 1992 "totalled 2% of the population (about 30,000)" it had decreased by 2004 to "only 1200 families and about 6,500 Sikhs and Hindus remaining". He then records RS as saying that cremation is allowed and practised and that RS showed him a letter from the Mayor of Kabul authorising Hindus and Sikhs to continue to cremate their dead; further there was no bar to attending the temple in order to worship and he is recorded as saying that twice a day up to 1,200 Hindus and Sikhs gathered at his Gurdwara to practise their religion. Mr Roberts noted he was unable to attend RS's Gurdwara as invited because of a major security alert. He did complain that many Hindus and Sikhs had had property wrongly taken from them by the Mujahideen but that the majority had documentary evidence of land ownership and could pursue their claims in Court. RS said property theft affected all religions. As to education, he said the Afghan government had recently founded a Hindu/Sikh school with four teachers. He said that RS

sends his children to the Amani High School which is considered by most to be the best school in Kabul and RS stated there were no problems for Hindu or Sikh school children in receiving an education comparable with other Afghans. On the subject of elections, no Sikh or Hindu encountered any problems in registering or voting in the Presidential election. RS had been a member of the Loya Jirga until recently and intended to stand again at the next election. He welcomed the electoral success of President Karzai. He also recorded RS as saying that until recently there were difficulties in relation to crime and security in the area of Kabul where most Hindus and Sikhs live but that "most of the problems related to general criminality and were not targeted at any religion or ethnic minority". Since the present Minister for Defence had moved into the area security had improved by reason of extra security and road blocks and RS is recorded as saying there were now hardly any crimes in this region of Kabul and that Hindus and Sikhs were able to move and travel freely. He was further recorded as saying than any type of criminal act against Hindus or Sikhs tends to go unreported to the police as there was a natural mistrust of any Afghan in authority but he accepted that such reports should be made and said he intended to advise his congregation to begin a process of reporting any wrongdoing. Mr Roberts then concludes as follows:

"From my conversation with [RS], I am unable to find evidence of discrimination by the state or other parties in Kabul. [RS]'s report was written nearly 5 months ago, and security seems to have improved in the area where the majority of Hindus and Sikhs live. However, throughout the length of our conversation, he did not make any comments that suggested that there was discrimination even at the time of his written statement. In the areas of crime, education, political representation, religious freedom and property rights, [RS] stated that there was no discrimination of Hindus or Sikhs based on their religious or ethnic background."

35. As we have said we were concerned as to the way in which this report had been prepared and gave directions for there to be further details filed and served. Our concerns arose on two bases: first, that if Mr Roberts' report were accurate, it would appear that RS was now saying that what he had previously said in the documents which had been produced to the Tribunal was not true; secondly, the claims that there was no discrimination whatsoever against Sikhs or Hindus on the basis of their religion or ethnicity clearly flew in the face of the current CIPU report as well as various international reports including those derived from UNCHR.

36. In his subsequent comment on his report dated 1 February 2005, Mr Roberts says that he would now amend the conclusion which we have quoted above by excluding the first sentence saying that he was unable to find evidence of discrimination by the state or other parties in Kabul, accepting that this statement is open to misinterpretation and is not supported by the report "as brief as it is" and that, were he given the opportunity to do so, he would not make that statement again. He states that although he had been asked to gather information

"that would provide a more recent, disclosable report than [that of RS of 14 June 2004] which indicated either that effective protection would be available to the Sikh community in Kabul, or that RS's report was accurate"

his interview, which he estimates lasted about 30 minutes, was of an informal nature in which he took occasional notes which he says were not comprehensive and that he used those notes as a basis of the report which he wrote, having taken the headings of the issues he raised from those matters set out in the 14 June report. He did not send a copy of the draft report to RS and did not ask him to confirm that the report which he had prepared was an accurate portrayal of RS's views.

37. In his two statements made in February 2005, RS refers to his interview with Mr Roberts. The latest statement says in this respect simply that he has read the report of 13 December 2004 and "I do not confirm it is my whole statement". In his statement of 9 February 2005, he deals with it in more detail. He says his recollection is that the interview lasted for about 15 minutes and he regarded it as an informal interview as Mr Roberts and his assistant did not take notes of his replies to their questions, nor was the interview tape recorded. His recollection was that he was asked about four questions at interview and he did not have the benefit of an interpreter. He says that he was asked about the problems that Sikhs and Hindus were facing in Kabul and produced correspondence with the office of President Karzai relating to the problems they were experiencing about cremation. He says he was asked whether Sikh and Hindu children could go to public school in Kabul and replied that they could do so but that no further questions were asked about that issue. Beyond that RS does not deal with what took place at this interview.

38. It was Miss Jones' submission that little or no weight should be placed upon Mr Roberts' report in evaluating the evidence of RS. Having regard to the clearly informal and curtailed nature of the interview, we find it difficult to regard it as an exercise which was seriously intended to seek to establish the true position of Sikhs and Hindus in Kabul and Afghanistan generally. Our concern in

this respect is enhanced by the fact that Mr Roberts now clearly accepts that insofar as his initial report states that there is no evidence of discrimination against Sikhs or Hindus in Afghanistan it cannot be regarded as accurate. The Tribunal had made clear that it regarded RS's earlier statements as evidence properly to be taken into account of the situation of Sikhs in Kabul and, indeed, in *IB and TK* the general background evidence other than that of RS was explored at some length so that the basis of the Tribunal's concerns would have been very apparent to any one who had taken the trouble to read its determinations which, presumably, gave rise to the interview which did take place in late October. Nevertheless, whilst we do not consider that Mr Roberts' conclusions, whatever they may be having regard to his second report, are to be accorded any particular evidential weight, it would be wrong to discount the record of the interview in our consideration of the reliability of RS as a witness. His February statements make it clear that he does not challenge the accuracy of Mr Roberts' record of what he said at the interview but simply asserts that because of its nature it provides only a partial instead of the full picture. Whilst that may be so, it remains relevant to our evaluation of his evidence that: (a) at his Gurdwara some 1200 worshippers were able to assemble for a particular ceremony in October 2004; we note that he appears to be mistaken as to Mr Roberts' attendance pursuant to the invitation he had issued but place no weight on this because it may well have been a not unreasonable assumption based on an earlier accepted invitation to so crowded an event; (b) that there was ongoing dialogue with the Mayor of Kabul on a formal basis about the problems of cremation; (c) that he accepted the court mechanisms for settling land disputes existed and that property theft was a generalised problem not confined to Sikhs and Hindus; (d) he had been able to secure satisfactory educational facilities for his son and that there was no legal restriction on Sikh and Hindu children attending state schools; (e) that the government had founded a school for Sikhs and Hindus (presumably in Kabul because all his evidence is directed to the situation there); (f) that Sikhs and Hindus had not been impeded in exercising their constitutional voting rights; (g) that most security problems were the result of general criminality not targeted at any particular group or sector of society; and (h) that the security situation in his own part of Kabul had substantially improved since the Defence Minister had moved there. It is also relevant to our evaluation of his reliability that none of this information was contained in any of the three statements that preceded the interview although RS does seek to deal with certain of the issues in his expanded statements made in February 2005.

39. In both *IB and TK* and *KK* the Tribunal was mindful of the need to bear in mind that RS could not be regarded as an impartial

witness. Indeed he expressly made clear that he was seeking to speak for the Sikh minority of which he was a member. What we have recorded in the preceding paragraph serves to underline the need to ensure that what he says is not to be regarded as partial, in both senses of that word, and requires careful weighing against the general background evidence. A further limitation on the scope of his evidence is that it relates, as he makes clear, only to the situation in Kabul of which he can claim first hand knowledge. The most he can say (and such a reference appears only in his latest statement) as to the situation outside Kabul is that "there are often reports of shootings and deaths in Afghanistan, and for [sic] Sikhs and Hindus in particular". No such reports are before us. We note, however, that in none of his statements does he claim that any Sikh or Hindu in Kabul has been shot or killed and the only examples of ill-treatment given, as opposed to generalised claims, are those set out in the statement of 14 June 2004 to which we will refer later. Finally, there are some concerns as to his consistency which is, perhaps, most noticeable in the way in which he approaches the numbers of Sikhs and Hindus in Afghanistan. Although it is clear from the country reports that there is no agreement on this issue, one would expect one witness to be consistent in his own approach. Surprisingly, RS is not. In the first statement (December 2003) he says the number of Sikhs and Hindus in Afghanistan has decreased to around 300 families in Kabul; in the April 2004 statement he says that in 1992 there were over 30,000 Sikhs in Kabul but that there are now only about 3000 Sikhs in the whole of Afghanistan; by June 2004 "there are no more than 1500 families" who "are living in the temples and we cannot afford to maintain these people"; although there is no reference to population numbers in the fourth statement, by the time of the last statement (25 February 2005) "there are approximately 1200 Sikh and Hindu families and about 6,500 in Afghanistan as a whole". It is right to add that in June 2002 UNOCHA (the United Nations Office for Co-ordination of Human Affairs) estimated there were 1000 Sikhs in Afghanistan of whom about half were in Jalalabad but in July 2003 UNHCR said there were about 3500 Sikh and Hindu families mainly in Kabul, Ghazni, Kandahar, Helmand and Nangahar Provinces.

40. In his latest statement RS treats Sikhs and Hindus in Afghanistan as falling to be treated similarly. He has made clear from his first statement that he regards himself as speaking on behalf of both communities to whom he says he reports the results of his dialogue with the Government. Mr McGirr said that he did not seek to suggest that there was any difference in the treatment of Sikhs and Hindus there and, indeed, that approach is borne out by the background evidence which generally treats both communities together and identifies them in one report as having "united in adversity" in contrast to the situation which

exists in India where they must be regarded as separate religious communities. According to RS, the degree of that unity in adversity extends to their using the same places of worship now and there is general background evidence that the number of Sikh Temples in Afghanistan has been drastically reduced by the general damage which occurred to the infrastructure between 1992 and 2002. RS says that there is effectively only one fully functioning Gurdwara in Kabul out of the former eight there but another is partly functional whilst the remainder require rebuilding. It is one of his complaints that neither national nor international funding has yet been provided for this purpose. There is no specific evidence as to the situation outside Kabul.

41. The matters which RS identifies as adversely affecting the Sikh and Hindu communities relate to freedom to practice their religion, educational facilities, economic prospects, and lack of sufficiency of protection from the state both in relation to property claims and to the personal safety of individual members of the population. We propose to deal briefly with each of these heads.
42. The primary difficulty in relation to religious observance, apart from the reduction in the number of available Gurdwaras noted above, is stated to be in relation to the Sikh and Hindu practice of cremation of the dead. This was not a matter raised by RS in any of his first three statements but appears to have developed from the issue raised at his interview with Mr Roberts. He makes clear that it has been the subject of correspondence with President Karzai which, indeed, he produced to Mr Roberts. He says in his statement of 3 February 2005 that the official position is that Sikhs should be allowed to carry out funeral rights according to their religious custom, which would, of course, be in accordance with the constitutional provisions as to freedom of religion and its exercise. But, RS then says that the reality is that no such facility has been provided by the Government. He explains that they can no longer use the original Crematoria in Qalacha area District 8 of Kabul (which belong to the Sikh and Hindu communities and have been used for decades) because they are now surrounded by houses owned by Muslims constructed in the area since the 1992 Mujahideen government. The greater number of Muslims returning from abroad as refugees has overcrowded the area and the local Muslim community will not permit the use of the Crematoria – cremation, is, of course, contrary to Muslim religious practice which requires a burial of the dead. Accordingly, in recent years his community had, with the consent of the Priest and Trustees, cremated their dead within the compound of the Kart-e-Parwan Gurdwara but the local Muslims who now live around this Gurdwara have also raised objections and have prevented such cremations being carried out. Both these matters have been raised with President

Karzai's office without any provision of an alternative site to date. His last statement, however, makes it clear that there is recognition of the problems with the local population because he says that security guards attend now at cremations and cites one specific instance in January 2005 when members of the local Muslim community sought to prevent a cremation taking place in the authorised ground and those present retreated to the Gurdwara for safety. If this is so, it follows that either the cremation was intended to be at the traditional crematoria (where he complains of difficulties with the local population) or that another site outside the Kart-e-Parwan Gurdwara exists. In either case, it suggests that the government assistance extends to sites other than the Gurdwara in addition to the provision of security to guard against the difficulties with the local Muslims to which RS refers.

43. As to attendance at his Gurdwara, in his June statement he referred to the remaining population being no more than 1500 families "who were living in the temples". It is, however, clear from what is said in other statements by RS that a substantial number of the Sikhs in Kabul have their own properties still. That clearly applies to RS and, as appears below, he also refers to at least 30 families who have returned as having been able to regain possession of their own properties there. At highest what he is saying on an analysis of all his statements is that those without their own homes were living in the Gurdwaras as they had nowhere else to go. Apart, however, from the reference in the June statement which clearly cannot be taken as being accurate in relation to the whole of the remaining Sikh and Hindu populations even in Kabul, the references in other statements make it clear that an unquantified number of Sikhs and Hindus continue to reside in their own homes. RS says that the numbers taking shelter in the Gurdwaras make it difficult for Sikhs or Hindus to attend the Temple to worship twice a day as required by their religion. Nevertheless, he confirms that it was correct, as Mr Roberts reported, that on the day Mr Roberts was invited to visit it was a specific religious festival and some 1,200 members of the community had attended the celebration held within the compound of the Gurdwara. He says, however, that this is not the norm and that only about 100 or so people attend daily. Others were willing to take the risk of attending morning prayers at 6.00 am when most in Kabul were still asleep. Given the ability to host so large a gathering for a specific ceremony, it seems to us that this part of his complaint comes down to the fact, as he claims, that the presence of families within the Gurdwara can be disruptive of religious observances there.
44. In his latest statement he says that his Gurdwara had been bombed by the Muslims although the date of the incident is not specified. He says he complained to the police who recorded

the complaint but failed to investigate it although there were many Sikhs and Hindus then living there as noted above. No effective protection had been provided by the police.

45. In his statement of 9 February RS says that at one time – the date is not specified and there is no earlier reference to such an incident - the local Muslims and their children were regularly stoning the Gurdwara situated in the Shore Bazaar and his complaint to the police produced no assistance. A group of Sikh elders then went to visit the Muslim elders in the local Mosques who called the youngsters before them in the presence of the Sikh delegation and told them that they must not stone the Gurdwara. RS says that they have stopped stoning the Gurdwara but now stone Sikhs and Hindus and their families who enter and leave that Gurdwara. He does not complain that anyone has been hurt by such actions. He says he lodged a complaint about this behaviour at the local police station but it was simply noted and no further action was taken.
46. As to the question of school facilities, he repeats that the reality is that only some 10 boys in his community go to school (aged about 9 to 10 years) and none of the girls do so. There are some 180 children of school age of whom 40% are girls. He says that the reality is that adults from his community are fearful in the streets of Kabul as to their personal safety and that for this reason parents are not willing to take the risk of sending their children to local schools for fear of their personal safety from abuse and abduction by the overwhelming Muslim local community. This stems from the perception of the Sikhs and Hindus that the police will not provide them with any assistance in the difficulties which he says they face in the streets from local Muslims who regard them as "Kawfirs" (non-believers). As we have already noted, RS's own son goes to one of the best schools in Kabul and in his latest statement he says that although there is a school in Baghe-Bala district for Sikh and Hindu children it is not currently functioning because there are no teachers or materials available. He says the school was built 25 to 30 years ago but the local community has been unable to restart education there. Given that such teachers would be from the Sikh and Hindu communities, we are bound to say that this strikes us as odd. It is also at variance with a BBC World News report of 30 October 2002 in Mr S's bundle where, reporting from Kabul, their correspondent says that whilst Hindu and Sikh children were free to attend ordinary state schools, their parents did not send them because the Muslim children abused and discriminated against them on the street and in school so that presently Hindu and Sikh children were being educated at the temples and places of worship. In the same bundle is a report from Religioscope, an organisation unknown to us, of 28 January 2003 which reprints a report of a few days earlier from the Institute for War and Peace

Reporting. This cites difficulties with education and contains the following passages:

"Our children can't study in ordinary schools because the Muslim children tease them for their hair and bracelets", said Avtar Singh, head of the only Hindu school in Kabul and leader of the community in the capital, whose remarks refer equally to Sikhs. "So our children can only study in our temple, where we can teach only four subjects – Maths, English, our own language and religion. We have run a school in a temple in the west of Kabul for the past 35 years. Before the wars, 5,000 students were studying there and others studied in ordinary establishments alongside Muslims." ...

Asked why they did not take their case to the ministry of education, Avtar Singh said, "We want our children to study with Muslims in ordinary schools, with the help of the ministry. But at present we can't because, firstly, our children don't even know their own language, so how can they learn Dari (Persian). Secondly, other children will know that they are different, from their hair, bracelets and names, and will tease them." ...

In Ghazi Ayub Lycee, in the west of Kabul, 13 year old Manish Kumar, a lone Hindu in a Muslim school, said he had experienced no problems and got on well with his class-mates. ...

The principal of Ghazi Ayub School, Sadat, told IWPR, "Hindu boys and girls won't face any problems if they want to come here. Before the wars, half of our students were Hindus, and they all got on well together. We have told Manish Kumar that if he has any problems he should come straight to us."

Deputy Education Minister Zabihullah Esmati said, "Hindus are Afghans, and they have a right to go to school with Muslim children. The doors of every school are open to everyone. If anyone teases or bullies them they can complain to the school principal. And failing that, they can come and tell us their problems."

47. As to economic prospects, it is clear from the general background evidence that although the Sikhs and Hindus were formerly active in commerce, their position was largely eroded during the period of the Taliban and has never recovered from this. Those general reports indicate that they have been subject to extortion on the part of the Mujahideen and RS says that this continues although to a lesser extent because of the depressed financial circumstances of those remaining in Kabul. In his

statement of 9 February he says that Government work is not available to them save in one case of which he is aware which involves an engineer with 25 years specialist experience who does work for the government. Nevertheless, a little later in the same statement when commenting upon the lack of national and international support, he says that Sikhs are forced to survive in Kabul 'by undertaking business activity' and that others survive through charitable donations from relatives abroad. He complains that women cannot find any jobs to sustain themselves and because of the fear of violence on the streets they do not go out of doors, leaving the men to perform any normal outside activities such as shopping. We observe, however, that according to the Human Rights Watch Report of July 2003 discriminatory treatment of women in Afghanistan is a general issue related to gender rather than ethnicity and the matters raised by RS appear equally applicable to the majority of women in Afghanistan according to that report.

48. So far as the provision of a sufficiency of protection is concerned, it is his claim that this fails both on a personal safety and property rights protection basis.
49. In the June 2004 statement considered in *KK* he had given 8 specific examples of violence which had been suffered within the 6 weeks preceding the preparation of that report. It is appropriate to give brief details because of the considerable diversity of the circumstances of each case. RS anonymises them by alphabetic letter and we adopt the same approach. A was a 15 year old going to the shop when stopped by four men who told him to say "Allah-ah-Akbar" meaning Allah is great. When he refused they beat him up, pulled out his hair bun and urinated on it. B was a priest who, when challenged by three men as to where he was going, said he was attending the Temple. He was told it would be destroyed and a Mosque built in its place and when he said that was not possible he was assaulted and his turban removed and thrown on the street. C was a 43 year old lady walking with her young son who was told to cover her head and when she tried to do so she was hit with a baton and her head was cut open. D was a Hindu and identifiable as such. He was singled out by a man for no apparent reason and severely beaten so that he became unconscious until rescued by a passing Sikh who took him to hospital. E was a 22 year old cosmetic seller in the Shore Bazaar Market who tried to recover his goods from a customer who had refused to pay. He sought the assistance of two men patrolling the streets but they refused to help him and beat him with the butts of their guns so that he could hardly walk. F, a female Sikh, was sitting on a bench not far from the Temple when three men made sexual advances to her and told her that they would convert her to Islam if she rejected them. They also said this

would send the message to other Sikh women of the treatment they could expect but before anything further took place a group of Sikhs going to the temple interrupted the men. G was a Sikh in his early 30s going to the cinema when five men tried to take his turban because they said they wanted to play Buskashi with it. When he tried to prevent them doing so he was hit and kicked repeatedly in the head and back so that he had to go to hospital for treatment. Whilst H was cycling to the market three men said that they had to search him. He did not refuse but when they found nothing on him they took his turban off and urinated on it.

50. In his latest statement, RS says that complaints were lodged with the police in the cases of C and G but they simply took a report and filed it without taking any further action. In the other cases the victims were unwilling to make any report for fear of further difficulties. He refers also to a recent incident on 5 October 2004 when two Hindu girls went missing in Kandahar and says they were forced to convert to Islam and marry two young Muslims. Two days after their abduction a procession on the street by the local Muslims celebrated their conversion but the authorities have failed to take any action.
51. The other area of complaint of lack of sufficiency of protection relates to the seizure of properties by the Mujahideen which he says was not raised at all with him by Mr Roberts, any more than the issues of employment and the ability of Sikh and Hindu Afghans to survive on their own in Kabul. He says that he is aware of some 60 to 70 Sikh and Hindu families who have returned from abroad of whom some 30 have succeeded in regaining their houses by payment of bribes to officials and their Muslim occupants. Nevertheless, he says there remain great difficulties in the recovery of property and he cites one specific example of a Mujahideen Commander, Amen Ula Guzar, who occupies a house in the Sikh area of Kabul belonging to AS, a deceased Sikh. Guzar refuses to hand over the property to the family because he says the owner is now dead. Monies have been paid to officials on several occasions for their assistance to get the commander out but to no avail. He says he will not leave until he is paid for having occupied the house since 1996 and looking after and maintaining it. He is not prepared to pay any rent for his use of the house. He is in a powerful position in government and the authorities cannot assist. We note at this point, however, that the CIPU Report makes specific reference to land disputes and the situation of Sikh and Hindu returnees at paragraph 6.90 as follows:

“In a report on land issues published in September 2003, UNHCR noted that there were some complicated cases regarding the land of members of ethnic and religious

minorities who had returned to Afghanistan. They had been forced to sell their lands or property during the Mujahideen or Taliban regimes and now wished to recover them. The report noted "Their only legal claim is that they had been coerced to sell their land at the time, which would be difficult to prove. For example, members of the Hindu minority group in the provincial capital of Helmand, Lashkargha claim that they were forced to sell their shops in the main Lashkargha bazaar to Mujahideen commanders prior to their expulsion from the area. These groups are currently trying to recover their property, although most of them do not hold documents evidencing their title. Their cases are currently pending with both the District Shura and the district [sic]."

It will immediately be apparent from this passage that the following points emerge: (a) that some members of ethnic and religious communities are returning; (b) that they include those who may expect difficulty in regaining their former homes; (c) that they are prepared to take legal action to do so in the Afghan courts; (d) that the identified triable issue may be a sophisticated one relating to concepts of coercion and the setting aside of apparently valid transactions. In the one specific example given by RS, there is similarly the legal issue of right to inherit which would require evidential proof so that it is perhaps hardly surprising that the person in possession will not simply concede the claim made by the family, quite apart from the fact that he appears to be raising issues as to entitlement to compensation for repairs and improvements. Significantly, the occupier does not appear to say he will not leave but is imposing conditions on his doing so.

52. Finally, he says that he is aware of forced returns of failed Hindu and Sikh asylum seekers from abroad. He is aware of eight single males having arrived at different times all of whom came initially to Hezkuvrawa but as to whose present whereabouts he has no information as they are no longer there. There was also one Sikh family deported from the Netherlands whom he saw for 15 days until they too disappeared. What has happened to these returnees is simply not known to RS and whatever he says in that respect is mere speculation. He does not say from what part of Afghanistan they originate but can say no more than that they are no longer in the temporary accommodation they obtained on their return.
53. Before we consider the individual circumstances of each appellant, we must deal with the primary submission on behalf of all the appellants that simply by reason of their Sikh or Hindu ethnicity there is a real risk to them on return to Afghanistan either of persecution for a Refugee Convention reason or of

breach of their protected human rights under Article 3 of the European Convention. So far as the Refugee Convention is concerned, it is not necessary that any such risk be solely by reason of ethnicity or religious opinion – it will suffice if a Convention reason forms a real part of the reason why there may be a real risk of persecution.

54. Before we consider the position of Sikhs and Hindus specifically, it seems to us that it is appropriate to look at the general situation in Afghanistan as shown by the country evidence.
55. The effectiveness of the judiciary and the legal system in Afghanistan is considered in the October 2004 CIPU Country Report at paragraph 5.46 onwards. That paragraph notes that the Europa Regional Surveys of the World for South Asia 2004 recorded that "after 23 years of civil war, which ended in December 2001 with the defeat of the Taliban, there no longer existed a functioning national judicial system." That broad view is reinforced in the subsequent paragraphs of the report. At paragraph 5.48, it is noted that UNCHR said in July 2003 that:

"The country's legal institutions suffered from lack of resources while the record of laws and regulations has been destroyed and much has disappeared during the years of conflict, leaving practitioners unclear as to the substance of the country's law. Although court systems exist from district and national levels, the influence of commanders and powerful figures often renders it impossible for fair and just decisions to be reached over land disputes".

But, the Constitution adopted in January 2004 confirmed that the judicial branch was an independent organ of state, providing also at Article 3 that no law could be 'contrary to the beliefs and provisions of the sacred law of Islam'. By 19 March 2004 the UN Secretary-General was able to report to the Security Council:

"There have been several achievements in justice sector reform. The decree of the reformed code of criminal procedure was issued in mid-February [2004], providing a versatile system under which jurisdiction can be shifted to provincial courts from district courts where necessary. This should enable the gradual transfer of criminal cases to the formal justice system, though it is conditional upon an effectively functioning provincial infrastructure and the rehabilitation of district courts. Construction of provincial courts is under way in nine capitals, while the prioritisation of district courts will be determined by the Provincial Stabilization Strategy. On 21 February [2004] a two week training-of-trainers seminar was initiated with senior judicial

and law enforcement personnel on the new criminal procedure code. In addition, 450 judges are being trained by the International Development Law Organization, an inter-governmental organization that promotes the rule of law and good governance."

56. Paragraph 5.64 notes that a Danish Fact-Finding Mission in March/April 2004 reported that "almost all sources consulted by the delegation were of the opinion that no rule of law existed in any place in Afghanistan not even in Kabul. UNCHR found that there is no rule of law in any part of Afghanistan, but local mechanisms for the solving of conflicts exists. People with influential relatives are likely to find their way out of a conflict."

57. Paragraph 5.65 records that the same Danish Mission reported:

"UNAMA was of the opinion that institutions, which should protect people against assault are not powerful enough to do so if the perpetrators are warlords or powerful persons from the government or the police force. UNAMA had knowledge of citizens who have out standings (sic) with powerful individuals and therefore were not safe in Kabul, and have had to flee the country. There are cases where parents and siblings to the persecutors have been involved too. ... the Italian Embassy explained that there are major geographical differences in the ability of the legal system to provide rule of law and justice. The system is not satisfactory anywhere in the country and even in Kabul, which is regarded as the best functioning area, considerable improvements are necessary. Everywhere in the country Judges are subject to interference in their work. No Judge is free to make a ruling solely according to his own judgement. This lack of independence also applies to the police. The source pointed out that the legal system including the police and other administrative offices are influenced by the general security situation in the country."

58. The position is equally unsatisfactory in relation to legal rights and is of application generally as recorded at paragraph 5.68 onwards in the CIPU report. The Danish Fact-Finding Mission has again been quoted extensively and paragraphs 5.74 and 5.75 of the CIPU report are relevant in this context:

5.74 According to the Danish Fact-Finding Report,

"The lawyers Union of Afghanistan stated that the Court system is almost in a state of chaos. When meeting in Court, it is possible to be confronted on the first day with a Judge who has trained only in religious law. On the next

day it might be a Judge who has a law degree but uses Sharia law to protect himself against criticism. As a consequence, women continue to be imprisoned for infidelity. The source expected that in time the law reforms will have an impact that will change the present situation. The source explained that corruption is so widespread that access to legal institutions and to rule of law do not exist. Only a few percent of the cases come out with a just or correct ruling. Anybody can start a legal case, but it is the most powerful or influential person who will come out as the winner of the case."

5.75 UNCHR informed the Danish Fact-Finding Mission that

"The state cannot offer any protection for individuals against persecution and violation. As an Afghan, you have to go to your network to find protection. In spite of the efforts to establish a legal system with a functioning police and courts, warlords continue to rule. This also applies for conflicts concerning land." According to UNAMA, "Court sentences are not enforced if the local warlord does not agree with the ruling. It was pointed out by the UNAMA that judges are intimidated in several districts. In many areas, judges and prosecutors are in need of protection."

59. A little later at paragraph 5.78, CIPU refers to the Freedom House Afghanistan Country Report 2004 as saying:

"As law-enforcement and judicial institutions function at varying levels in different parts of the country, procedures for taking people into custody and bringing them to justice do not follow an established code and often rely on the whims of local officials. Authorities subject Afghans to arbitrary arrest and detention, often with the aim of extracting bribes in exchange for a prisoner's release... According to Article 28 of the criminal procedure code of 1965, which remains in force, police can detain suspects without charge for up to 24 hours during the course of an investigation, which can be extended for up to a week if the police apply to the attorney general's office. However, in many police detention centres, suspects are routinely held for weeks or months on end. This is in large part due to the lack of a functioning judicial system, as well as inadequate police infrastructure in terms of personnel, transport equipment, and holding facilities, especially in the remoter provinces".

60. On the subject of internal security (CIPU paragraph 5.82 onwards) paragraph 5.85 notes the July 2003 UNCHR position paper as saying:

"The absence of systematic or multi-lateral decommissioning and disarmament, the lack of law enforcement, coupled with the war economy, have given rise to banditry and criminality. Insecurity is high on several roads, including on some of the main road links. Road travel has become more dangerous in certain areas, with money being demanded by bandits and by individual commanders through the establishment of checkpoints or ambushes."

At paragraph 5.88, attention is drawn to the report to the UN Security Council of 23 July 2003 where the Secretary General stated that the overall security situation throughout Afghanistan remained fragile and, in many areas, exhibited signs of deterioration. He referred to localised tensions between rival factions in the north having taken a dramatic turn for the worse and makes specific reference to General Dostrum as one of the warlords concerned. As to the position in Kabul, the UNCHR stated in July 2003 that although the security situation there was better than elsewhere because of the presence of ISAF, "certain persons could still be targeted in Kabul, if the persecutors intend to target them".

61. Paragraph 5.128 of CIPU records:

In May 2004 the European Council on Refugees and Exiles advised that:

"In Kabul, the security and human rights situation has been, to a limited degree, alleviated by the presence of the International Security Assistance Force (ISAF) and by the significant international presence in the capital. However, the Afghan government continues to lack effective control over Kabul, and efforts to create a new national army and police force and to reform the judicial system throughout the country remain at an embryonic stage. It is clear from human rights and other reports that the militia, which carry out the primary policing function in the capital, offer the population no protection from human rights abuses. Beyond Kabul, the absence of an effective system of law and order means that the various power holders can act within impunity. The population at large is thus subject to the arbitrary use of power and the government is not in a position to accord protection from abuses of such power. Allegations continue that communities are often deprived

of their basic rights and are victims of serious human rights abuses, sometimes by the police themselves."

62. Dealing specifically with the police, (CIPU paragraph 5.183 onwards) the first paragraph quotes from a report issued in March 2003 by Amnesty International to the effect that much of the police force consists of former Mujahideen with extensive military but little or no professional police training or experience, and that the Mujahideen are accustomed to acting with impunity. Whilst there is international response of training and the trained police have contributed to stability, public confidence and maintenance of law and order, the UN Secretary General noted in December 2003 that it was at an early stage of the process and that the number of trained police remained too low and ill equipped to provide the full support needed by the central government. According to paragraph 5.196, the UN Secretary General was noted as reporting on 12 August 2004 that:

"The need for Afghanistan to have a trained and properly equipped national police force is acute, both for, long term estate building and in particular in the context of the upcoming elections. The existing force suffers from a shortage of trained policemen and equipment and weak command and control structures. Efforts to train a national police force have intensified through the operation of five regional training centres nationwide. These are in addition to the German-supported Police Academy and the United States-led Central Training Centre, both in Kabul. To date some 19,500 police have received training ... Of those trained, some 4000 have received at least one year's training at the Police Academy. The target strength of the force provides for a core of 47,500 national police, 12,500 border police and 2,500 highway police to be reached by the end of 2005. "

We note that this progress has been achieved from a base where, as Amnesty International reported in March 2003, there had been no civilian police force in Afghanistan throughout the last 23 years of armed conflict.

63. In the light of this general evidence as to the country situation, it is hardly surprising that in the general section dealing with human rights issues, paragraph 6.5 of CIPU notes that police in Afghanistan were committing human rights violations according to Amnesty International in a March 2003 report, which also talked of many men and children alleging ill-treatment and torture by the police, predominantly during interrogation, reflecting the lack of basic investigative skills and resources available to police and a general tolerance of violence in

society. The general section of CIPU cites similar concerns on the part of Human Rights Watch (reports of November 2002 and July 2003) and the USSD Report of 2003 which, whilst noting some improvement in respect for human rights in 2003 acknowledges that many serious problems remain, especially outside Kabul.

64. It seems to us clear from this general evidence that in a tribal society local family, tribal, cultural and religious networks play an important part in the means by which ordinary citizens achieve some form of security in their lives. Whilst there is a common criminal code and a court system to enforce it, it is also clear that both systems are in their early days of functioning and that they may be ineffective to afford protection against someone in a position of power in the community. Whilst there have been clear advances in the provision of policing, the country has been without a functioning police force prior to the fall of the Taliban for very many years so that the institution and its ethos is having to be built from the beginning. Whilst the general evidence points to a rapid deployment and expansion of the police force, it is clearly still in its early stages and there remain general problems of criminal law enforcement within the new system. In parallel with the new criminal legal system, there is also a functioning civil system although it is considerably handicapped by lack of resources and the effects of having fallen into decay over the preceding period of general unrest within the country. These are, however, general problems, affecting Afghan society as a whole and the issue which we must consider is whether there is any evidence that the state discriminates against its Sikh and Hindu minorities.

65. The tenor of RS's evidence is that the state does not offer practical assistance such as the provision of crematoria, the funds for rebuilding the Gurdwaras and the provision of work and education although he accepts that these communities are free to practice their religions under the Constitution and there is clear evidence that they do so in practice. It is equally clear that there is no discrimination in law in respect of education and that Sikh and Hindu children have the right to education in state schools like any other Afghan citizen. Clearly some do take advantage of their right to state education. Moreover, there is no government objection to the existence of schools specifically for the minority Sikh and Hindu communities. RS makes it clear that many children in those communities do not attend the state schools for fear that they will suffer at the hands of Muslim fellow pupils but that is a matter of societal rather than state discrimination and no examples of such discrimination are given by him in this respect. Indeed the only clear evidence on this point from the Institute for War and Peace Reporting to which we have referred above and, significantly, puts the issue in far less extreme terms than does RS. It is to the effect that although there

may be such a fear on the part of the community (and we note it is expressed in terms of teasing rather than physical danger at a number of points in that report), it is not necessarily the predominant factor and in the case of one secondary school in Kabul at least does not in fact exist. His complaint as to lack of provision of work opportunities within the State even taken at its highest does not in our view amount to any evidence of state discrimination in this respect. There is no evidence as to what employment opportunities exist in the public sector or that access to them is determined on a discriminatory basis. Such a complaint must equally be tempered by the reference which he makes to Sikhs engaging in business activity and the access to financial support within their own community both in Afghanistan and abroad. Taking into account that from a refugee law perspective these are in Professor Hathaway's classification (see Chapter 4 of *The Law of Refugee Status*) mainly complaints about third level rights – e.g. work, education and medical care – and that there is no sustainable evidence of any discrimination on the part of the State but rather the contrary – we do not consider that such matters either individually or cumulatively demonstrate any conduct on the part of the State which is either persecutory or in breach of Article 3 rights. Even taking RS's evidence at its highest there is no evidence of persecution on the part of the State or its emanations. Having carefully reviewed all the evidence before us, the broad submission contended for can succeed, if at all, only on the basis of the behaviour of non-state actors.

66. In this respect, it seems to us that the claims are twofold: first, that the level of societal discrimination against Sikhs and Hindus by the local Muslim population is such that all Sikhs and Hindus in Afghanistan are at real risk of persecution or Article 3 ill-treatment; secondly, that the power of individual warlords or persons of similar local authority is such as to pose a similar risk to these minority communities. The second proposition is clearly unsustainable. It depends upon experiences which are specific to individual members of the communities and as such must be assessed on a case by case basis. There is no evidence of generalised persecution on their part against the minority communities as such. The first proposition is one which really derives from the specific examples given by RS in the June 2004 statement. But, the appellants face considerable obstacles to demonstrating such a generalised risk from the Muslim population. The claims of generalised attack are limited even on RS's evidence. There is the one incident of the bomb being thrown into the Gurdwara but it is not suggested that anyone actually suffered injury on that occasion and it is clearly an isolated event – it is likely to be a reference to the incident in October 2003 which resulted in an open letter from Human Rights Watch to President Karzai noted at CIPU paragraph 6.91. There is

the complaint of one incident at an intended cremation ceremony where the mourners were confronted by a Muslim mob but, again, this is an isolated event, the state was providing security guards, it is not claimed that anyone was actually injured and the mourners were able to retreat to their Gurdwara where they were safe. Beyond generalised claims by RS – and as we have made clear there are reasons to approach his evidence with some caution – there are only the eight specific examples in the June 2004 statement. The descriptions of the incidents make it clear that they were opportunistic in nature and suffered at the hands of a very limited number of assailants. No later such incidents have been cited but when he met with Mr Roberts he told him that security in the area in which most Sikhs live in Kabul had improved and that the principal risk was from general criminality, which would clearly apply to the whole population. There is nothing to suggest that any of those assaulted were able to identify their assailants and in the absence of identification it is notorious that there is little more that the police can do. Whilst we note RS's assertion that no action beyond recording the incident has taken place, such complaints are by no means limited to Afghanistan but are frequently a common perception of the victims of opportunistic street crime. The lack of progress in individual cases may equally be the result of the lack of any evidence. Given the structural difficulties faced by the emerging police force in Afghanistan, which must place practical limitations on their ability to follow up complaints of this nature, we are by no means satisfied, even to the lower standard of proof, that the lack of positive results can be ascribed to unwillingness or even indifference on the part of the police to deal with such complaints although we understand this may be the perception of the victims. We note also the accepted increase in security in Kabul referred to above, however it may have come about. Moreover, it is important to consider these few cases in relation to the position of the Sikh and Hindu populations as a whole. The evidence as to the numbers of those populations is contradictory. We do not place any reliance on what RS says in this respect. He has, as noted above, put forward substantially differing estimates. Given their ability to obtain information on the ground from a variety of sources, we consider that the UNHCR estimate is the most reliable which is before us. In July 2003 they estimated there were some 3500 Sikh and Hindu families in Afghanistan (see paragraph 39 above). Assuming, perhaps conservatively, an average of 5 to 6 persons per family, this would suggest that the Sikh and Hindu communities are in total in the region of 20,000 persons of whom a substantial proportion are in Kabul. Against those numbers, the specific cases cited do not support a risk of persecution which is general to the entire community but rather point to the conclusion that they were simply victims of random and opportunistic attacks. For these reasons, having more fully explored the background

evidence, we differ from the conclusions of the Tribunal in *KK* insofar as they may have found a general risk to Sikhs identifiable as such in Kabul. We reaffirm the conclusions expressed in *IB and TK* that Sikhs and Hindus are not as such at general risk of persecution or treatment in breach of Article 3 rights in Kabul. We are further satisfied, for the reasons which we have given, that this applies generally in Afghanistan. We note that there are significant sections of these communities in other cities and there is no evidence that in general terms their position differs from that of the Sikhs and Hindus in Kabul. There are no reports that any have been killed or tortured because of their religion or ethnicity and the one incident in Kandahar referred to by RS is isolated. There is in our judgment no evidential basis for considering that such communities are generally at risk.

67. We have taken into account in the weight to be given to what he says that RS has been able to travel to and from India apparently at will: in particular, that he makes clear in his statements made in India in February 2005 that he is on holiday there and intends to return to Afghanistan. Such a willingness to return adds to our caution in regarding him as wholly reliable in relation to the severity of the level of discrimination and random physical danger which he claims to exist. We have also taken into account that there is clear evidence that there are Afghan and Sikh families who are returning to Afghanistan, albeit not in great numbers, but that factor also is nevertheless significant in any evaluation of claims that these communities are generically at risk. The information given by RS to Mr Roberts which was not apparent from any of his three preceding reports has also been taken into account by us. It confirms the Tribunal's earlier concerns that his evidence, as being directly in support of the Sikh and Hindu asylum claimants' causes, needed to be approached with some caution. We are satisfied that the information given to Mr Roberts does suggest that we must regard his evidence as generally seeking to put the case of discrimination against Sikhs and Hindus at its highest and, specifically, failing to give due weight to the clear evidence of improvement as the Afghanistan Government establishes itself in the wake of a long period of civic unrest. We are satisfied that there is no question of state persecution and that some steps are being actively taken to deal with societal non-state actor discrimination on the part of members of the Muslim population. The provision of security guards at cremations is of particular significance in this respect in our view. As was said in *IB and TK*, there is no reason to doubt that life for members of the Sikh and Hindu communities in Afghanistan may be difficult and frequently unpleasant but, looking at all the evidence in the round, the levels of discrimination which these communities suffer are not such as to give rise to a general need for protection. As the UNHCR advises, each case must be approached with care

on its own merits, bearing in mind that the Sikh and Hindu minorities are subject to societal discrimination.

68. We turn now to consider the appeals of the individual appellants, dealing first in each case with whether there has been a material error of law on the part of the Adjudicator and, if so, the effect of our general findings in each case.

Findings in Relation to Mr L

69. In the case of Mr L he appeals on human rights grounds only and those grounds have in the submissions to us been confined to Article 3 issues. He and his family had an accepted history of past ill-treatment on the part initially of the Mujahideen, then the Taliban, and subsequently the Northern Alliance after the fall of the Taliban. The first Adjudicator found that the appellant's brother had been detained and killed by Northern Alliance forces with his nephew who had disappeared at the same time. It also appears that the first Adjudicator accepted that it was not until after the fall of the Taliban that the appellant had been punished for failing to close his shop during Muslim prayers. The first Adjudicator concluded, however, that it was not necessarily the authorities who had carried out these actions, and she dismissed his asylum appeal on the basis that he did not show he was then at a current risk of persecution for a Refugee Convention reason. We note that Mr L came from Jalalabad but that the most serious problems affecting his family took place in Kabul. There was no appeal against that decision and the second Adjudicator, correctly applying the ratio in *Devaseelan*, regarded herself as bound by the findings of the first Adjudicator and confined herself to consideration of whether there had been any change in the situation in Afghanistan in the intervening period which would affect the position of the Appellant as someone who on his personal history had been found to have no well founded fear of persecution. On the basis of the evidence before her, it seems to us that it was clearly open to the second Adjudicator to conclude that removal would not be in breach of the Appellant's protected Article 3 rights. Our own conclusion on the objective evidence simply reinforces this. The Appellant has failed to show that there was any material error of law on the part of the second Adjudicator and cannot therefore succeed before us. His appeal is accordingly dismissed.

The Appeal of Mr T

70. Like Mr L, Mr T is from Jalalabad and has no past connection with Kabul. He left Afghanistan prior to the fall of the Taliban. The Adjudicator's determination which was promulgated on 31 May 2004 and in respect of which the CIPU report for April 2004 was

produced to the Adjudicator, is unsatisfactory insofar as there are no factual findings on his account as to the position of the appellant in his home area. That is a fundamental error of law on the part of the Adjudicator because proper findings in relation to the individual situation of a claimant are essential in considering whether he can bring himself within the ambit of the two Conventions. It is an error which cannot be corrected by us and we agree with Mr McGirr's submission that absent satisfactory findings of fact the evidence will have to be heard afresh. It cannot be said that his case is hopeless if he is credible in his claims. This appeal is accordingly allowed to the extent that it is remitted for hearing before an Adjudicator other than Mr P A Grant-Hutchison.

The Appeal of Mr S

71. The determination in the appeal of Mr S was promulgated on 11 December 2003 when, again, the bulk of the country evidence to which we have referred would have been available to the Adjudicator in the then current CIPU report. The Adjudicator accepted the appellant's core account although for reasons which are wholly unexplained later rejects two minor elements in that account, namely that the appellant had been denied a fair hearing in Court and that the second Judge refused to assist the appellant because of his religion. Given the fact that the Adjudicator found the appellant otherwise wholly credible and that the rejection of those two points is, as we say, wholly unreasoned and accompanied in paragraph 38 of her determination by matters of pure speculation, it seems to us that the rejection of those two points is unsustainable on the face of the evidence. In any event, such rejection in relation to the issue of a fair hearing (and, presumably, by this there is to be included the enforceability of the Court's judgment), is wholly contrary to the general tenor of the background evidence which is that those with power are able to treat Court decisions with impunity in any event if they do not like them.
72. We are concerned also with the Adjudicator's finding that there is no religious element in the dispute but that it is a property dispute pure and simple. Mr S's earlier account of his treatment in 1994 by the Mujahideen is quite clearly on the basis of his religion and ethnicity but, in relation to the later property dispute on the facts accepted by the Adjudicator an Uzbek man was unlawfully seeking to recover possession of property which he had voluntarily sold to the appellant. The Adjudicator does not appear to have considered whether the appellant would have been treated in the way in which she accepts he was treated had it not been for his Hindu ethnicity. Those actions seem clearly to have been carried out on a basis of impunity from State interference or redress. The extreme nature of the dispute is

highlighted by the fact that in the course of it the appellant's brother was, in the presence of the family, killed in a generalised attack on the family arising out of the claim to repossess the property.

73. In this appeal also the vast majority of the background evidence to which we have referred would have been available to the Adjudicator but does not appear to have been the subject of consideration by her in any meaningful way. She has not asked herself whether the authorities could provide protection to the appellant against those who had already murdered a member of his family out of a dispute directly involving the appellant. Nor does it seem to us that she has properly considered the issue of any reason for persecution because she has confined herself to saying whether it would be by reason of his religion. Afghan Hindus are distinguishable on grounds both of their ethnicity and religion and there was evidence before her that they were a disadvantaged class. To that extent it seems to us that the Adjudicator has asked herself the wrong question and that is a material error of law which vitiates her findings.
74. There is no evidence before us as to whether, ignoring his specific history as found by the Adjudicator, he and his dependants would be able to resume life in Kabul where he was born, established his home and his business interests prior to his flight from the country. We know that his father, at least, of his extended family remained in Kabul when he left. He is not, as we have found on the evidence before us, entitled to succeed simply on the basis of his membership of the class of Afghan Hindus, although that is a factor to be taken into account in evaluating his situation. As to his personal history, it is accepted that he has powerful enemies amongst the Mujahideen who were prepared to attack his family indiscriminately because of a land dispute in which he was a principal party. In the course of such attacks his brother was murdered and his sister-in-law abducted, subsequently dying in unexplained circumstances. These events, coupled with a real risk that he may be unable to access state protection, were the catalyst which led him to flee with his family and to seek refuge abroad. There is objective evidence that in such circumstances the State may be unable to provide a sufficiency of protection as we have set out in paragraphs 55 to 62 above. Given that personal history, and taking due account of the exacerbating factor of membership of the Hindu minority, we are satisfied that, notwithstanding that he would otherwise have an established base in Kabul to which he could return, there is a real risk that if now returned to Afghanistan he would face both persecution by reason of his Hindu ethnicity and religion, at least in part sufficient to engage the Convention, and that he would also be at real risk that his

protected human rights under Article 3 of the European Convention would be breached.

75. We accordingly allow the appeal of Mr S on both asylum and human rights grounds.

Summary of findings

76. On the basis of the findings of fact made and reasons set out at paragraphs 71 to 74 above, and on the basis of our evaluation of the source materials identified in Appendix B to this determination, the Tribunal finds that Afghan Sikhs and Hindus are not at risk of either persecution for a Refugee Convention reason or of treatment contrary to their protected human rights under Article 3 of the European Convention simply by reason of being members of those minority communities anywhere in Afghanistan. Nevertheless, the UNHCR guidance that these minority communities are the subject of societal discrimination must be given due weight in assessing the position of individual claimants on a case by case basis.
77. This determination gives the current country guidance of the Tribunal on the issue of the situation of Afghan Sikh and Hindu asylum and human rights claimants. *Gulati* [2002] UKIAT 02130 and [2003] UKIAT 00057 *K (Afghanistan)* and *KK (Evidence -Late Filing - Proper Notice) Afghanistan* [2004] UKIAT 00258 are superseded and should no longer be cited on this issue. Save to the extent that the review of evidence contained in the reported case of *IB and TK (Sikhs - Risk on return - objective evidence) Afghanistan* [2004] UKIAT 00150 is relied on in this determination, the conclusions in that case as to the position of Sikhs and Hindus originating from outside Kabul (which depended wholly on a concession by the Respondent which has not been made in the present appeals) are also superseded.
78. Applying those findings to the current Appellants, the appeal of Mr L is dismissed, the appeal of Mr T is allowed to the extent that is remitted for hearing afresh before an Adjudicator other than Mr P A Grant-Hutchison, and the appeal of Mr S is allowed for the reasons set out at paragraphs 69 to 75 of this determination.

J Barnes
Vice President

Appendix A

List of background materials placed before the Tribunal

CIPU Country Report for Afghanistan of October 2004
USSD Report on Afghanistan for 2003 published in February 2004
UN General Assembly Security Council Report of 12 August 2003
European Council on Refugees and Exiles (ECRE) Report of April 2003
Human Rights Watch Report of July 2003, Vol 15 No. 5(c) pp 70-88 –
denial of basic freedoms to women and girls
Human Rights Watch Essential Background Overview of human rights
issues in Afghanistan of 31 December 2003
Human Rights Watch report of January 2004 – Losing the peace in
Afghanistan
Amnesty International press releases of 28 April 2003 (Forced Return)
and 23 June 2003 (Afghanistan still not safe enough)
Religioscope Report of 28 January 2003 – Afghanistan: Hindus still face
prejudice
Statements of RS dated 3 December 2003, 23 April 2004, 14 June 2004,
9 February 2005 and 25 February 2005
Statements of Mr Roberts dated 13 December 2004 and 1 February
2005