



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number: PA/01264/2015**

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 8 August 2017**

**Decision & Reasons Promulgated  
On 30 October 2017**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR SAMER IGHERIA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr Duffy (Senior Home Office Presenting Officer)  
For the Respondent: Ms R Frantzis (Counsel)

**DECISION AND REASONS**

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (hereinafter "the tribunal") made after a hearing of 29 March 2017, whereupon it allowed the claimant's appeal from a decision of the Secretary of State of 8 September 2015, to refuse to grant him asylum or any other form of international protection.

2. The claimant, who was born on 1 January 1977, is a national of Afghanistan. It is not in dispute that he is from a part of Afghanistan called Wardak. In seeking asylum he said that he was at risk at the hands of the Taliban because he had previously worked for the American Forces as a labourer. He claimed to be a Shi'a Muslim. The Secretary of State refused the application because it was not believed that he had attracted the adverse attention of the Taliban and that, put simply, he had made up his claim to be at such risk. The respondent, at that stage, took the view that he could

safely return to Wardak but that, if that were not so, he would be able to internally relocate to Kabul. So, protection was refused.

3. Matters did not, by any means, stop there. The claimant appealed and his appeal was heard on 26 May 2016 by Judge Mensah. She too disbelieved him about his being at risk at the hands of the Taliban. But she was also faced with an argument that he would be at real risk of serious harm in consequence of a serious and individual threat to his life or person by reason of indiscriminate violence in a situation of internal armed conflict (Article 15(c) of the Qualification Directive). She concluded that he would not face such a risk relying, at least in part for her conclusions as to that, upon the well known country guidance decision of the Upper Tribunal of AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC). There followed an application for permission to appeal to the Upper Tribunal. That application was granted and after a hearing of 10 August 2016 Deputy Upper Tribunal Judge Bagral set aside the decision of Judge Mensah on the basis that, as was conceded before her, there had been a material error of law through failing to consider an expert report and failing to adequately consider background country material relevant to the Article 15(c) arguments. Deputy Upper Tribunal Judge Bagral decided to remit the case to the First-tier Tribunal so that arguments could be considered and findings could be made regarding the Article 15(c) issue only. The findings of fact relating to Judge Mensah's disbelief of the claimant's expressed fear of the Taliban were preserved. It was on that basis that the matter came before the tribunal on 29 March 2017.

4. It is apparent from the tribunal's determination of 30 March 2017 that argument focused upon whether or not there had been a material change in conditions in Kabul such that the claimant would face an Article 15(c) risk there. In looking at what is said from paragraphs 27-29 of the determination it does not appear that it was argued before the Judge that the claimant could, in fact, safely return to Wardak. So the focus was upon Kabul. In that context it was contended on behalf of the claimant that there had been a change in conditions in Kabul, said to be properly evidenced, and which justified departure from what had been said in the country guidance case of AK, cited above. Pausing there, it had been said that conditions in Kabul did not, in general terms, make return there unsafe or unreasonable and that there was not, in Afghanistan, such a high level of indiscriminate violence as to establish the Article 15(c) risk.

5. The tribunal was provided with extensive written material regarding conditions in Kabul. There was a report of 16 May 2016 prepared by Dr. Antonio Giustozzi along with an addendum to that report, a Human Rights Watch Report of 12 October 2016, an Office of the United Nations High Commissioner for Human Rights/United Nations Assistance Mission in Afghanistan Report of 6 February 2017 and various other materials. Having considered the written material and having heard the oral submissions, the tribunal concluded that it should depart from country guidance in AK and that the claimant would face an Article 15(c) risk in Kabul which was the part of Afghanistan to which he would be returned.

6. The Secretary of State applied for and obtained permission to appeal. The grounds, in summary, contended that the tribunal had erred through conducting an insufficient analysis of the evidence; through giving inadequate reasons for its decision to depart from country guidance; through conducting an inadequate scrutiny of Dr. Giustozzi's report; through misunderstanding the evidence such that it treated certain figures in the information before it as relating to deaths rather than injuries; and through basing its ultimate conclusions as to risk upon an inadequate number of civilian deaths. There is a degree of overlap with respect to certain of those grounds. The subsequent grant of permission was not limited. I have not, as yet, set out the tribunal's reasoning but I will do, below, during the course of my consideration of the grounds.

7. Permission having been granted the matter was listed for a hearing before the Upper Tribunal (before me) so that consideration could be given to the question of whether or not the tribunal had erred in law. Representation at that hearing was as stated above and I am grateful to each representative. At the hearing Mr Duffy confirmed he would rely upon the written grounds and accepted that the focus should be on the tribunal's reasoning in relation to Kabul. He observed that it was accepted by the Secretary of State that "there is flux outside Kabul". He also, at a later point in the hearing, acknowledged that the tribunal had directed itself appropriately as to when it was appropriate to depart from country guidance. But he drew attention to the claimed factual error regarding the figures for deaths and injuries and asserted that, overall, the tribunal's conclusions had simply not been correct. Ms Frantzis, for her part, argued that the tribunal's determination was comprehensive, that the approach to when it might be appropriate to depart from country guidance had been "impeccable" and that the tribunal's conclusion had been open to it on the material before it.

8. To be clear, though, I did not understand Ms Frantzis to be inviting me to actually adjudicate for myself upon and make findings about the question of the existence or otherwise of an Article 15(c) risk in Kabul or, for that matter, in any part of Afghanistan. The thrust of her submissions was that, whatever anyone else's view might be (including mine), the tribunal had followed the correct approach, had reached conclusions open to it and had not erred in law in the processes which had led it to arrive at its conclusions.

9. The tribunal's determination is certainly a thorough one. It has been prepared with evident care. Having set out the relevant law and case law regarding Article 15(c) the tribunal reminded itself (it quoted from the headnote) what had been said in AK. Then, in a section running from paragraph 10-13 of its determination it set out the considerations it was required to have regard to in deciding whether or not to depart from country guidance. As to that, it said:

" 10. I am being asked to depart from the Country Guidance contained in AK and, therefore, it is relevant to set out the terms of Practice Direction 12.2 and 12.4.:

*12.2 A reported determination of the Tribunal, the AIT or IAT bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authority in any subsequent appeal so far as that appeal:-*

- (a) relates to the country guidance issue in question; and*
- (b) depends upon the same or similar evidence.*

*12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law.*

11. In the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2, at paragraph 11, it is stated:

*If there is credible fresh evidence relevant to the issue that has not been considered in the country guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion on the evidence, taking into account the conclusion in the CG case so far as it remains relevant.*

And at paragraph 12:

*Where country guidance has become outdated by reason of developments in the country in question, it is anticipated that a judge of the First-tier Tribunal will have such credible fresh evidence as envisaged in paragraph 11 above.*

12. In the case of *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 the Court of Appeal held:

*‘ 46. The system of Country Guidance determinations enables appropriate resources, in terms of the representations of the parties to the Country Guidance appeal, expert and factual evidence and the personnel and time of the Tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the Country Guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination.*

*47. It is for these reasons, as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so.’*

13. *EM and others (Returnees) Zimbabwe CG* [2011] UKUT 98 provides that:

*‘ 71. The proposition that a country guidance case should provide the ‘starting point’ for a subsequent case that relates to the country guidance issue is inherent in the Practice Direction (and its AIT predecessor). Where the subsequent case is being ‘set down to review existing country guidance’ or not, the effect of Practice Direction 12 and section 107(3) of the Nationality, Immigration and Asylum Act 2002 is to require the existing country guidance case to be authoritative, to the extent that the requirements in Practice Direction 12.2(a) and (b) are met. This is fully in accord with what the House of Lords (per Lord Brown) held in *R (Hoxha) v Special Adjudicator* [2005] UKHL 19. If the existing country guidance is such as to favour appellants (to a greater or lesser extent), it will in practice be for the respondent to adduce before a subsequent Tribunal ‘sufficient material to satisfy them’ that the position has changed’ (Paragraph 66)’.*

*72. ... We recognise that the country guidance system has limitations if extant decisions become out of date and not based on relevant assessments as close as reasonably practicable to the date of the decision. The solution is two fold. First, in individual appeals where there is fresh material not available at the time of the country guidance the Immigration Judge will be entitled to depart from the country guidance in the particular case on the basis that the guidance was either not directed to the particular issue in the subsequent appeals, or the factual assessment in the guidance case has now to be updated in the light of relevant cogent fresh information. Second, it is for the Tribunal to identify appeals as suitable for fresh country guidance where a fundamental review of all relevant material should be undertaken to see whether the situation has changed. The observations in *TK* were directed to the first class, rather than setting a test for departure from country guidance in all circumstances. We nevertheless recognise that where a previous assessment has resulted in the conclusion that the population generally or certain sections of it may be at risk, any assessment that the material circumstances have changed would need to demonstrate that such changes are well established evidentially and durable. ...’*

10. Before me, Mr Duffy did not contend that the tribunal had erred in looking at the above matters and cases for guidance. Indeed, he expressly acknowledged that the Judge had “looked at guidance and directed himself appropriately”. That comment was made to me in the context of departure from country guidance. There was no contention in the written grounds, notwithstanding the various other points made, that the tribunal had misdirected itself in this regard. Indeed, for myself I would take the view that the tribunal meticulously considered the material which informed it as to when it might be appropriate to depart from country guidance. I also note that at paragraph 49 of the determination the Judge summed up the position by saying:

“ 49. The test I must apply is, are there very strong grounds, supported by cogent evidence, of change which is well established and durable?”

11. No challenge has been made to that summary either. I cannot, for myself, detect any fault in it.
12. Having considered where the country guidance might be departed from, a consideration which I find to be free of legal error, the tribunal then set out certain points which had been made by the parties at the hearing. It then turned to the current evidence informing as to the situation in Kabul, which had been placed before it. That included the expert report and its addendum as well as various other material some of which I have already referred to. I have hesitated before setting out all of what the tribunal had to say in this regard but I have done so, not least, because it is illustrative of its care and attention to detail. As to the evidence it said this:

“The Current Evidence

30. I am referred by Miss Frantzis to the European Asylum Support Office Country of Origin Information Report: Afghanistan Security Situation [2. Regional description of the security situation in Afghanistan – 2.1. Centre] dated 9 November 2016. Particularly I consider paragraph 2.1.1. ‘Kabul City’ (bundle A2), the most relevant section of which reads (my emphasis):

*Recent security trends*

*From 1 September 2015 to 31 May 2016, Kabul City counted 151 security incidents. The following table provides an overview of the nature of the security incidents ([251]):*

<i>Violence targeting individuals</i>	<i>21</i>
<i>Armed confrontations and air strikes</i>	<i>18</i>
<i>Explosions</i>	<i>50</i>
<i>Security enforcement</i>	<i>31</i>
<i>Non-conflict related incidents</i>	<i>28</i>
<i>Other incidents</i>	<i>3</i>
<i>Total security incidents</i>	<i>151</i>

*The Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) compiled all major incidents that happened in Kabul for the last few years ([252]). Here follows a non-exhaustive listing of incidents for the reporting period September 2015 to August 2016 according to this ACCORD-compilation and, where referenced differently, completed with other sources. In September 2015, a police officer was killed by a MIED attached to his car. The same month, the head of the ALP in Logar was shot. In October 2015, at least seven policemen were injured in an attack on the adjacent houses of a tribal elder and the former governor of Helmand ([253]). One civilian was killed and three wounded in an attack on a religious congregation site in the Chendawol area. In the same month, an attack on a restaurant was thwarted by the security forces killing two suicide bombers. A convoy of UK military vehicles was targeted with an IED causing seven victims but not hitting the intended target. In November 2015 a former diplomat and political analyst was shot. In the same month, an election commission official was targeted by a suicide attack which killed a security guard and injured his driver. In December 2015, a complex attack on an international guesthouse near the Spanish embassy killed four Afghan policemen and two Spanish guards and injured seven others. A suicide car bomber targeted a convey of IMF near the airport but instead killed at least one civilian. At the start of 2016, a suicide bomber targeted the French restaurant, Le Jardin, killing two Afghan civilians, including a child, and injuring 18 more ([254]). The next day a compound for foreign contractors near the airport was targeted with a truck bomb, killing one civilian and wounding 22. A magnetic bomb was attached to a car in Wazir Abkar Khan, and a driver exploded his suicide vest when stopped at a checkpoint near the airport but failed to detonate his car bomb ([255]). In January 2016, a minibus carrying personnel of Tolo News TV station was targeted by a suicide bomber after the Taliban declared Tolo News a military target for reporting the events in Kunduz in September 2015. In this incident at least seven people were killed and 25 injured.*

*In February 2016, the headquarters of the ANCOP were targeted by a suicide bomber, killing 20 police officers and injuring 29. The same month, another suicide bomber targeted the Ministry of Defense, killing 12 people and wounding eight others including many civilians. In March 2016, a bomb targeted a former senator in the Panjshir Watt area, but instead killed a man, woman and two children, all pedestrians, and wounded 15 ([256]). Security forces thwarted an attack on the house of the head of the NDS and against the Ministry of Interior in May 2016 ([257]). In April 2016, a magnetic bomb was attached to a bus carrying Ministry of Education personnel, killing one person and wounding five ([258]). On 19 April 2016, a truck bomb exploded and targeted a former NDS building housing a unit tasked with the close protection of senior government officials and VIPs. The attack resulted in at least 68 dead and 347 wounded. As the explosion took place in a civilian area, next to a bus stop, the vast majority of the dead and wounded were civilians. This attack recalls in magnitude and method the attack in the Shah Shahid neighbourhood in August 2015 (259). In May 2016, NDS shot a suicide bomber before he could reach his target ([260]). A retired judge was gunned down in Kart-e Naw ([261]). In June 2016, an Afghan MP was killed in an explosion near his house ([262]). In June 2016, 14 Nepali security guards were killed after a suicide bomber hit a minibus in Kabul ([263]). In August 2016, AGEs conducted a complex attack against the American university of Kabul, killing 13 people, including students and a professor, and injuring dozens of others ([264]).*

*The most deadly attack happened on 23 July 2016, when two explosions targeted a demonstration by members of the mainly Shi'ite Hazara minority in Kabul. This attack resulted in at least 80 dead and 230 wounded. Islamic State claimed responsibility for the attack. This was one of the worst attacks in many years in terms of casualties in Kabul ([265]).*

*In January 2016, the Italian embassy was targeted by a rocket and in March 2016 three rockets were fired at the Parliament building, both incidents without casualties ([266]). During a visit of US Secretary of State in April, several rockets exploded outside the Presidential Palace and outside the US Embassy. This attack led to no casualties, but a girls' school was hit ([267]). Another girls' school was torched after the guard was killed in Kabul. This is reportedly the first such incident in Kabul ([268]).*

31. From a reading this litany of violence it becomes apparent that many of the victims are from the security forces or have connections with the authorities. One exception to this is underlined in the above extract, being the targeting of Hazara, which, notably, is the appellant's ethnicity.

32. Paragraph 2.1.6 of the EASO Report details the security situation in Wardak:

*Recent security trends*

*From 1 September 2015 to 31 May 2016, Wardak Province counted 359 security incidents. The following table provides an overview of the nature of the security incidents ([457]):*

<i>Violence targeting individuals</i>	28
<i>Armed confrontations and airstrikes</i>	277
<i>Explosions</i>	33
<i>Security enforcement</i>	21
<i>Non-conflict related incidents</i>	0
<i>Other incidents</i>	0
<i>Total security incidents</i>	359

33. Miss Frantzis also draws my attention to three Radio Free Europe reports (A1-87 & 89).

34. The first relates to an incident which occurred on 7 February, 2017 when at least 20 were killed and 48 wounded, including women and children in a suicide attack outside Afghanistan's Supreme Court building in Kabul.

35. The second describes two Taliban suicide bombers attacking a District Police Headquarters in western Kabul and a National Directorate of Security office on 1 March, 2017. At least 16 people were killed and 40 wounded. The report does not indicate the number of civilian victims but I note that the targets are involved with the security forces.

36. The third report is of more than 30 dead and 50 wounded in an attack on Kabul Military Hospital on 8 March, 2017. Again, the target is related to the security forces.

37. Miss Frantzis referred me to the United Nations Report: The situation in Afghanistan and its implications for international peace and security: Report of the Secretary-General (March 2017):

‘3. *The security situation continued to worsen, with armed clashes between security forces and the Taliban reaching a record high in 2016 and continuing at that pace in 2017. High levels of violence against civilians continued to be recorded as a result, with a significant increase in casualties among children and in internal displacements. Service delivery remained challenging given the difficult security situation. The economic situation remained fragile, with persistently low rates of economic growth and low investment rates.*

...

13. *The overall security situation continued to deteriorate throughout 2016 and into 2017. The United Nations recorded 23,712 security incidents, an almost 5 per cent increase compared with 2015 and the highest number in a single year ever recorded by UNAMA. While the fighting remained particularly prevalent in the five southern and eastern provinces of Helmand, Nungarhar, Kandahar, Kunar and Ghazni, where 50 per cent of all incidents were recorded, the conflict spread in geographical scope, with increasing Taliban activities in northern and north-eastern Afghanistan, as well as in Farah in the west. The Taliban continued to put pressure on the Government’s control of the provincial capitals of Farah, Kunduz, Lashkar Gah, Helmand Province, and Tirin Kot, Uruzgan Province. International and Afghan air support and the deployment of Afghan special forces remained critical to the holding of these cities. In late November, The Taliban captured the Ghorak district administrative centre of Kandahar Province, bringing to 14 the total number of districts claimed by the Taliban to be under their control. In addition, the control of a number of districts has been contested, with some reports claiming an increase in the percentage of Afghan territory under Taliban influence. The fighting evolved further in character as the number of armed clashes between the Taliban and Government security forces increased by 22 per cent in 2016, accounting for 63 per cent of all security incidents, the majority of which were initiated by the Taliban. Improvised explosive device attacks continued to decline in 2016, however, and were 25 per cent lower than during the previous year.*

...

23. *The human rights situation deteriorated further in 2016 and into 2017, with the continued growing toll of the fighting on the civilian population. On 6 February 2017, UNAMA released its annual report for 2016 on the protection of civilians in armed conflict. It found that civilians increasingly suffered the consequences of the conflict in Afghanistan, with the highest number of civilian casualties in a single year documented by UNAMA since 2009. UNAMA documented 11,418 civilian casualties (3,498 dead and 7,920 injured), a 3 per cent increase compared with 2015. Conflict-related violence also destroyed homes, livelihoods and property, displaced thousands of families and restricted access to education, health and other services throughout the year. UNAMA attributed 61 per cent of all civilian casualties to anti-government elements and 24 per cent to pro-government forces, of which 20 per cent was attributed to Afghan national security forces, 2 per cent to international military forces and 2 per cent to pro-government armed groups. Ground engagements between pro-government forces and anti-government elements remained the leading cause of civilian casualties, accounting for 4,295 casualties (1,070 dead and 3,225 injured), followed by the detonation of improvised explosive devices, complex and suicide attacks and targeted and deliberate killings.*

24. *UNAMA has documented an increase in attacks carried out by ISIL-KP targeting civilian government administrations, tribal elders and places of worship. The mission attributed 899 civilian casualties (209 dead and 690 injured) to ISIL-KP in 2016, compared with 82 civilian casualties (39 dead and 43 injured) in 2015. The majority of these casualties resulted from a pattern of deliberate sectarian attacks against the minority Shia Muslim community. ISIL-KP claimed responsibility for*

*three separate attacks on 23 July, 11 October and 21 November 2016 that targeted members of the community living in Kabul.*

25. *Anti-government elements continued to perpetrate deliberate attacks targeting civilian government officials, including women, during the reporting period. On 21 December, the Taliban claimed responsibility for a complex attack against the home of a member of parliament in Kabul, in which eight civilians were killed and seven others were injured. In addition to the attack by anti-government elements on the residence of the Governor of Kandahar Province on 10 January, on the same day, the parliamentary administration compound in Kabul was hit by a suicide attack, for which the Taliban claimed responsibility and in which 34 civilians were killed and 75 others were injured. On 7 February, 20 civilians were killed and at least 40 injured in a suicide attack outside the Supreme Court in Kabul.*

...

39. *The humanitarian situation further deteriorated in 2016 and into 2017, with record numbers of new, conflict-induced internal displacement, a situation compounded by the return of more than 620,000 refugees and undocumented Afghans from Pakistan. The number of newly internally displaced persons in 2016 was recorded as 651,751 in 32 of 34 provinces, with more than 45 per cent of them displaced between October and December. This is the highest number of internally displaced persons recorded in the region, with 220 districts recording conflict-induced displacement and a 38 per cent overall increase compared with 2015. To date in 2017, 12,863 persons have been newly displaced, with 17 of 34 provinces already recording some level of forced displacement. The United Nations and non-governmental organizations provided humanitarian assistance, including cash, health services and supplies, shelter, food and non-food items, to the displaced populations.*

...

52. *Afghanistan continues to face a range of complex challenges. Worsening conflict has resulted in record levels of civilian casualties and internally displaced persons. The rising numbers of returning refugees and undocumented Afghans has put further strain on social and economic conditions. The Government also continues to face both internal and external political challenges. Addressing all of those challenges will continue to require the determined resolve of the Government. In that regard, a cohesive working relationship between the President and the Chief Executive will remain vital.*

...

57. *Civilians continue to pay a heavy price for the conflict. UNAMA recorded the highest number of civilian casualties in a single year, partly as a result of escalating ground engagements. The rising number of children killed and injured is unacceptable. I call upon all parties to the conflict to take urgent steps to halt the killing and maiming of civilians and stress the need for accountability for violations of international humanitarian law and human rights law. The full implementation of the national civilian casualty prevention and mitigation policy is of the utmost urgency. Attacks on health-care facilities, educational facilities, healthcare workers and educators must cease.'*

38. There is before me the United Nations Office for the Coordination of Humanitarian Affairs Report of 02/01/17. I am referred to pages 140, 141, 143 of bundle A1. I have read but do not set out all the references. However, the first paragraph of the 'Humanitarian Needs Summary' at page 140 appears particularly relevant.

*Afghanistan remains one of the most dangerous, and most violent, crisis ridden countries in the world. [1] The continued deepening and geographic spread of the conflict has prompted a 13% increase in the number of people in need of humanitarian assistance in 2017, now 9.3 million. Violations of International Humanitarian Law (IHL) and Human Rights Law (HRL) occur regularly – including, targeted killings, forced recruitment [2] and attacks on health and education facilities. [3] The 8,397 civilian casualties in the first nine months of 2016 is the highest recorded and included a 15% increase in child casualties compared to 2015. [4] In 2016 increasingly frequent ground engagements continued to be the main cause of civilian casualties, [5] while also limiting freedom of movement for civilians and contaminating areas with explosive remnants of war (ERW) which disproportionately affect children. [6] Health partners reported 57,346 weapon wounded cases*



*between January and September alone, compared to 19,749 in 2011, representing almost a three-fold increase. [7].*

39. Of particular interest is the European Asylum Support Office: The implementation of Article 15(c) QD in EU Member States. I note the report is dated July 2015. It considers the issues in respect of Afghanistan [A1 69, 70].

*Indiscriminate violence*

*In order to assess level of violence and/or its indiscriminate nature, following indicators are considered particularly relevant in the case of Afghanistan<sup>10</sup>:*

- *Government presence, including security forces, and control over the territory;*
- *Accessibility of an area, including road security and access to airports;*
- *The impact of the violence on the daily life of the population, including indirect effects, such as limited access to health care and education and/or restrictions on women's participation in public life (on the condition that the indiscriminate violence was the effective cause that triggered them).*

*Long-lasting effects of decades of war in Afghanistan, hampered economic development and living standards and consequent negative outlook or prospect for the future are taken into consideration as well, especially in comparison with situations in other parts of the world (e.g. Iraq and Syria).*

*Some Member States (MS) compare the level of violence and/or its indiscriminate nature with previous periods and/or with other regions or provinces in Afghanistan. Thus, provincial or district capitals, especially some main urban centres (Kabul, Mazar-e Sharif, Hirat Ghazni) are usually considered to be safer than other areas. However, it has to be noted, that areas with less security incidents can also reflect a retreat or absence of security forces.*

*Serious and individual threat*

*In March 2015, two MS assessed the level of violence as sufficiently high for a civilian to face a real risk of serious harm solely by being present in the territory of Afghanistan. Eight MS consider that this is the case in certain most volatile regions, provinces or districts in Afghanistan only. For six MS the level of violence was nowhere in Afghanistan sufficiently high for such conclusion, two of them clarifying that only an exceptional situation would qualify for this, meaning the most extreme situation of violence. Elements leading to the conclusion that such threshold was not met include:*

- *armed conflict not being durable and widespread;*
- *incidents happening with low frequency; occasional fighting;*
- *government or groups controlling the territory in a durable way;*
- *the violence being more concentrated in areas and more targeted (such as on troops, supporters of government, foreigners, etc.) and not very indiscriminate in its intention;*
- *number of victims and IDPs not being so high, compared to other conflicts (e.g. Iraq and Syria).*

40. I have been referred by Miss Frantzis to other background evidence which I have read and taken into account in reaching my decision in this appeal. I set out the references below but have not set out the texts because, largely, they repeat other incidents and statistics which I have included in this decision. Page references are to the appellant's bundle marked A1.

Amnesty International's Report of 22/02/17 [91, 92, 93];

South Asia Intelligence Review of 13/02/17 [98, 99];

Office of the UN High Commissioner for Human Rights/UNAMA Report of 06/02/17 [104, 105, 108, 109, 124];

41. Miss Frantzis, directed me to the evidence of Dr Antonio Giustozzi in his report of 16 May 2016 which provided as follows:

Of Wardak:

*'The situation changed in part due to the fall of neighbouring Ghazni province under the influence of the Taliban and in part due to the appointment of a very ineffective and abusive chief of police in Wardak.'* (paragraph 4, page 15 A1)

*'[There were 378 reported insurgent attacks in Wardak in 2012 ... in 2013 429 insurgent attacks took place, a 12% increase on 2012. In 2014 the level of insurgent violence did not change, whilst in 2015 470 attacks took place, a 9.6% increase on the previous year'* (paragraph 4, page 16 A1)

Speaking generally, Dr Giustozzi wrote

*'In 2015, 18,958 insurgent attacks took place, another 14% increase that took Taliban violence at its highest level ever'* (paragraph 14, page 22 A1)

*'It is clear that violence has been intensifying during the autumn of 2015'* (paragraph 15, page 25 A1)

Of Kabul City:

*'In general violence reached a new high in Kabul in 2014. By the autumn of 2014, the level of violence in Kabul had reached such levels that the Chief of Police was forced to resign'* (paragraph 22, page 30 A1)

*'Between August 2015 and January 2016 an escalation of terrorist attacks in Kabul has taken place''* (paragraph 23, page 30 A1)

*'A letter has been sent to all the relevant embassies, saying that the Afghan will no longer accept deportees as it falls outside the scope of the Memorandum of Understanding since the Kabul internal flight alternative is not viable as a genuine and safe alternative'* (paragraph 24, page 30 A1)

*'Finding accommodation in the central neighbourhoods of Kabul will be, however, difficult and probably forbiddingly expensive'* (paragraph 25, page 31 A1)

*'Earning a living whilst staying out of danger would be a major challenge for Mr Igheria'* (paragraph 26, page 31 A1)

42. Dr Giustozzi has provided an updated report dated 24 October 2016. His conclusions in respect of Wardak appears at paragraph 4 [43-44 A1].

4. *Maps 1 and 2 show the situation in Wardak in terms of violence and Taliban control as of mid-2016. During the first three quarters of 2016, the number of insurgent attacks remained almost unchanged at 14,628 (vs 14,646 in the same period of 2015).*

43. In respect of Kabul he reports at paragraphs 9-10.

9. *The Taliban have continued using large amounts of explosive in attacks in Kabul after May 2016. In August they targeted a hotel used by contractors, and in September they attacked the Ministry of Defence. In both cases there were heavy collateral casualties among bystanders.*

10. *The level of violence so far in 2016 has remained very close to the record levels of 2015. According to UNAMA, 2562 civilians were killed and 5835 injured because of the conflict in January – September 2016, vs 2681 killed and 5805 injured during the same period of 2015. 61% of all civilian casualties were caused by insurgents, while government forces were responsible for 23%. The remaining casualties could not be attributed to either side in the conflict.*

13. Having carried out that quite exhaustive survey of the evidence the tribunal then set out its reasoning as to its ultimate conclusions in this way:

“Findings and Reasons

44. In determining this appeal I have carefully considered all the evidence and the submissions on behalf of both parties. If I have not specifically mentioned a document, certain evidence or a particular submission in this decision I does not mean I have not considered it and given it appropriate weight in reaching my decision.

45. The appellant claim to be at real risk of serious and individual threat by reason of indiscriminate violence on return to Afghanistan. I find that this must not be looked at in the light of his personal characteristics. As stated above in HM the legal principles include the following:

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

46. I must consider whether there is a real risk of serious harm to the appellant from indiscriminate violence simply by him being present in Afghanistan.

47. The current country guidance case of AK finds that a situation sufficient to trigger Article 15(c) did not exist in Afghanistan when the case was decided in 2012.

48. A distinction has been drawn in this appeal between the risk to the appellant in his home province of Wardak and in Kabul. Unfortunately, in AK the situation in Wardak was not considered but the situation in Kabul was considered. In my consideration below I will also only consider Kabul. It is apparent from the background evidence and it is generally accepted that the situation in most of the provinces around Kabul (and Wardak, is adjacent to the south-west) is worse than in the capital.

49. The test I must apply is, are there very strong grounds, supported by cogent evidence, of change which is well established and durable?

50. I find that Miss Frantzis has provided me with a considerable volume of background evidence which I find to be reliable and authoritative. The background evidence is supported by the helpful reports of Dr Giustozzi. I rely on his opinions and statements. I find the evidence, especially when treated as a whole, to be cogent.

51. This evidence is consistent throughout the sources and each gives a clear picture of increasing violence since 2012. That violence has been at a particularly high level in 2015 and 2016. Thus, it follows that I am able to find that there is change for the worse and so that part of the test is met.

52. I find that because of the high levels of violence over the last two years and the indication in the evidence that those levels will be maintained or exceeded in 2017 I am able to find that the change is durable.

53. The only element of the test that has not yet been met is whether the levels of violence are sufficiently serious such that, if present there, the appellant would be at real risk of serious harm from indiscriminate violence.

54. In AK it is noted that the number of civilian deaths in Kabul in 2011 was 71. Miss Frantzis has drawn my attention, (the details are above), to two incidents in Kabul this month (March 2017) which have killed 46 and an incident at the beginning of February which killed a further 20. Regrettably, it is safe to say the 2017 figure of 71 will be well exceeded.

55. In avoiding counting security and government personnel casualties and looking only at civilian casualties I note the report, Afghanistan: Protection of Civilians in Armed Conflict: Annual Report 2016 [Executive Summary; I. Human Rights Protection in Conflict-Affected Areas]. It is up to date, having been published on 6 February 2017. There are two tables and text which I reproduce below and can be found in the appellant’s bundle [A1 105, 113]:

*Civilian Deaths and Injuries*

*January to December 2009 – 2016*

2009: 5969  
 2010: 7162  
 2011: 7842  
 2012: 7590  
 2013: 8638  
 2014: 10535  
 2015: 11034  
 2016: 11418

*Civilian casualties increased in five of Afghanistan's eight regions in 2016. The armed conflict most affected the southern region, which recorded 2,989 civilian casualties (1,056 deaths and 1,933 injured), a 17 per cent increase compared to 2015. [11] The central region recorded the second highest number of civilian casualties – 2,348 civilian casualties (534 deaths and 1,814 injured) – an increase of 34 per cent compared to 2015 due to suicide and complex attacks in Kabul city. [12] The north-eastern and eastern regions experienced a decline in civilian casualties; however, both recorded significant numbers – 1,595 civilian casualties (433 deaths and 1,162 injured) in the eastern region and 1,270 civilian casualties (382 deaths and 888 injured) in the north-eastern region. [13] UNAMA documented 1,362 civilian casualties (384 deaths and 978 injured) in the northern region, [14] 903 civilian casualties (340 deaths and 563 injured) in the south-eastern region, [15] 836 civilian casualties (344 deaths and 492 injured) in the western region [16] and 115 civilian casualties (25 deaths and 90 injured) in the central highlands region. [17]*

*Women Deaths and Injuries  
 January to December 2009 – 2016*

2009	2013
Deaths: 133	Deaths: 236
Injuries: 152	Injuries: 514
Total: 285	Total: 750
2010	2014
Deaths: 167	Deaths: 298
Injuries: 202	Injuries: 611
Total: 369	Total: 909
2011	2015
Deaths: 203	Deaths: 334
Injuries: 247	Injuries: 913
Total: 450	Total: 1247
2012	2016
Deaths: 196	Deaths: 341
Injuries: 352	Injuries: 877
Total: 458	Total: 1218

56. I find the above figures of assistance in assessing the proportionate increase in violence over the years 2011 (as this is the year for which statistics would be available for the Court in AK) and 2016 (being the last full year available to his Tribunal).

57. The relevant figures in the Civilian Deaths table are in 2011: 7842 and in 2016: 11,418. I find this to be a substantial increase.

58. When compared with the civilian deaths I find the violence suffered by women is, in my view, a better reflection of the level of violence suffered by the civilian population, particularly in the male dominated

society of Afghanistan. Furthermore, I consider, not only the figures for deaths but for injuries because, if combined, these better reflect the risk of 'serious harm'.

59. In 2011 the deaths and injuries for woman totalled 450. In 2016 the figure was 1218, a threefold increase. I find this is particularly strong evidence of the seriousness of the situation that prevails in Afghanistan.

60. Weighing all the evidence for what it is worth and considering it cumulatively in the light of the challenges to it by the respondent I find that the appellant has proved to the required standard of reasonableness degree of likelihood that if returned to Kabul, or any other area of Afghanistan, he will be at real risk of suffering serious harm as defined in Article 15 (and Paragraph 339CA(iv) of Cmnd 6918).

61. I am satisfied that substantial grounds have been shown for believing that the appellant, if returned to Afghanistan, would face a real risk of suffering serious harm and hence the appellant is entitled to humanitarian protection under Paragraph 339C of Cmnd 6918.

14. Having set out all of that I now return to the written grounds of appeal. It seems to me it is simply unsustainable to argue that the tribunal erred through carrying out an insufficient analysis of the evidence. It has clearly read and indeed reproduced to some extent much of the written material which was before it. It has then identified trends in the evidence at paragraphs 51 and 52 of its determination. It has highlighted certain statistical indicators at paragraph 55 and it has explained its view that statistics concerning violence suffered by women represent "a better reflection of the level of violence suffered by the civilian population", as opposed to non-civilians. I am satisfied that its analysis was not, in any sense, insufficient or inadequate.

15. Did the tribunal provide inadequate reasons for its decision to depart from country guidance? It properly identified, as has already been stated, the test it had to apply. After that its key reasoning, in the context of this ground of appeal, is to be found from paragraph 50 of the determination onwards. In this context, I remind myself that I am not asking myself whether I would have reached the same view on the same material. I am concerned with the tribunal's approach. The tribunal said it found the background country material provided to it to be "reliable and authoritative". It does not appear that it had been put to it that it should conclude otherwise. Further, it seems to me it was entitled to reach that view. It felt able to rely upon the opinion of Dr. Giustozzi and at paragraph 50 it noted that (on my reading this is a reference to the expert report and the background material when taken together) it found the evidence to be cogent. It noted that the overall evidence was consistent in giving a picture of increasing violence since 2012. It noted high levels of violence in 2015 and 2016. It was open to the tribunal, as it did at paragraph 52, to project that there would be levels of violence in 2017 which would be at the same or a greater level than had gone before. All of that led to the tribunal concluding that there had been a change which was "durable". The tribunal then went on to explain why, in its view, figures demonstrating increased deaths and injuries meant the 15c threshold in Kabul had now been reached. In light of all of that I cannot say that the tribunal's reasons as to why it was departing from the country guidance in AK, even though some or perhaps many may disagree, was legally inadequate.

16. There is then the discrete challenge to the tribunal's assessment of Dr. Giustozzi's evidence. Again, that is said to be inadequate. But the tribunal pointed out at paragraph 24 of its determination that that evidence had not been challenged. I take that to be a reference to there being a lack of any challenge to the expert evidence at the tribunal hearing. Perhaps the lack of challenge, of itself, might have been sufficient for the tribunal to accept the views contained in the report. But the tribunal's consideration of the expert evidence went further in that it set out certain of what the expert had to say at a passage commencing at paragraph 40 of the determination and it noted, as I read it, that there was consistency between the expert evidence provided and the background country material (see paragraphs 50 and 51 of the determination). In the circumstances I do not

detect any error of law in the tribunal's treatment of Dr. Giustozzi's evidence and I specifically conclude it has not been shown that the tribunal's scrutiny of that evidence was legally inadequate.

17. So, that deals with three of the grounds. I would also observe, at this stage, that I did not interpret anything Mr Duffy said before me as an attempt to add to or support those particular grounds. But that cannot be said of the remaining two to which I now turn.

18. It is well established that an error of fact can sometimes translate into an error of law. It was asserted in the written grounds that the tribunal had made an error of fact in that it had treated some figures which related to both civilian death and injury rates as relating only to civilian deaths. The complaint relates to the content of paragraphs 55 and 57 of the determination. Indeed, it would appear that whereas the tribunal said, at paragraph 57, that there had been 7,842 civilian deaths in Afghanistan in 2011 and 11,418 in 2016, the figures the tribunal had in mind were cumulative ones being total figures for both civilian deaths and civilian injuries for those years. But the point the tribunal was seeking to make, as is evident from what it had to say at paragraph 56 of its determination, was that the available figures demonstrated an increase in violence. It seems to me that that conclusion is untouched or unaffected by the factual error which was made. In any event, civilian injuries are relevant to the question of the existence or otherwise of an internal armed conflict as well as civilian deaths. In my judgment this factual error, if it is to be characterised as such, is not one which impacted upon the tribunal's reasoning. It does not translate into an error of law.

19. The final ground is really an assertion that there have been an inadequate number of deaths (and presumably injuries) to justify a conclusion that there is an internal armed conflict or to justify departure from the country guidance. But there are no set threshold figures for any of this and there is no specific applicable mathematical formulae. I can quite see that many differently constituted tribunals might have reached a view that, most unfortunate as all of these incidents no doubt are, the number of civilian deaths and civilian injuries do not indicate that the Article 15c threshold has been reached. But I cannot see that the tribunal's conclusion here was perverse or irrational. Indeed, the grounds have never gone so far as to suggest so. The tribunal, then, was entitled to conclude as it did.

20. In light of all of the above, therefore, I have reached a conclusion that the tribunal did not err in law when it decided, on the basis of the particular material before it and the particular arguments presented to it, to depart from country guidance. But it is also important to stress what I am not deciding. This appeal to the Upper Tribunal has never been designated as a country guidance case. I am absolutely not giving or purporting to give new country guidance to any extent whatsoever. I have not been invited to decide that previous country guidance was, in any sense, wrong or has been overtaken by events. I have only ever been asked to decide whether in making its decision on the material in front of it, the tribunal took a lawful approach. So, the mere fact that I have decided it did not err in law does not mean I have concluded anything beyond that. In particular, I have not decided that there has been any material change in Kabul or, indeed, elsewhere in Afghanistan since AK was decided. This decision of the Upper Tribunal, therefore, is not to be used as authority for and indeed is expressly not authority for the proposition that there has been a material change.

## **Decision**

The decision of the First-tier Tribunal did not involve the making of an error of law. Accordingly, that decision shall stand.

**Anonymity**

I make no anonymity direction. None had been sought before the First-tier Tribunal and none was sought before me.

Signed:

Date: 26 October 2017

Upper Tribunal Judge Hemingway

**TO THE RESPONDENT  
FEE AWARD**

I make no fee award.

Signed:

Date: 26 October 2017

Upper Tribunal Judge Hemingway