



**Upper Tribunal
Immigration and Asylum Chamber**

R (on the application of HN and Others) v Secretary of State for the Home Department
(JR – scope - evidence) IJR [2015] UKUT 00437 (IAC)

Before

**The President, the Hon. Mr Justice McCloskey
Upper Tribunal Judge Allen**

Between

The Queen on the application of

**HN, SA, JG,
FK & AB**

Applicants

v

Secretary of State for the Home Department

Respondent

- (i) *It is intrinsically undesirable that judicial review proceedings be transacted in circumstances where material evidence on which the Applicants seek to rely has not been considered by the primary decision maker.*
- (ii) *There is a strong general prohibition in contemporary litigation against rolling review by the Upper Tribunal in judicial review proceedings. .*
- (iii) *Where a judicial review applicant is proposing to make further representations to the Secretary of State in circumstances where a new decision will foreseeably be induced, it will normally be appropriate, to refuse permission or to dismiss the application substantively on the ground that it will be rendered moot and/or an alternative remedy remains unexhausted and/or giving effect to the prohibition against rolling review.*
- (iv) *The principles rehearsed above are to be similarly applied to applications for permission to appeal to the Court of Appeal.*

- (v) *Where a draft judgment is circulated in advance of handing down the function of parties and their representatives is confined to notifying mis-spellings, formatting defects, inadvertent factual errors, ambiguities of expression and kindred blemishes: Edwards & Ors R (on the application of) v Environment Agency & Ors [2008] UKHL 22 applied*

On this application for permission to apply for judicial review and having conducted a “rolled up” hearing and following consideration of the documents lodged by the parties and having heard Ms S Naik, Mr A Bandegani and Ms B Poynor, all of Counsel, instructed by Duncan Lewis Solicitors, on behalf of the Applicants and Ms M Glass and Mr N Ostrowski, of Counsel, instructed by the Government Legal Department on behalf of the Respondent at hearings at Field House, London on 10 March, 22 April and 08, 11 and 12 May 2015, followed by further written submissions initially completed on 05 June 2015 and ultimately completed on 06 July 2015.

Judgment

Delivered (in draft) on 17 June 2015. Final approved judgment dated 21 July 2015.

McCloskey J

Introduction

This judgment, to which both members of the panel have contributed, consists of the following chapters:

- I. These proceedings
- II. “Rolled Up” Order
- III. Application to amend
- IV. Tribunal Directions of 23 May 2015
- V. The Evidence
- VI. The Individual Applicants
- VII. The Issues
- VIII. Conclusions
- IX. Order and Ancillary Issues

I. THESE PROCEEDINGS

1. The subject of removing Afghan nationals from the United Kingdom to their home country, while not lacking novelty, has gained increasing prominence and exposure during the past few months. This has been stimulated by two flights arranged by the United Kingdom government for the purpose of returning unsuccessful asylum claimants to Afghanistan. These planned flights generated a flurry of litigation activity, giving rise to orders of both the Court of Appeal and the Upper Tribunal prohibiting the removal of certain persons until further order.
2. The Applicants are five single male adults, of assorted ages, ranging from 19 to 40 years, all nationals of Afghanistan. They bring these proceedings against the Secretary of State for the Home Department (the "*Secretary of State*") arising out of action taken by the latter to convey all of them by charter flight to Afghanistan on 10 March 2015. In the case of the fifth Applicant, AB, we made an Order on that date refusing to grant interim relief having heard Counsel for the Applicant. Later on the same date our Order was reversed by the Court of Appeal.
3. The challenge brought by AB was one of 14 similar cases initiated on the same day, 09 March 2015. The following day, a further 7 comparable challenges followed. All of these challenges were related to the repatriations to Afghanistan proposed to be effected by the Secretary of State's charter flight on 10 March 2015. To summarise, on this date:
 - (a) AB was granted interim relief by the Court of Appeal.
 - (b) The Upper Tribunal granted interim relief in 16 cases.
 - (c) The Administrative Court granted interim relief in 3 cases.
4. The next material development was that the Secretary of State arranged a further charter flight to Afghanistan, scheduled to depart on 21 April 2015. Removal directions were made accordingly. This was the stimulus for 21 new judicial review applications in which interim relief was granted. We took the view that the determination of these applications had, in effect, been dictated by the Court of Appeal's Order reversing our decision in AB's case on 10 March 2015. Interim relief was, in consequence, granted to a total of 14 Applicants. Pausing, there were, altogether, 35 live cases, having much in common with each other, at this stage.
5. From this group five lead cases, including that of the fifth Applicant, AB, were selected. This was reflected in a consent order dated 10 April 2015. This mechanism was deployed in the interests of orderly and efficient case management and with a view to inducing a decision of the Tribunal designed to encompass all members of the group. At that stage it was apparent that, broadly, there were two dominant issues in the

proceedings, namely the areas within Afghanistan to which the litigants were expected to return or to relocate and the individual characteristics of certain litigants.

6. As a result of the subsequent withdrawal of four cases by consent, the current number of judicial review Applicants is 32. The evolution of these proceedings outlined above has resulted in the allocation of the Applicants to three Schedules. These are the final Schedule AB, the consolidated Schedule C and Schedule D. These Schedules are appended to this judgment
7. There are certain facts and factors common to all five Applicants:
 - (a) Each of them entered the United Kingdom unlawfully at different times and claimed asylum unsuccessfully.
 - (b) The First-tier Tribunal (the “*FTT*”) dismissed their ensuing appeals.
 - (c) Permission to appeal to the Upper Tribunal was refused subsequently.
 - (d) All of the Applicants are challenging decisions by the Secretary of State to remove them to Afghanistan.
 - (e) Following the initiation of these proceedings and the grant of interim relief at the first of the two stages noted above, namely on 10 March 2015, further representations were made, generating new decisions by the Secretary of State, in all five lead cases, that these did not amount to a fresh claim under paragraph 353 of the Immigration Rules (“the fresh impugned decisions”). The second to fifth Applicants received successive fresh decisions, on 23 and 31 March/01 April 2015. In the particular case of the first Applicant, HN, the decision which he received at this stage was an initial decision. These further decisions of 31 March and 01 April 2015 have overtaken the earlier removal decisions and, following amendment, are the revised target of the Applicants’ current challenges.
 - (f) A singular feature common to all five lead cases is that following the fresh impugned decisions, during the currency of these proceedings, further evidence has been generated on behalf of all the Applicants and filed, in support of their judicial review challenges. Further evidence was also assembled and filed on behalf of the Secretary of State. We shall examine the significance and implications of these developments *infra*.
8. The most recent country guidance decision of the Upper Tribunal relating to Afghanistan is AK (Article 15(c) Afghanistan) [2012] UKUT 00163. The Tribunal, while noting that there had been a deterioration in the general security conditions prevailing in the country, held that there was an insufficient degree of violence in Afghanistan as a whole to overcome the Article 15(c) threshold. The Applicants in these proceedings make the case that having regard to a substantial body of evidence which has materialised since 2012, it is appropriate

to reconsider the guidance promulgated in AK.

9. There is some ambivalence in the Applicants' arguments as to whether these judicial review proceedings should be the vehicle for the formulation of fresh, updated country guidance. In principle, they might have sought to make a case having the following components: that the new country evidence forms part – a significant one – of the material upon which the Secretary of State should properly have decided that the fresh claims threshold was overcome; that by these judicial review applications the unlawfulness of the Secretary of State's decisions will be exposed; and, in consequence, it will be incumbent upon the Secretary of State to make further decisions recognising that these are indeed fresh claims, with the result that appeals will lie to the FtT which will provide a forum for presenting evidence and ventilating arguments relating to the enduring tenability of the decision in AK. This would not, therefore, be a country guidance appeal by stealth. However, the Applicants' case was not presented in this way.

II. "ROLLED UP" ORDER

10. Following the grant of interim relief to 14 Applicants, as recorded above, these proceedings effectively split into a series of phases:
 - (i) The initial phase, during which the judicial review applications were initiated and interim relief was granted.
 - (ii) The case management phase which, initially, unfolded between 10 March and 22 April 2015.
 - (iii) In parallel with the case management phase, the submission of further representations to the Secretary of State on behalf of all Applicants, including the five lead Applicants and the making of fresh decisions in four cases and an original decision in the case of the first Applicant, HN
 - (iv) In parallel with (ii) and (iii) and beyond, the progressive acquisition of further evidence on behalf of the Applicants which was filed and upon which they sought to rely.
 - (v) The intermittent acquisition and filing of further evidence on behalf of the Secretary of State.
11. The Tribunal's initial intention was that on the date allocated for hearing, 22 April 2015, these cases would proceed as *inter partes* permission hearings. At the commencement of the hearing on this date, the Tribunal raised the question of whether these should properly be combined permission and substantive hearings viz so-called "rolled up" hearings. Submissions were made on behalf of both parties. Having considered such submissions, the issue was reserved

and the presentation of the Applicants' case commenced. This occupied a substantial part of the day and was not completed. An adjournment ensued, with the hearings to recommence on 08 May 2015.

12. On 08 May 2015, the Applicants, without prior intimation to the Respondent or the Tribunal, produced a substantial quantity of new evidence, including an expert's report, upon which they wished to rely. It became clear that due to the lateness of this development, the hearing would have to be vacated. Bearing in mind the public law character of judicial review proceedings, the Tribunal was minded to receive the further evidence *de bene esse*, subject to the Respondent having an opportunity to reply. It became clear to the Tribunal at this stage that the proceedings no longer had the character of a typical permission application. Evidence had been assembled in considerable bulk, the Secretary of State had made fresh decisions in each case, there were extensive skeleton arguments and the legal representatives in attendance numbered approximately 12 in total. Furthermore, in the interim, the Applicants' solicitors had proposed the conversion of the proceedings to the "rolled up" variety, to which the Respondent's representatives objected. The Tribunal had made no ruling on this issue. Taking into account the aforementioned factors, the allocation of a panel of two Judges to deal with the cases and the overriding objective, we concluded without hesitation that a rolled up order was appropriate. The Applicants' representatives protested that they would need further time to prepare in consequence. With great reluctance, a further adjournment was granted, with rescheduled dates of 11 and 12 May 2015.
13. The further consideration which influenced the Tribunal in making the "rolled up" order was that the substantial commitment of Tribunal time and resources which had materialised would not be properly or usefully employed in a decision merely granting or refusing permission, having regard to the rules and principles of precedent, the large number of cases belonging to the group (30+) and the foreseeable likelihood of further challenges to attempted Afghanistan repatriations.

III. APPLICATION TO AMEND

14. On the third day of hearing (11 May 2015) an application on behalf of one of the Applicants to amend the grounds of challenge was served. The Tribunal pointed out that, as formulated, this did not identify any intelligible public law ground of challenge to the Secretary of State's decision. We directed a concise, coherent pleading, rectifying this defect. On the fourth day of hearing (12 May 2015) a further pleading in purported compliance with this direction was produced. As our exchanges with Counsel for the Applicant made clear, the Tribunal continued to struggle with the thrust of this proposed new ground. By this stage of the proceedings, the Applicants' grounds had already undergone significant amendment, resulting in amended grounds dated 15 April 2015.
15. The thrust of the proposed new ground of challenge, as understood by the Tribunal, was symptomatic of the organic evolution which had, by this juncture,

become one of the hallmarks of these proceedings. It was based upon two pieces of documentary evidence, recently materialised, relating to the attempts of the Red Cross organisation to trace the family of the Applicant, SA, in Afghanistan. It was contended that the new evidence demonstrated that this Applicant's parents and sister had been killed in hostilities, that family members no longer resided in his home area and that, in consequence, the findings of the FtT bearing on these issues were undermined. The contention formulated was that had this recently received evidence been available at the FtT stage, it would have precipitated a finding that this Applicant, being a child without family support, was a refugee or, alternatively, that this would have ranked as a minimum as a highly influential consideration in the FtT's decision. The argument prayed in aid AA (Unattended Children) Afghanistan CG [2012] UKUT 00016 (IAC). The legal ground of challenge formulated appeared to be a contention that the Secretary of State had failed to discharge her tracing duty under regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005. The second dimension of this proposed amended ground was based on the concept of correction of historic injustice, giving rise to the contention that this was a material consideration "*to be taken into account in the decision to remove now.*" [Our emphasis.] As this summary demonstrates, this was yet another instance of a newly formulated case being played out for the first time before this Tribunal, rather than the primary decision maker, the Secretary of State.

16. The application to amend was opposed on behalf of the Secretary of State. Having considered the submissions of both parties' Counsel, we pronounced our ruling, refusing the application. Our reasons for doing so were, in summary:
- (a) The application was based on fresh evidence which had not been considered by the Secretary of State. It would be undesirable for the Tribunal to conduct any review of something which had not been the subject of consideration and decision by the Secretary of State, the primary decision maker.
 - (b) It was difficult to see how new evidence of the kind in question could properly found a challenge to a decision under paragraph 353 of the Immigration Rules.
 - (c) The Applicant in question was seeking to advance a discrete judicial review challenge without having first exhausted the alternative remedy of making his case to the Secretary of State.
 - (d) The application to amend was unacceptably delayed: the evidence established that the Applicant's solicitors were in possession of much of the relevant evidence by 23 April 2015 at latest and the failure to give advance notice appeared tactical.
 - (e) To permit the application would be to prejudice the Secretary of State, given its nature and lateness.

- (f) To permit the application could jeopardise the orderly and expeditious continuation and completion of the proceedings.
- (g) The application did not satisfy one of the tests enshrined in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49, at [66] & [92], since it was not based on reliable and undisputed evidence: quite the contrary, the two pieces of evidence in question, consisting of letters from the Red Cross, were directly contradictory of each other.

This ruling having been made, the submissions on behalf of the Applicants were completed and this was followed by the submissions of Counsel for the Secretary of State. At the conclusion of the fourth day of hearing, the Tribunal indicated that the further conduct of the proceedings would be dependent upon a direction to be issued and the parties' responses thereto.

IV. THE TRIBUNAL'S DIRECTION OF 23 MAY 2015

17. We reproduce in full the direction which the Tribunal made on the following day, 23 May 2015:

"(1) In all of these cases (except one) following the initiation of these proceedings:

- a. The Respondent, having received further representations on behalf of all of the Applicants, reconsidered the initial impugned decisions and made a fresh, updated decision in each case. One of the decisions was an original one. All of these decisions refused the Applicants' claims under paragraph 353 of the Immigration Rules. These are the decisions now under challenge (the "impugned decisions")*
 - b. Since the impugned decisions were made, during the currency of these proceedings a substantial quantity of further evidence has been generated bilaterally. All of this new evidence has been placed before the Tribunal. None of it has been provided to, or considered by, the Respondent in a decision making context. All of the new evidence, to a greater or lesser extent, has a bearing on the two central grounds of challenge pursued by the Applicants, namely (in a nutshell) risk upon return to their country of origin, Afghanistan and an inter-governmental memorandum of understanding.*
- (2) It appears to the Tribunal that, but for the intervention of these proceedings, all of the new material would inevitably have been placed before the Secretary of State in the context of further representations and submissions on behalf of the Applicants, for the purpose of reconsideration of the impugned decisions and fresh decisions. This has not occurred.*
- (3) In the event of any or all of the Applicants failing in their judicial review challenges, it seems to the Tribunal that the analysis in (2) above applies fully.*

- (4) *If any of the Applicants were to succeed in these proceedings, the relief to be granted would, as requested, almost certainly be an order quashing the impugned decision/s. The effect of this would be to oblige the Respondent to reconsider the impugned decision/s substituting a fresh decision or decisions. In this scenario, it appears to the Tribunal that the Applicants will inevitably rely upon the new material for the purpose of urging more favourable decisions.*
- (5) *Taking into account the Applicants' duty of candour to the Tribunal and their duty to co-operate with the Tribunal and considering further the overriding objective and the discretionary character of judicial review proceedings, the Applicants' solicitors are required:*
- (a) *to confirm the correctness of the Tribunal's assessment in (2), (3) and (4) above; and further, or alternatively,*
- (b) *to provide such other confirmation and/or information as may be appropriate.*
- (6) *In the event of an affirmative confirmation of the Tribunal's assessment in (2), (3) and (4) above, the Applicants solicitors should also indicate in writing [**not to exceed two A4 pages**] the grounds upon which it is contended (if it be thus contended) that these proceedings should continue."*

As the terms of this direction indicate, the Tribunal considered that a watershed had been reached in the proceedings.

18. The purpose of the aforementioned direction is, we trust, self evident. Its timing was not ideal, in the sense that in the hypothetical ideal world of litigation a direction of this kind should preferably issue before substantive hearings begin. However, given the evolution of these proceedings, summarised above, the Tribunal considered that it was appropriate to issue the direction at this stage.
19. The response made by the Applicants' solicitors began with the following significant acknowledgement:

"The Applicants in the lead cases invite on a pragmatic basis a reconsideration by the SSHD of her impugned decisions dated 23 and 31 March and 01 April 2015, which reject their representations as fresh claims, to allow her to consider all the material submitted by the Applicants subsequent to that together with that submitted before."

It is clear from the remainder of the response that the Applicants' representatives did not contest the correctness of the propositions in [2], [3] and [4] of the Tribunal's direction (*supra*). Their response confirmed that there would indeed be "*further representations*" to the Secretary of State. Notwithstanding, it was contended on behalf of the Applicants that while further representations would be made to the Secretary of State, prompting reconsideration and fresh decisions, these proceedings should be stayed and

representations were also made about a *“timetable for the submission of further evidence”*. The response on behalf of the Applicants further contended that, as a minimum, this Tribunal should provide a substantive ruling on the *“second head of challenge”*, which was paraphrased as *“the MOU and Operational Guidance Note [issue]”*. This would be linked with further case management directions, to include the Applicant’s *“formal reply in writing to the SSHD’s submissions on this issue”*.

20. This was followed by the Secretary of State’s rejoinder. This incorporated a contention that the Tribunal should complete the proceedings *“.... on all grounds except that the Tribunal should not consider the material which postdates the decisions under challenge save to the extent that the material touches on other issues which the Tribunal has to determine”*. We interpose the immediate observation that it is not altogether easy to grasp the meaning of this suggestion. The Secretary of State’s submission further noted that subsequent to the initially impugned decisions viz those proposing to remove the Applicants from the United Kingdom on 10 March 2015, further evidence, in particular two expert reports and country evidence, was served on behalf of the Applicants, followed by the Secretary of State’s further decision in each of the five lead cases on 31 March 2015. The Applicants’ position was that yet another fresh decision should be made in the currency of these proceedings and in the context of a stay thereof. The following passage encapsulates the Secretary of State’s rejoinder:

“.... The Applicants seek, after weeks of intense litigation, to stay the almost complete substantive hearing of the impugned decisions in respect of their first and second fresh claim applications to make a third/fourth application and without at this stage the full evidence on which they will rely and which they seek 14 days to obtain

The proper approach is that the decision as to whether there should be, or not, a further application should be considered by the Applicants’ advisors once all the new evidence is available and in light of the Tribunal’s judgment in respect of their past applications.”

21. It was further submitted that the adoption of this course would result in the parties receiving the Tribunal’s evaluation of the large volume of material which was considered by the Secretary of State at the stage of the post-permission decisions on 31 March and 01 April 2015. This course, it was contended, would have the virtue of obliging the Applicants’ representatives to consider the viability of yet another *“fresh claim”* to the Secretary of State in the light of the Tribunal’s judgment. One could reasonably anticipate, it was argued, a *“narrowing”* of both the issues and the evidence to be considered in any further decision making process and any ensuing new judicial review proceedings. The submission of Ms Glass was that this course would further the overriding objective. Finally, this submission invoked the circumstance of other, pending cases viz the cases of the (almost 30) Applicants who do not have the status of lead Applicants, some of whose cases are the subject of undetermined permission renewal applications.

22. Unsolicited, the Applicants' representatives rejoined to the Secretary of State's response. This took the form of yet another not insubstantial written submission. This adverted to still further recent evidence, in the public domain, postdating the adjournment of the proceedings on 11 May 2015. There followed a lengthy rehearsal of the circumstances in which various items of new evidence materialised and were deployed in the proceedings subsequent to their initiation in early March 2015. This submission contains the following passage which, evidently, refers to the adjournment which occurred on 08 May 2015:

".... Following that adjourned permission hearing the SSHD was asked (via her Counsel) whether she wished to consider [Mr Foxley's expert report of 07 May 2015] in the context of these proceedings and if so the Applicants could withdraw their claim. The SSHD declined to respond to this but stated in her second skeleton argument that she was prejudiced both by the new material and by the rolled up hearing now directed at short notice."

This submission contains the proposal that the Tribunal should:

- (a) adjourn the first ground of challenge, pending further claims/representations to the Secretary of State and the outcome thereof; and
- (b) determine, at this stage, the second ground of challenge – but only following still further submissions on behalf of the Applicants.

This is followed by the statement:

"If any or all of the fresh material is excluded from [the Tribunal's] consideration the Applicant will, as previously observed by the Tribunal, place (and any further) material before the SSHD for her consideration in any event and she is bound to consider it and further proceedings may ensue."

This submission terminates with the warning that still further evidence and "further material submissions" are likely ("may well be anticipated").

V. THE EVIDENCE CONSIDERED

23. At this juncture, it is convenient to highlight the new evidence generated bilaterally following the grant of interim relief on 10 March 2015 and, in addition, subsequent to the further decisions of the Secretary of State dated 31 March and 01 April 2015. This is divided into two schedules in Appendix 2 hereto. Furthermore, as noted above, there is the distinct possibility of yet another category of evidence materialising. In the paragraphs which follow we provide our resume of the most salient parts of the evidence.

Dr Schuster and Professor Clayton

24. One of the main stimuli for the recent

flurry of proceedings described above is a litigation report dated 04 March 2015 prepared by Dr Liza Schuster of the City University London, School of Social Sciences. Dr Schuster is presently a guest researcher and lecturer at Kabul University and her experience of the country dates from around 2009. Her research project focuses on the aftermath of deportation to Afghanistan and, in particular, the impact on those deported and their families. In connection with this project, she interviewed the new Afghani Minister for Refugees and Repatriation on 28 February 2015. In her ensuing report the following statement is attributed to the Minister:

*“.... He is unwilling to continue operating the current MOUS [Memoranda of Understanding] until new ones are negotiated because the removing countries are breaching conditions: women and children and people who are mentally and physically unwell are being removed, **as well as those who cannot be returned to their provinces of origin.** The Minister argued that only those who could safely be returned to their provinces of origin should be removed*

In the Minister’s view, only Bamiyan and Panjshir were safe, but the roads to Bamiyan are not.”

[Our emphasis.]

On 26 March 2015 Dr Schuster provided an updated report. In this she quotes from the opinion of 04 February 2014 expressed by Professor William Maley, also described as an expert:

“.... It is essential to appreciate that the situation in Afghanistan is extremely fluid and assessments of the situation made even a year ago do not necessarily provide an accurate picture of the situation at the beginning of 2014.”

Dr Schuster continues:

“The withdrawal of international troops, the prolonged period of uncertainty before the formation of the new government following the election embolden the insurgents and the beginning of 2014 saw a number of spectacular attacks that have continued into 2015. Currently, the Taliban/insurgents are active in 32 out of 34 provinces and the security forces are having to battle for control of many, especially in the south ... and east It makes little sense to single out particular provinces as almost all have seen a sharp decline in security and an increase in attacks and casualties. It is anticipated that insecurity and attacks will further increase as usual with the start of the annual spring offensive.”

25. Addressing the years 2013 and 2014, Dr Schuster states:

“.... While civilian casualties caused by IEDs [improvised explosive devices] also increased to unprecedented levels over the same period in 2013, deaths and injuries caused by mortars, rocket propelled grenades and small arms fire in ground engagements jumped dramatically as the frequency and intensity of these incidents increased in 2014, particularly in areas with concentrated

civilian populations (such as Kabul). In 2014, the fight is increasingly taking place in communities, public places and near the homes of ordinary Afghans, with death and injury to women and children in a continued disturbing upward spiral."

The sources on which Dr Schuster draws include a joint 2014 report prepared by the United Nations Assistance Mission in Afghanistan ("UNAMA") and the United Nations Office of the High Commissioner for Human Rights ("UNHCHR"). Dr Schuster also draws on the Human Rights Watch ("HRW") report "Today We Shall All Die", published in March 2015. This examined in particular the culture of impunity which leaves Afghans unprotected against serious human rights abuses perpetrated by Government and military officials and their agents. Focusing specifically on the capital city, Dr Schuster summarises the "sharp increase" in the frequency of attacks during 2014, giving rise to substantial civilian deaths and casualties. She notes that during a 10 year period the population of Kabul increased from 0.5 million to around 5 million, including hundreds of thousands of internally displaced persons ("IDPs"). Addressing the topic of internal relocation, Dr Schuster emphasises the critical role of family networks in Afghani society. Such networks perform the function of offering support and employment opportunities. Where they do not exist, integration into an alien community is extremely difficult. This is due in substantial measure to the elevated levels of mistrust which is one of the legacies of three decades of war. Securing employment and accommodation in Kabul is highly problematic. Furthermore, young men bereft of social networks are vulnerable to recruitment by insurgents. The report also comments on the limitations of the facilities and assistance provided to returning Afghan nationals by the United Kingdom Return and Reintegration Programme.

26. The evidence assembled by the Applicants includes a very short statement of Professor Susan Clayton, who has also carried out relevant research relating to Afghanistan during a period of several years. She suggests that the availability of accommodation provided by the International Office of Migration ("IOM") is both limited and variable, while financial allowances to returning nationals permit survival in Kabul only for 2 or 3 days. She corroborates Dr Schuster's evidence about the lack of employment prospects in the city, largely on account of the non-existence of family networks. She opines that only some 10% of those returning remain in Kabul longer term; some 10 - 15% return briefly to their home areas outside Kabul, mainly temporarily only; and the remaining 75/80% leave the country within 2 - 3 months. This assessment is based upon the Professor's sample group of around 70 unsuccessful asylum claimants who were removed from the United Kingdom to Afghanistan.

UNHCR 2013 Guidelines

27. In August 2013 UNHCR published its "Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan". In its overview, this report states:

“A non-international armed conflict continues to affect Afghanistan, posing the Afghan National Security Forces (“ANSF”) assisted by the International Military Forces (“IMF”) against a number of Anti-Government Elements (“AGEs”), notably the Taliban.

Afghans in rural communities perceive AGEs to be exercising de facto control over areas in many regions of Afghanistan ... to assume effective control of communities ... or to harass and intimidate local residents into supporting them.”

The report notes the limited results achieved by some of the Government peace and reintegration initiatives. It provides the following description of the overall security situation:

“The security situation in Afghanistan remains unpredictable, with civilians continuing to bear the brunt of the conflict ...

With the ongoing security transition, the nature of the conflict has changed as AGEs have changed the focus of their attacks from the IMF to Afghan targets. AGE attacks have shown a significant increase in targeted killings of local civilian leaders and a general campaign of intimidation aimed at controlling communities in rural areas. Moreover the conflict, which had previously been concentrated in the south and east, has come to affect most parts of the country ...

Similarly, while AGEs continue to carry out high profile attacks in Kabul, the violence is not limited to Kabul or more generally to urban centres.”

The report notes that the “proliferation” of local militias and armed groups is mainly in the north, north east and central highland regions. Drawing on UNAMA data, it states:

“UNAMA started tracking civilian casualties (comprising civilians who are either killed or injured as a result of conflict and other forms of violence) in 2007. The number of civilian casualties increased every year between 2007 and 2011. UNAMA noted that while the total civilian casualty figure for 2012 represented a 4% decrease compared to 2011, civilian casualties in the last half of 2012 increased by 13% compared to the same period in 2011. This upwards trend continued in 2013. In the first 6 months of 2013, UNAMA registered 3852 conflict related civilian casualties, an increase of 23% compared to the same period of 2012 and representing a return to the record high number of civilian casualties of 2011.”

Targeted attacks on Government employees and officials have become increasingly prominent, with correspondingly fewer “ground engagements” between AGEs and pro-Government forces. There were 698 documented deaths and 379 documented injuries to civilians in 2012, increasing by 29% in the first six months of 2013.

28. By the end of 2012, 670,000 Afghans were reported to live within 500 metres of areas contaminated by land mines, affecting more than 1800 communities, while undetonated IEDs continued to have an impact in certain areas. There were almost 20,000 incidents initiated by AGEs in 2012. Of the 12 provinces with the highest incident rates – 640 – six are in the south or south eastern region. ANSO described the southern, south eastern and eastern region as forming an increasingly contiguous battle space. Cross border shelling from Pakistan also continued, with a total of 44 incidents causing 14 civilian categories in the eastern region during the first six months of 2013.
29. In its report, UNHCR describes “an increasingly heavy toll on the humanitarian situation in the country”, coupled with diminishing humanitarian access to affected populations who are amongst the most vulnerable of the country’s citizens. The reduced availability of health care facilities was highlighted. The years 2012 and 2013 witnessed an increase in the number of internally displaced people (“IDPs”) from around 486,000 to some 575,000. Such persons are amongst the most vulnerable groups in the country, particularly in urban areas.
30. The UNHCR report addresses the specific issue of internal relocation in Afghanistan, particularly from the perspectives of safety and reasonableness. It highlights the volatility and fluidity of the continuing armed conflict. It suggests that the proposed area of relocation must be “practically, safely and legally accessible” to the person concerned. The personal traits and circumstances of the individual must be evaluated, together with the security situation, respect for human rights and the possibilities for economic survival in the area concerned. UNHCR opines that internal relocation is not available in “areas affected by active conflict”. A person relocating to an urban area (such as Kabul) with no assured accommodation, no livelihood option and bereft of meaningful support networks, will be in a situation comparable to that of IDPs. The significance of this is that IDPs are considered to be among the most vulnerable groups in Afghanistan, many beyond the reach of humanitarian organisations. UNHCR suggests that internal relocation is reasonable only where the individual can expect to benefit from meaningful family, community or tribe support in the area of prospective residents. The report continues:

“The only exception to this requirement of external support are single able bodied men and married couples of working age without identified specific vulnerabilities who may in certain circumstances be able to subsist without family and community support in urban and semi-urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and that are under effective government control.”

The report further suggests that some of those who do not qualify as refugees under the 1951 Convention may be eligible for subsidiary protection under Article 15 of the Qualification Directive.

The 2015 EASO Report

31. The European Asylum Support Office (“EASO”) Report of January 2015 describes the continuing conflict between the Afghan National Security Forces (“ANSF”), supported by the International Military Forces (“IMF”) and the AGEs, or insurgents. This is described in certain quarters as a non-international armed conflict. In November 2014 Afghanistan was ranked second only to Syria in the World Security Risk Index. The International Security Assistance Force (“ISAF”), with a total strength of some 35,000 troops supplied by 48 contributing nations, operating under the UN Charter and the UN Security Council, is no longer deployed in Afghanistan, following a phased withdrawal between 2012 and 2014. The closure of the ISAF bases precipitated an end to the work of the Provincial Reconstruction teams. EASO suggests that this has had a significant adverse impact on the areas formerly secured by the ISAF forces:

“In those areas, which are now left to the ANSF, insurgents increasingly take control of territory and attack administrative centres and security installations The transition initiated a new phase in the war, characterised by fighting between the ANSF and insurgent groups ...

The overall trend is one of decreasing government control outside the larger towns and cities, escalating violence and more insurgent attacks.”

[Emphasis added.]

The insurgents, it is reported, operate in fronts of several hundred fighters. Their activities have been countered by ANSF with not insubstantial success:

“... ANSF have repelled most attacks and regained control over district administrative centres and security installations More civilians were caught in cross fire and ground engagements. However, in some areas, ANSF succeeded in holding the territory after the closure of an ISAF base, which resulted in fewer civilian casualties”

While the number of security incidents – 11320 – recorded by the UN between March and August 2014 reflected an increase in the 2012 and 2013 figures, it was lower than in 2011.

32. The report notes that, according to UNAMA, just under 5000 civilian casualties (some 1600 killed and 3300 injured) were documented in the first half of 2014, a 24% increase compared to the corresponding period in 2013. Other figures suggested that the likely total number for the whole of 2014 would be around 10000. The report states:

“..... more civilians were killed and injured in ground engagements, including rockets, mortars and grenades and cross fire, than any other type of violence [since 2009]. The regions where ground engagements and cross fire led to the

most civilian casualties are the south, south east and east ...

The vast majority of civilian casualties is attributed to AGEs."

The second highest cause of civilian casualties continues to be IEDs, sometimes combined with suicide and complex attacks, usually in public places. Once again, the highest casualties were in the south and south east provinces. While AGEs remain active in Kabul, the violence there has a particular profile, focusing on security personnel and their vehicles and other government officials, with the risk to civilians described as "*relatively low*". One organisation, UNOCHA, estimated that in the year September 2013 to August 2014 151 civilians were killed and 234 were injured in Kabul.

ISW 2015 Report

33. The Institute for the Study of War ("ISW") has published a very recent report, in March 2015. This records that the US military presence in Afghanistan is now reduced to approximately 10000 troops. The so-called "draw down" timetable and the US counter-terrorism strategies are currently under review. The report notes the "*numerous challenges*" confronted by ANSF, highlighting:

"... The insurgency itself threatens the Afghan government's control over terrain. Taliban attack patterns in 2014 were not typical of the previous two years. The Taliban conducted high profile attacks on district centres and security check points throughout the country in late 2014, often with massed, co-ordinated assaults. These factors led to casualty rates for both Afghan security forces and Afghan civilians in 2014 higher than in any of the last six years

Far from defeated, the ongoing Afghan insurgency remains a serious challenge and threatens to reverse hard won prior gains

Second, the ANSF lacks requisite capacities as a counter insurgent force. Although the ANSF was able to push back insurgents from seized district centres over the past year, the ANSF may not be able to sustain a sufficient forward presence to prevent their return ...

The insurgency's resilience in the face of ANSF clearing operations suggests that the ANSF lacks the ability to clear and hold terrain decisively. The fight will protract over the long term, which is a problem at this rate of combat loss."

Another specific concern identified is the presence of Al-Qaeda and other terrorist groups and possible affiliation with the Islamic State. The following analysis is particularly informative:

"The Taliban's strategy at the local level is to subvert, weaken and drive out institutions of state governance, isolate the Afghan security forces and build parallel institutions with which to increase its influence across Afghanistan's periphery

ANSF units are increasingly confined to their bases and security check points, unable or unwilling to go out on patrol in the community. This leaves the Taliban free to provide its own forms of governance in the countryside. Such a situation allows insurgents to sustain ground attacks on ANSF units."

The report notes that in 2014 civilian casualties arising from ground engagements in the northern, north eastern and western regions, doubled, in comparison to the 2013 figures, while those in the southern region almost tripled. The report suggests that operations in 2014 highlighted the limitations in the ANSF capabilities and exposed "*several key gaps*" therein.

34. The Institute provides the following informative summary:

"The violence witnessed since late 2014 and so far in 2015 in Afghanistan is not an anomaly, but indicative of a resurgent enemy ... The insurgency will again attempt to increase its influence in rural areas by temporarily seizing a number of vulnerable rural Afghan check points and district centres ...

The Afghan Central Government too is preparing to face a difficult spring and summer offensive in 2015"

The report notes the success of one particular operation conducted by the ANSF, which achieved definite gains in insurgent heavy areas in the south of the country. However, many of the gains proved to be short lived. There are concerns that the Taliban will mount its biggest ever offensive this year. On the positive side:

"ANSF still retains the capability to move units and supplies along major road networks to reinforce urban centres against large scale Taliban advances. And with more than 150000 troops, the ANA theoretically has the ability to field significant numbers of men and equipment

[However] should the Afghan state fail to provide an adequate level of protection, local communities would be tempted to militarise, creating a breakdown of state authority that would facilitate the regeneration of trans national terrorist groups in the country."

Notably, with the exception of the information summarised in [32] above, the discrete issue of civilian casualties does not emerge as one of the dominant themes, or concerns, of the Institute.

UNAMA

35. The relative proliferation of recent reports includes the United Nations Assistance Mission in Afghanistan ("UNAMA") 2014 Report, published in February 2015. We have already addressed this report indirectly, since several of the reports summarised above draw upon and reproduce information contained in it. One of the central themes of the report is the increasing toll of

the conflict on civilians. This is reflected in a 22% rise in civilian casualties in 2014. There were 3699 civilians' deaths and injuries to 6849 civilians, increases of 25% and 21% respectively in comparison with 2013. This was the highest number of civilian deaths and injuries in a single year since the commencement of systematic recording by UNAMA in 2009. During the six year period beginning on 01 January 2009, there have been 17774 civilian deaths and injuries to 29971 civilians. One of the main causes of these increased casualties is to be noted:

“Consistent with trends documented in the first half of 2014, ground engagements increasingly killed and injured women and children ...

The rise in civilian casualties from ground engagements largely resulted from civilians caught in cross fire between insurgents and Afghan security forces during fighting in and around populated areas

Anti-Government elements [AGEs] increased their mobility in a number of regions and increasingly carried out ground attacks against Afghan security forces to hold territory and secure new areas.”

One of the specific causes of the increasing civilian casualties was the use of indirect fire weapons, namely mortars, by all parties to the conflict. The use of mortars, rockets and grenades in civilian populated areas generates a “very high” risk of civilian casualties. These accounted for 50% of civilian casualties caused by ground engagements.

36. The report further notes an increase in civilian casualties, for the sixth consecutive year, caused by “the indiscriminate and unlawful use” of IEDs. This followed ground engagements as the second main cause of civilian casualties in 2014 (28%). Typically, these deaths were precipitated by attacks directed against Afghan security forces in populated areas. Compared with 2013, the increase was 38%, entailing 42 deaths and injuries to 126 civilians. In the year 2014, the total attacks claimed by the Taliban resulting in civilian casualties was 382. Of these, some 60% were directed at various elements of the Afghan and international military forces.
37. The UNAMA evidence is nothing if not current. It includes a press release, dated 12 April 2015, containing the following statement:

“In the first three months of 2015, civilian casualties from ground engagements rose by 8% compared to the same period in 2014. Ground fighting between Pro-Government Forces and Anti-Government elements caused 521 civilian casualties (136 civilians killed and 385 injured).”

Of these casualties, almost 50% of the deaths and injuries were caused by mortar and rocket attacks, an increase of 43% compared with the corresponding period in 2014. Increasing casualties among women and children were noted, attributed to increased ground fighting/ground engagements in civilian

populated areas. The second main cause of civilian casualties was IEDs. Increased ground conflict during the forthcoming months was predicted.

The Home Office February 2015 Reports

38. In February 2015, the Home Office published its Country Information and Guidance Report ("CIG") and updated Operational Guidance Note ("OGN") relating to Afghanistan.
39. The CIG Report has the expressed purpose of providing guidance to Home Office decision makers on the handling of protection claims made by nationals of Afghanistan. This publication records that in areas controlled by AGEs, no effective state protection exists. This is followed by a suggestion that in Kabul and other cities and towns controlled by the Government, a willingness to offer protection is unlikely to equate with the availability of effective protection –

"... given the structural weaknesses in the security forces, including a lack of resources, training and adequate equipment, poor vetting of recruits, weak command and control structures together with corruption and official impunity for serious abuses."

The report also highlights, in this context, significant shortcomings in the judiciary. This assessment gives rise to the following policy statement:

"In general, the state is unable to provide effective protection, although each case will need to be considered on its specific facts."

It is appropriate to interpose at this juncture the observation that this assessment of widespread inadequate state protection, even in Government controlled areas, is not reflected in any of the other reports digested above.

40. The Home Office CIG draws heavily on other sources, including the EASO and UNAMA reports, reflecting the pattern of overlap and duplication to which we have adverted above. It also draws on the Secretary General's report to the UN Security Council, which records a 5% decrease in security incidents during the 3 month period August to November 2014; a 10% increase during the period January to November 2014; and a description of the southern, south eastern and eastern regions of the country as the most volatile areas, accounting for 69% of incidents. ANSF consists of the National Army, the National Air Force and the National Police, with some 358000 members in total. This composite force is supplemented and assisted by other groupings or entities known as "Pro-Government Forces". The consistent perception and assessment that ANSF, particularly the police element, has engaged in human rights abuses with impunity, corruption, abuse of power and extortion is one of the reasons for the evaluation of overall state protection as weak and inadequate. Finally, the CIG adopts the USSD 2013 report which notes:

"The greatest barrier to movement in some parts of the country was the lack of

security. In many areas insurgent violence, banditry, land mines and IEDs made travel extremely dangerous, especially at night. Armed insurgents also operated illegal check points and extorted money and goods. The Taliban imposed nightly curfews on the local populace in regions where it exercised authority, mostly in the south east."

Finally, the report notes the continuing application of AK (*supra*) and H&B v United Kingdom [2013] ECHR 298.

41. The Home Office Operational Guidance Note ("OGN") relating to Afghanistan issued in June 2013 was updated and republished in February 2015. As regards the discrete issue of internal relocation, emphasis is placed on the application of the relevant UNHCR eligibility guidelines [17/12/2010]. These include the following significant passage:

"UNHCR generally considers internal relocation as a reasonable alternative where protection is available from the individual's own extended family, community or tribe in the area of intended relocation. Single males and nuclear family units may, in certain circumstances, subsist without family and community support in urban and semi-urban areas with established infrastructure and under effective Government control. A case by case analysis will, nevertheless, be necessary given the breakdown in the traditional social fabric of the country caused by decades of war, massive refugee flows and growing internal migration to urban areas."

As ever, fact sensitivity and individuality are key considerations.

42. The final issue addressed in the OGN is that of enforced returns to Afghanistan. This highlights the general policy that such returns can properly take place, subject to certain limitations. Assisted voluntary return remains the preferred option. In this context, reference is made to the Memorandum of Understanding ("MOU") executed by the United Kingdom, the Afghan Transitional Administration and UNHCR in October 2002 (*supra*). The subject matter of this MOU is stated to be "**Voluntary** Return". The report continues:

"However, as agreed with the Afghan authorities, from April 2003 those not choosing voluntary return and found to be without protection or humanitarian needs have been liable to be considered for enforcement action although those individuals or groups identified as vulnerable are excluded from the programme of enforced returns."

In this context, it is noted that in all cases of enforced return by charter flight from the United Kingdom, those affected:

"... are given immediate post-arrival assistance including temporary accommodation and onward transportation if required and [are] offered access to a reintegration programme which includes vocational training and business support options."

As noted in [25] & [26] above, the efficacy and durability of these assistance measures have been questioned.

The Inter-Governmental Evidence

43. This evidence, in summary, bears on the arrangements/agreements made between the United Kingdom and Afghanistan Governments. It consists of the aforementioned MOU, some recent "Notes Verbales" ("NVs"), four witness statements and one letter filed on behalf of the Secretary of State. The first of these statements was generated pursuant to the Tribunal's directions in the wake of the Court of Appeal order, dated 10 March 2015, reversing its decision refusing to grant interim relief in the case of the fifth Applicant, AB. By this direction the Secretary of State was required to provide evidence relating to what actually happened upon the arrival in Kabul of the charter flight which departed the United Kingdom on 10 March 2015. This direction was motivated, in the context then prevailing, by one plausible interpretation of the then extant evidence namely that the Afghan authorities would refuse to allow any passenger considered by them vulnerable to disembark, thereby forcing their return to the United Kingdom. This evidence would have an obvious bearing in the context of any subsequent charter flight repatriation operation.
44. This direction stimulated the first witness statement of one Robert Chatterton Dickson, Charge d' Affaires of the British Embassy in Kabul. To this witness statement were exhibited a Memorandum of Understanding and a single NV. The witness statement is dated 18 March 2015. While a further witness statement of Mr Chatterton Dickson and additional exhibits materialised thereafter, together with a witness statement made by a different deponent, these were unsolicited in the sense that they were volunteered on behalf of the Secretary of State rather than required by directions of the Tribunal. This brief preface to the Respondent's evidence serves to highlight again the organic nature of these proceedings.
45. The tripartite Memorandum of Understanding ("MOU") was executed by the United Kingdom, the Afghan Transitional Administration and UNCHR in October 2002. The recitals make reference to co-operation:

*"..... in order to assist the voluntary, dignified, safe and orderly repatriation to and successful reintegration in Afghanistan of Afghans now in the United Kingdom who also **opt** to return."*

The MOU embraces Afghan citizens present in the United Kingdom who have obtained refugee status or subsidiary protection or have withdrawn their applications for such status or have had their applications refused. The agreement speaks of the primacy of "voluntary" repatriation. This theme is re-emphasised by the words "their freely expressed wish". It is designed to facilitate

and achieve repatriation in conditions which are humane, safe, dignified and sustainable. Special provision is made for vulnerable persons:

“The Participants will take special measures to ensure that vulnerable groups receive adequate protection, assistance and care throughout the repatriation and reintegration process. In particular, measures will be taken to ensure that unaccompanied minors are not returned prior to successful tracing of family members or without specific and adequate reception and care-taking arrangements having been put in place in Afghanistan.”

The United Kingdom Government commits itself to a basic medical examination of all Afghans prior to their repatriation. By the terms of the MOU the United Kingdom Government is further committed to meeting the travel costs of each returning Afghan national and offering a “repatriation package” to all, giving special consideration to “the needs of women, children and other vulnerable groups”.

46. The MOU is to be considered in conjunction with four inter-governmental communications in March and April 2015, each in the form of a NV. The first, dated 10 March 2015, refers to an agreement, evidently of very recent vintage, between the two governments:

*“.... It was agreed that chartered British flights carrying immigrants from the UK shall be allowed to land at Kabul Airport, unless vulnerable people (**children, families, women without a male relative and individuals whose permanent residential areas are insecure**) are boarded amongst the returnees.”*

[Emphasis added.]

The second NV, dated 08 April 2015, in effect approves a request of the United Kingdom Government to return Afghan nationals by a charter flight scheduled for 22 April 2015, provided that the passengers contain no vulnerable persons. The third NV is brief, contains very little of substance or novelty and highlights once again the cohort of “vulnerable refugees”. It is dated 13 April 2015, as is the fourth, which refers to (apparently) a further meeting between the Afghan Minister and the British Charge d’ Affaires and states:

“.... It was agreed that the UK Government discontinues deporting Afghan vulnerable people, such as single mothers, children, elders, individuals whose living areas are under security risks and abstain from separating family members from each other.”

47. The MOU and four NVs must be considered in conjunction with three witness statements and one letter of Mr Chatterton Dickson filed on behalf of the Secretary of State. The first of these is dated 18 March 2015. Mr Chatterton Dickson avers that on 01 March 2015 the charter flight scheduled to depart on 11 March 2015 received “landing request approval” from the relevant Afghan Minister. Three days later, on 04 March 2015, the Afghan Government formally

48. communicated its wish to reconsider the terms of the MOU. It is evident that the first NV, dated 10 March 2015, was the product of high level inter-governmental activity and negotiation during the preceding days. Mr Chatterton Dickson's witness statement contains no definition of "*vulnerable people*" and, further, avers to an inter-governmental disagreement as to whether, given the terms of the MOU, it embraces persons from allegedly unsafe home provinces. Further, Mr Chatterton Dickson's statement refers specifically to the cohort of involuntary returnees:

*"On 09 March 2015, during a phone conversation, the British Prime Minister, David Cameron requested President Ghani's agreement to the UK being allowed to continue **non-voluntary** returns to Afghanistan whilst MOU discussions took place."*

[Emphasis added.]

49. Next, Mr Chatterton Dickson addresses events at Kabul Airport on 11 March 2015, describing this operation as "*successful*". He lists the nine provinces to which the 24 returning Afghan nationals were travelling. They received the conventional Institute of Migration ("IOM") briefing, which includes information about a maximum 14 night stay at a purpose built reception centre and onward travel. The latter option was selected by 21, while three chose to stay at the centre. Some of those returning were met by family and friends. The following day, Mr Chatterton Dickson was formally advised that the Afghan Government does not have "*a co-ordinated position on the issue of international returns*" and that any renegotiation of the MOU would, therefore, be deferred.
50. In his second witness statement, which is dated 17 April 2015, Mr Chatterton Dickson, having exhibited the three NVs, avers:

"It is clear therefore that the Afghan Government remains committed to accepting returns to Afghanistan and is content for the UK Charter to continue whilst the Afghan Government considers their internal policy position."

Mr Chatterton Dickson then adverts to a disagreement between the two Governments regarding the definition of "*vulnerable*" persons, averring that the definition espoused by the UK Government is set out in his first statement. In further averments he indicates that the attempts of the Afghan Ministry of Foreign Affairs to achieve a co-ordinated Afghan Government stance on the subject of returns continue. It is suggested that, in the interim, the repatriation of Afghan nationals from the United Kingdom will continue. This is said to be the subject of a "*written assurance*", which is not exhibited. Mr Chatterton Dickson further avers that repatriation from six other states pursuant to agreements comparable to the MOU continues and that this includes Afghan nationals returning to allegedly insecure provinces. Mr Chatterton Dickson avers, and repeats, that the Afghan Government is agreeable to enforced returns "*in accordance with the current MOU*". We observe that Mr Chatterton Dickson's

assertion of a “written assurance” is intelligible if it refers to the MOU, in conjunction with the NV, which is how we construe these words.

51. The third of Mr Chatterton Dickson’s witness statements is dated 06 May 2015. Reflecting the organic character of these proceedings, it was made:

“.... in order to update the Tribunal and the Applicants on developments in relation to the events set out in my first statement signed on 18 March 2015 and second statement signed on 17 April 2015.”

This statement explains that whereas the Afghan authorities had authorised the charter flight from the United Kingdom scheduled to land in Kabul on 22 April 2015, the flight was cancelled at 23:00 hours on 21 April “... on the basis that given the significantly reduced number of people we were able to remove, proceeding with the flight did not represent value for money for the tax payer” Mr Chatterton Dickson continues:

“It is worth noting that the Afghan Government did not express any concerns about the April charter. The Ministry of Foreign Affairs provided permission on 13 April 2015. The Director General in charge of the Fourth Political Directorate at the [Ministry] confirmed that Minister Balkhi’s statement on security was not an established Afghan Government position on 18 March and 15 April as set out at paragraphs 16 and 6 of my first and second witness statements and confirmed that the UK could continue returns under the existing terms of our [MOU]. In addition, the Ministry of Refugees and Repatriation did not express any concerns with the 57 individuals on the list of returnees provided to them on 19 April 2015. This included not objecting to the return of individuals from 17 provinces.”

Continuing, Mr Chatterton Dickson avers that on 22 April 2015 the Embassy’s First Secretary Migration met the aforementioned Director General for the following purpose:

“... to request a Note Verbale from the [Ministry] which clearly set out the Afghan Government’s position on returns. [The First Secretary] explained that the recent Notes Verbales not only contradicted each other but also contradicted the [Director General’s] verbal assurances on 18 March and 15 April 2015 [and] ... indicated that this needed to be clarified as a matter of urgency.”

This elicited the response that repatriation could continue in accordance with the terms of the MOU and that this would embrace all of the provinces of Afghanistan. The Director General, it is averred:

“.... also confirmed that Minister Balkhi’s views on security were not an established Afghan Government position.”

The Director General is said to have undertaken to provide a clarifying NV. This

was not forthcoming and, soon afterwards, he explained that the Ministry had established a Commission to “review the issue of international returns”. This was accompanied by a reiteration of the commitment that repatriation under the existing MOU would persist. This assurance was repeated subsequently. Furthermore, it is averred, it was repeated by the Afghan Prime Minister at a meeting on 06 May 2015. Embassy officials continued to press for a further NV. Mr Chatterton Dickson avers, finally, that four other European States have enforced the repatriation of 46 Afghan nationals since 28 February 2015 and that only two of these are from the three provinces declared to be safe in Minister Balkhi’s statement, the remaining 44 originating from 12 other provinces. Ditto the 22 Afghan nationals repatriated from the United Kingdom on the charter flight of 10 March 2015 and five voluntarily returning Afghan nationals subsequent to the cancellation of the flight scheduled for 21 April 2015.

52. Exhibited to Mr Chatterton Dickson’s third witness statement is a letter from the United Kingdom Immigration Minister to the aforementioned Director General. This contains the following passage:

“The UK currently returns only single males who receive arrival, travel and reintegration assistance and can be successfully repatriated ...

We understand the new Minister of Refugees and Repatriation has expressed concerns about returning individuals from ‘dangerous provinces’ and concerns about returning ‘vulnerable groups’ and this has led to several Note Verbale from your Ministry asking the UK to impose several new return conditions. The UK Government is open to discussion but we do not believe new conditions can be imposed unilaterally and we would like to discuss any proposed changes as part of formal MOU negotiations.”

This is followed by a reference to the uncertainty generated by Minister Balkhi’s public statement. Finally, the letter reiterates the imperative of receiving “written clarification” from the Afghan Government that the repatriation of Afghan nationals from the United Kingdom to their country of origin can continue “under our current MOU” without any “new return conditions”.

53. Mr Rich, the Assistant Director of the Operational Support and Certification Unit (“OSCU”) of the Home Office, is the author of the fourth of the Respondent’s witness statements. This is dated 18 March 2015 and contains the following salient averments:

“The evidence submitted by the Applicants as to the interviews which Dr Schuser had with the Minister for Refugees and Repatriation is not disputed. However ... the position has changed since that interview. Minister Balkhi ... has since agreed that the charter would be accepted.

The Ministry of Foreign Affairs [believes] it made sense to hold discussions about a new [MOU] after the UK elections. The [Afghan] Director General also confirmed that returns from the UK could continue in the meantime under the existing MOU.”

The events and litigation developments surrounding the second of the two recent flights to Kabul, on 21 April 2015, postdated this statement.

The Most Recent Evidence

54. Notwithstanding the determination of the Tribunal to complete these proceedings with the maximum expedition and to provide a swift judgment, the phenomenon of new evidence continued. Thus, on the morning of the rescheduled substantive hearing on 08 May 2015 – see [11] and [12] above – the following new evidence was presented on behalf of the Applicants:
- i. The witness statement of a caseworker employed by the Applicants' solicitors documenting a telephone conversation with Minister Balkhi and attributing to the Minister a statement that repatriation will not be acceptable in the cases of "*children, families, lone females, those from dangerous provinces and those with serious illness*", coupled with a description of the provinces of Helmand, Ghazni and Kunduz as "*very dangerous*" provinces.
 - ii. A witness statement of another caseworker describing a telephone conversation on 22 April 2015 and two emails dated 4 May 2015 with one of those repatriated via the flight on 10 March 2015, a person described as a failed asylum seeker now aged 21 years. This person, it is averred, reported that following arrival he was accommodated in the reception centre for 14 days whereupon he was required to leave and is "*currently living on the streets and begging*". He claims to have no family contacts. We have highlighted the date of this conversation for the purpose of underlining the unacceptability, in the context of these proceedings, of the caseworker's witness statement being delayed for a period of 16 days thereafter.
 - iii. The witness statement of a consultant solicitor documenting a telephone conversation with an official of the Afghan Ministry of Refugee and Repatriation on 07 May 2015 to the effect that the repatriation of "*any families, children, lone females, those from dangerous provinces and those with serious illness*" is unacceptable to the Afghan authorities. It is further averred that on 06 May 2015, eight out of nine Afghan nationals repatriated from Sweden were accepted. The ninth was returned "*as no proper identification checks had been carried out*".
 - iv. Finally, there is a 58 page document entitled "Expert Report, Security Situation in Afghanistan", dated 07 May 2015, prepared by Tim Foxley MBE. This report, despite its bulk, ends with "health warnings" that it is "*preliminary only*" given the "*tight time frame*" imposed on the author. There is no clear explanation of the timing or genesis of this report, in a context where the proceedings were progressing on a high speed track and were of two months vintage at this stage. Having highlighted these

significant qualifications, or disclaimers, we note also the vintage and sources of the contents of the report, the author's limited direct contact with the country and his designation of analyst. For these reasons, we consider that this report qualifies to be accorded at best minimal weight.

VI. THE INDIVIDUAL APPLICANTS

55. It is appropriate to recall that the five Applicants were selected, by agreement of the parties duly endorsed by the Tribunal, in the circumstances outlined in [1] – [10] above. These are five lead cases in a context in which a total of 34 Applicants have been granted interim relief. Permission to apply for judicial review has not been ordered in any of these cases. The purpose of the exercise of identifying five lead Applicants was to generate a judicial decision which would, to the maximum extent possible, provide guidance in and, if feasible, effectively determine the other pending cases. The individual features of the cases of the five lead Applicants, summarised in [55] – [59] *infra*, are to be considered in this context. Furthermore, pursuant to further directions of the Tribunal, the text which follows has been agreed by the parties' representatives.
56. The first Applicant, HN, is aged 22 years. He entered the United Kingdom as a minor, in 2007, aged 14. He is from Laghman province. He has resided here for almost eight years. The last judicial decision in his case was on 30 September 2013, when the FtT decided that the Applicant was not credible and rejected his evidence since his last appeal in 2011. The Judge found he had a deep-rooted resistance to being returned to Afghanistan, and rejected any risk on return. The FtT found that the Applicant had support in Afghanistan (the Applicant's own account was of his cousin's family in Kabul and he claimed he had previously resided in Kabul with a neighbour's relative for a year before his departure from Afghanistan). The Judge also dismissed the Article 8 appeal. Mental health was not in issue in this appeal. On 20 November 2013 the Upper Tribunal refused permission to appeal. This Applicant's challenge asserts a *prima facie* risk of treatment contrary to Article 15(c) of the Qualification Directive in his home province. It further involves the contention that, in his present condition, he cannot safely or reasonably relocate to Kabul. This contention is based on certain medical evidence which records a history of recent suicide attempts, self-harming and hunger strike. The medical expert describes this Applicant as manifesting severe mental health problems, describing his condition as "*unstable*". He too invokes paragraph 276 ADE of the Immigration Rules, highlighting his age, length of residence, health and the lack of meaningful healthcare in Kabul and linking this with his private life rights under Article 8 ECHR. He further contends that he qualifies to be considered a vulnerable person within the terms of the OGN of February 2015 and that the Secretary of State should now give consideration to granting him leave to remain exceptionally under paragraph 353B of the Rules.
57. The second Applicant, SA, celebrated his 18th birthday on his deemed date of birth of 01 January 1997. He originates from the Baghlan province. On 01 October 2014 the FtT held that while he would be at real risk of persecution in

his home area, he could safely and reasonably relocate to Kabul. The first element of his case is based on Article 15(c). The second involves the contention that he cannot safely relocate internally in Afghanistan. The third, invoking paragraph 276ADE(vi) of the Immigration Rules, is based on the contention that in light of his age, recent separation from Afghanistan and absence of family support in Kabul, there are clearly serious obstacles to his reintegration there. The fourth element of his challenge is, invoking JS (Former unaccompanied child - durable solution) Afghanistan [2013] UKUT 00568 (IAC), that he is a former looked after child who requires a “durable solution” to any proposed resettlement and, given the absence thereof, his removal to Afghanistan will breach his right to respect for private life under Article 8 ECHR.

58. The third of the five Applicants is JG. He entered the United Kingdom in 2009, aged 19 and is now aged 25. The FtT accepted that his father was a member of the Taliban in charge of nine or ten men who died fighting in 2009. The FtT also accepted that the Taliban possibly tried to recruit the Applicant but did not find it credible that they would do so forcibly or that they would harm or kill him if not prepared to join them. Like FK (the fourth Applicant) he originates from the Nangahar province. The last judicial decision in his case was on 30 January 2015, when the FtT decided that the Applicant was not credible, and found that he was not at risk from the Taliban, and in any event could reasonably and safely relocate to Kabul. He was unrepresented at the appeal. The Judge considered the appeal under the SSHD’s OGN. The Judge found that the Applicant had a wealthy uncle in Afghanistan who would be prepared to support him, and even without such support relocation to Kabul was reasonable. The FtT also rejected his Article 8 appeal finding he had family in Afghanistan. On 3 February 2015, the FtT refused permission to appeal. His challenge has two dimensions. The first is that there is a *prima facie* risk of Article 15(c) treatment upon returning to his province. The second is that, per paragraph 276 ADE of the Rules, there are serious obstacles to his integration and/or his private life rights under Article 8 ECHR will be infringed having regard particularly to the insecurity of attempting to travel to his home area, the new evidence about the prevailing conditions in Kabul and the absence of any family there.
59. The fourth Applicant, FK, is aged 25 years and originates from the Nangahar province, where his family lives. On 11 December 2014, the Applicant claimed asylum and was admitted to the Detained Fast Track (“DFT”) process. The last judicial decision in his case was on 19 January 2015, when the FtT decided that the Applicant was not credible and rejected his entire account of risk from the Taliban and / or Afghan government. The FtT also rejected the appeal under Article 15(c) of the Qualification Directive. In the alternative, the Judge found the Applicant could relocate to Kabul. On 27 January 2015 permission to appeal was refused by the FtT. His case is based on the contention that to repatriate him to his home area will generate a *prima facie* risk of treatment contrary to Article 15(c).
60. The last Applicant, AB, is aged 26 years. He has been in the United Kingdom

since 29 November 2014. He hails from the Uruzgan province of Afghanistan. On 23 January 2015, having been admitted to the DFT, the FtT decided that while he had a well-founded fear of persecution in his home area from the Taliban and others, linked to his work as a human rights defender, which was known to others in the human rights field in other parts of Afghanistan who the Applicant had encountered in the course of his work; his attendance at the London conference in December 2014 was likely to have become known to people in his home area; his family received a threatening letter from the Taliban in consequence, and that he could safely and reasonably relocate to Kabul. His family continue to reside in his home area. His case, in a nutshell, is that having regard to the totality of the evidence now available, the FtT's assessment that he can safely and reasonably relocate to Kabul is no longer sustainable. While he apparently has no family or other support in Kabul, the determination records that he had travelled to Kabul previously in connection with his human rights work.

VII. THE ISSUES

The Qualification Directive

61. We have noted the salient features of each of the Applicants and their individual circumstances above. In doing so we have outlined the legal contours of their challenges. The first element of the Applicants' cases, duly developed by Ms Naik in both written and oral argument, is based on the Qualification Directive. The primary case made by some of the Applicants is founded on Article 15(c) of the Qualification Directive, while others invoke this protection in a secondary, or indirect, manner. Article 15(c) provides:

"Serious harm consists of

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

Article 15 is applied by Article 2(e) which defines a person eligible for subsidiary protection (described as humanitarian protection in paragraph 339C of the Immigration Rules which applies Article 15 using the same terminology save for the addition of 'unlawful killing') as follows:

"... a third country national ... person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ... would face a real risk of suffering serious harm as defined in

Article 15 ... and is unable or, owing to such risk, unable to avail himself or herself of the protection of the country.”

There are now two decisions of the Court of Justice of the European Union (CJEU) which deal with Article 15(c): Case C-465/07 Elgafaji v Staatsscretaris van Justitie [2009] 1 WLR 2100, and Diakite v Commissaire general aux refugies [2014] WLR(D) 37, [2014] EUECJ C-285/12.

62. In Elgafaji, the ECJ construed Article 15(c) as dealing with a more general risk of harm than that covered by 15(a) and (b).

The essence of the Court’s ruling in Elgafaji was:

“43. Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) of the Directive, must be interpreted as meaning that: the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances; the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.”

63. In Diakite, the Court, having provided a definition of internal armed conflict at [28] reaffirmed in [30] its view that for civilians as such to qualify for protection under Article 15(c) they would need to demonstrate that indiscriminate violence was at a high level:

“30. Furthermore, it should be borne in mind that the existence of an internal armed conflict can be a cause for granting subsidiary protection only where confrontations between a State’s armed forces and one or more armed groups or between two or more armed groups are exceptionally considered to create a serious and individual threat to the life or person of an applicant for subsidiary protection for the purposes of Article 15(c) of Directive 2004/83 because the degree of indiscriminate violence which characterises those confrontations reaches such a high level that substantial grounds are shown for believing that a civilian, if returned to the relevant country or, as the case may be, to the relevant region,

would – solely on account of his presence in the territory of that country or region – face a real risk of being subject to that threat (see, to that effect, Elgafaji, paragraph 43).”

At [31] the Court reaffirmed the view it expressed in Elgafaji at [39] that Article 15(c) also contains (what UNHCR has termed) a “sliding scale” such that “the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.” The Court thereby recognised that a person may still be accorded protection even when the general level of violence is not very high if they are able to show that there are specific reasons, over and above them being mere civilians, for being affected by the indiscriminate violence. In this way the Article 15(c) inquiry is two-pronged: (a) it asks whether the level of violence is so high that there is a general risk to all civilians; (b) it asks that even if there is not such a general risk, there is a particular risk based on the “sliding-scale” notion.

64. In the United Kingdom, the leading decision of the higher courts dealing with Article 15(c) remains QD (Iraq) v Secretary of State for the Home Department [2011] 1 WLR 689. QD helpfully explains how Elgafaji should be applied. In addition we have the guidance set out in HM and others (Article 15(c) Iraq CG [2012] UKUT 409 (IAC) wherein, at [42]-[45], the Tribunal stated:

“42. We recognise that the threat to life or person of an individual need not come directly from armed conflict. It will suffice that the result of such conflict is a breakdown of law and order which has the effect of creating the necessary risk. It is obvious that the risk is most likely to result from indiscriminate bombings or shootings. These can properly be regarded as indiscriminate in the sense that, albeit they may have specific or general targets, they inevitably expose the ordinary civilian who happens to be at the scene to what has been described in argument as collateral damage. By specific targets, we refer to individuals or gatherings of individuals such as army or police officers. The means adopted may be bombs, which can affect others besides the target, or shootings, which produce a lesser but nonetheless real risk of collateral damage. By general targets we refer to more indiscriminate attacks on, for example, Sunnis or Shi’as or vice versa. Such attacks can involve explosions of bombs in crowded places such as markets or where religious processions or gatherings are taking place.

43. The CJEU requires us to decide whether the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level as to show the existence for an ordinary civilian of a real risk of serious harm in the country or in a particular region. When we refer below to the “Article 15(c) threshold”, this is what we have in mind. Thus it is necessary to assess whether the level of violence is such as to meet the test.

44. In HM at [73] the Tribunal decided that an attempt to distinguish between a real risk of targeted and incidental killing of civilians during armed conflict was not a helpful exercise. We agree, but in assessing whether the risk reaches the level required by the CJEU, focus on the evidence about the numbers of civilians killed or wounded is obviously of prime importance. Thus we have been told that each death can be multiplied up to seven times when considering injuries to bystanders. This is somewhat speculative and it must be obvious that the risk of what has been called collateral damage will differ depending on the nature of the killing. A bomb is likely to cause far greater “collateral damage” than an assassination by shooting. But the incidence and numbers of death are a helpful starting point.
45. The harm in question must be serious enough to merit medical treatment. It is not limited to physical harm and can include serious mental harm such as, for example, post-traumatic stress disorder. We repeat and adopt what the Tribunal said in HM at [80]:

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

65. The second legal element in the Applicants’ collective challenge is constituted by the principle, now firmly embedded in refugee law, that the grant of asylum can be lawfully withheld on the basis of internal relocation in the claimant’s country of origin only where this recourse, or solution, is both reasonable and safe: see, for example, Jasim v SSHD [2006] EWCA Civ 342, per Sedley LJ at [16]. The third legal basis of the Applicants’ challenges invokes the private life dimension of Article 8 ECHR, in conjunction with paragraph 276 ADE(vi) of the Immigration Rules. The latter provides, under the rubric “Requirements to be met by an applicant for leave to remain on the grounds of private life”, in material part:

“ The applicant

- (vi) Subject to subparagraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of

imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

Paragraph (2) disapplies this provision in cases where it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004: this does not apply to any of the present cases.

66. The next element of the Applicants' challenge has two ingredients, namely the Secretary of State's policy guidance enshrined in the OGN (digested in [25] - [26] above) and the MOU. Reliance is placed on paragraph 6.4 of the former, which replicates the agreement enshrined in the MOU that individuals or groups identified as vulnerable will be excluded from the programme of enforced returns. This aspect of the challenge, duly developed in Ms Naik's submissions, also highlights the specific provision in the MOU committing the UK Government to take into account "*the evolving situation in Afghanistan as well as the major challenges involved in ensuring basic services for all of its citizens*" and the related commitment that the return process will be phased, orderly and humane, will be accomplished in manageable numbers and will take into account the availability of accommodation (per paragraph 3).
67. In the particular case of SA (the third Applicant), who has very recently attained the age of 18 years, the status of former looked after child is invoked. This status founds the contention that his repatriation would contravene the "*proposition*" in JS (former unaccompanied child - durable solution) Afghanistan [2013] UKUT 00568 (IAC) that he is protected from removal by Article 8 ECHR, having regard to his teenage status upon arrival in the United Kingdom, his subsequent placement in care and his current age (18). Ms Naik also invoked the principle of durable solutions.

Paragraph 353, Immigration Rules

68. Mrs Naik's submissions also dilated on the Applicants' challenge to the Secretary of State's certification of their claims under paragraph 353 of the Immigration Rules ("the Rules"). This provides:

"353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas”.

There are well settled principles governing the test for a fresh claim and the Secretary of State’s clearly unfounded certification thereof. In brief compass, the threshold to be overcome has been variously described as “*modest*” and “*not very high*”; a realistic prospect of success equates with a prospect which is merely more than fanciful; the question is whether on any legitimate view of the facts the applicant’s claim could succeed before an immigration Judge; regard must be had to the standard of proof which an immigration Judge would apply; correct self-direction is essential viz the Secretary of State must ask herself the proper question (the “*Tameside*” principle); anxious scrutiny must be applied; and, finally, in the generality of cases, a decision made by the Secretary of State under paragraph 353 will be vulnerable to judicial review only on the ground of *Wednesbury* irrationality. These principles are uncontroversial.

The Secretary of State’s Riposte

69. We distil the submissions of Ms Glass on behalf of the Secretary of State on all issues to the following main contentions:
- i. Particular regard must be had to the recent determinations of the FtT in the Applicants’ cases. This involves in particular acknowledging the lack of novelty in the suggestion that relocating to Kabul is not safe or reasonable, in circumstances where recent country evidence was judicially considered.
 - ii. The lawfulness of the Secretary of State’s most recent decisions withstands scrutiny by reference to the standard of rationality.
 - iii. The Secretary of State’s decisions are consistent with the recognition in the most recent UNHCR guidelines of the internal relocation of single able bodied men and couples of working age to urban areas that have the necessary infrastructure and livelihood opportunities to meet the basic necessities of life.
 - iv. Professor Clayton’s brief report does not arguably justify a departure from the country guidance promulgated in AK.
 - v. The statements of Minister Balkhi have been considered by the Secretary of State and must not be viewed in isolation from other evidence and events, including the efficacious repatriation of 24 Afghans from nine provinces pursuant to the charter flight of 11 March 2015. Furthermore, his statements are not supported by UNHCR.
 - vi. The Secretary of State reasonably concluded that, given its limitations, Dr Schuster’s report did not warrant a departure from

the assessment of risk in AK. Furthermore, Dr Schuster did not suggest that breaches of Article 3 ECHR or Article 15(c) of the Qualification Directive would be occasioned by repatriation. More fundamentally, the Secretary of State rationally concluded that Dr Schuster's assessment of the issue of relocation to Kabul suffers from a series of intrinsic limitations and does not justify a departure from AK.

- vii. Focusing on the standard of rationality to be applied to the Secretary of State's most recent decisions, the current country evidence falls well short of sustaining the Applicant's challenges.
- viii. Those Applicants who invoke the "*very significant obstacles to integration*" criterion in Rule 276ADE(vi), in advancing claims under Article 8 ECHR, did not make this case in their further submissions to the Secretary of State. Furthermore, as regards the Applicant HN, his Article 8 private life claim has been rejected in two successive appeals.
- ix. As regards the Applicants, HN and SA, both of whom assert mental health problems, the supporting evidence is extremely limited and, in the case of SA, there is no medical evidence.
- x. The relevance of the MOU is confined to the context within which interim injunctive relief was granted. Furthermore, the MOU does not give rise to legal rights and obligations and, even if it does, these must be confined to the parties thereto.
- xi. The OGN does not have the status of a Home Office repatriation or removals policy. Rather, its function is to provide guidance to case workers and decision makers. In any event, it does not erect any policy obstacle to the enforced return to Afghanistan of failed asylum applicants. Furthermore, it contains no definition of "*vulnerable*". In this context, the MOU defines only one category of vulnerable persons, namely unaccompanied minors satisfying certain requirements. None of the Applicants are within this category.

70. The final element of the submissions of Ms Glass has the following components:

- (a) The Applicant is forced to argue the hopeless case that the meaning of vulnerable in the SSHD's OGN is not the SSHD's view, nor even by reference to the MOU, but instead by reference to the new Afghan Minister Balkhi's recent opinion of who is vulnerable as set out in the recent Note Verbales. It should be noted that these opinions were given in the context of the Afghans seeking to renegotiate the MOU, they were not an agreed Afghan Government policy position and the Minister's views are not accepted by the UK government, as detailed by the first and second witness statements of the Charge D'Affaires of

the British Embassy.

- (b) Moreover, Minister Balkhi's views as to vulnerable groups are irreconcilable with the various NVs. In particular:
 - (i) Previous Afghan government communications had requested that the MOU be reconsidered and proposed the suspension of all repatriations; and
 - (ii) the first NV (noted in [46] above) defined vulnerable people as set out.
- (c) Minister Balkhi's views on vulnerable groups are not the agreed views of the Afghan government, which has indicated that there is no consensus, and that they need time to agree an internal position. Minister Balkhi's opinions are contradicted by events in Kabul, in particular the successful return of 24 Afghans from nine provinces via the charter flight accepted by the Afghan authorities on 11 March 2015. They are also contradicted by the position of the Director General in charge of the Fourth Political Directorate at the Ministry of Foreign Affairs, Mr Zia, who confirmed to the UK Charge D'Affaires on 18 March 2015 that there was no consensus within the Afghan government on international returns and that, in the meantime, the UK returns could continue under the terms of the current MoU. On 15 April 2015, Mr Zia again confirmed to the First Secretary Migration at the British Embassy in Kabul, in similar terms, that returns under the MoU could continue.
- (d) Thus, the Applicants' case that the OGN / MOU render their removal unlawful is unarguable. Finally, Ms Glass submits that the invocation of the exceptional circumstances rubric under Immigration Rule 353B fails to identify any ascertainable public law misdemeanour, much less an arguable one.

VIII. CONCLUSIONS

Overview

71. In the circumstances outlined *in extenso* in chapters I - VII above, the fundamental question which arises is: what can, and should, this Tribunal properly and usefully decide, or declare? We consider that, broadly, there are two basic competing considerations. On the one hand, there is the overriding objective, the ingredients whereof include in particular the substantial investment of judicial time and resources in the conduct of these proceedings and the exercise (a progressive one) of preparing this judgment; the considerable investment of time and resources by all the parties; the factor of public funding; the large number of litigants; and the evident inevitability of further attempted exercises of repatriating Afghan nationals from the United Kingdom to their country of origin, with resulting challenges. On the other side of the scales, there

72. is the well established principle, expressed in various ways, that judicial review remedies are discretionary; the court or tribunal will not conduct a moot; the purpose of judicial review proceedings is to provide real, practical and efficacious results and remedies; and remedies such as a quashing order will not “beat the air” (see, for example, R (McPherson) v Ministry of Education [1980] NI 115, at 121, per MacDermott LCJ). Related to this is the intrinsic undesirability and unattractiveness of judicial review proceedings being played out in circumstances where material evidence produced by the parties has not been considered by the primary decision maker, especially where this will, as a matter of virtual inevitability, result in reconsideration and ensuing fresh decisions. In these circumstances we ask ourselves: how to square the circle?
73. At this juncture, we refer to the appendices to this judgment which encapsulate, at a glance, the evolution recounted above. We also highlight certain key facts. First, the decisions of the Secretary of State impugned by the Applicants in these proceedings were based on evidence which has, subsequently, evolved significantly. Second, further, updated decisions on the part of the Secretary of State are now inevitable. Third, these decisions will be the product of the new (ie post - 01 April 2015) evidence, the further representations which will be made on behalf of all of the Applicants and such additional evidence as may have materialised since the adjournment of the hearings in these proceedings on 12 May 2015 and/or may yet materialise. It is common case that the Secretary of State will be obliged to consider all of the new evidence and representations. This, we pause to observe, is a public law duty. In these circumstances, we must decide whether judicial adjudication of the Applicants’ challenges on the basis of all the evidence amassed is appropriate, in circumstances where the proper course is plainly for the Secretary of State to make further, updated decisions, with such consequences as may materialise.
74. Balancing the various interests identified above and bearing in mind that this is a “rolled up” hearing, we have concluded, not without hesitation, that these judicial review applications should be determined substantively. While this conclusion is marginal in nature, the factors which tip the balance favouring this course are the heavy investment of judicial and lawyers’ resources to date, the high number of litigants involved, both directly and indirectly and the potential for judicial adjudication of the main issues in these proceedings to influence future events and decisions, to limit the areas of dispute and to save costs, given the predictable scenario of the parties continuing to join issue in the context of fresh decision making by the Secretary of State.
75. Conscious of the judicial review character of these proceedings, we consider that we have a discretion whether to consider the totality of the evidence. Consistent with the approach adopted by the House of Lords in R v Secretary of State for the Home Department, ex parte Launder [1997] 1 WLR 839 (per Lord Hope at 860 - 861 especially), we have decided to exercise this discretion in favour of taking into consideration all of the evidence assembled. This will enhance achievement of the aims just identified. Furthermore, this course is preferable to the rather impracticable option urged by Ms Glass of adjudicating on all the

issues but doing so only on the basis of the pre-decisions evidence. This would limit the utility of the Tribunal's judgment. Furthermore, the mental acrobatics involved in this course would be, to say the least, challenging.

76. We are mindful that, in the paradigm judicial review challenge, the evidence considered by the court or tribunal in exercising its supervisory jurisdiction will be confined to the material considered by the decision maker. However, it is consistent with the character of the judicial review jurisdiction that this is not an absolute rule or principle, as the decision in Lauder illustrates. Other illustrations include R v Secretary of State for the Home Department, ex parte Turgut [2001] 1 All ER 719, where the determining factor in the Court of Appeal's preparedness to consider fresh evidence was the Article 3 ECHR dimension. It has been clearly stated that the reception of fresh evidence principles enunciated in Ladd v Marshall [1954] 1 WLR 1489 are not applicable in judicial review proceedings: see E v Secretary of State for the Home Department [2004] QB 1044, at [81], and Haile v Immigration Appeal Tribunal [2002] IMM AR 170, at [25]. We consider it far from coincidental that many of the cases in which this flexible approach to evidence has been adopted have a fundamental rights or asylum context.
77. We are also mindful of the oft repeated admonition that judicial review is an unsuitable vehicle for resolving disputed facts. It seems to us that the correct formulation of this principle must be that, as a general rule, the forum of judicial review proceedings is frequently less suitable than others for resolving disputed issues of fact. It is undeniable that, in this respect, the classic *inter-partes* model with its adversarial rules and traits, which include "live" evidence and cross examination, has clear advantages. However, once again, as decisions such as Anufrijeva v London Borough of Southwark [2004] 2 WLR 603 illustrate, this is not an inflexible principle. Thus, while, per Lord Lowry, oral evidence and disclosure "*are not part of the ordinary stock in trade of the prerogative jurisdiction*" (R v Inland Revenue Commissioners, ex parte Coombs [1991] 2 AC 283, at 302), we consider that the fact sensitive nature and litigation sensitive context of the individual case must always be examined. Furthermore, the related principle that in judicial review the Respondent's (or Defendant's) evidence is to be taken as it stands, namely in preference to that of the Applicant (or Claimant) where they are in conflict with each other, does not nowadays apply with the same force of yesteryear. As was observed by Nolan LJ in R v Secretary of State for the Department of Environment, ex parte London Borough of Islington [1997] JR 121, at 128:

"Disputed questions of fact do not normally arise in judicial review cases, but they can of course arise and they may be crucial."

We consider that the following formulation of Richards J captures the true principle:

"In each case the Court has to make a judgment on the basis of the factual material before it. There are often gaps in the evidence. That is something with

which the Court has to cope as best it can."

See London Borough of Islington v Camp [2004] LGR 58 at 66. Moreover, the effect of the whips and scorns of time and the effervescent evolution of the common law is that the notional paradigm judicial review case is somewhat less prevalent nowadays than in earlier eras, as the present proceedings graphically illustrate.

78. We have referred above to the litigation context. In the present case, relevant features of the litigation context include the reality that some of the material evidence takes the form of the reported oral statements of persons, Afghan Government Ministers in particular, who will probably not be available for cross examination (if such course were ordered) in any conceivable circumstances. It is also appropriate to take into account that tribunal judges have ample familiarity with the tasks of resolving contentious factual issues and making findings of fact. We are further aware that none of the parties to these proceedings, all of them represented by experienced Counsel, has suggested that in the forum of this litigation the Upper Tribunal is in any way ill equipped to make evaluative assessments of the evidence and, where necessary or appropriate, to find facts. Indeed, the final submissions of all parties positively espouse this course, albeit in somewhat contrasting terms.
79. The Tribunal shall proceed accordingly. In doing so, we would highlight that we have rehearsed all the evidence *in extenso* in chapter V above and we have, with the assistance of the parties, identified all of the key facts bearing on the individual Applicants in chapter VI. In performing this exercise we have identified certain key issues, to which we now turn.

Minister Balkhi's Statements

80. This forms a lynchpin of the Applicants' challenges. We have reviewed the evidence bearing on this discrete issue and refer to our digest of it in [24] and [54] above. As a starting point we accept that Minister Balkhi spoke the words attributed to him. We must view his statements in the full surrounding context and within the landscape formed by all the evidence. Minister Balkhi is the Afghani Minister for Refugees and Repatriation. We note, firstly, that when he was interviewed by Dr Schuster he was newly appointed. This chimes with later, more detailed, evidence from Afghan government members and representatives about the lack of a settled government position on the topic of the repatriation of Afghan nationals. We consider it likely that Minister Balkhi seized the opportunity to broadcast a hard line, in the context of the obvious reality that Afghanistan remains a struggling country with significant economic and other problems and a grossly over populated capital, Kabul. We take judicial notice of the fact that repatriation involves a drain on limited resources. Thus the discouragement of would be repatriating countries is a far from surprising strategy.
81. We further take into account that Minister Balkhi was expressing a personal

opinion. This is clear from the terminology of Dr Schuster's report:

"He is unwilling in the Minister's view"

[Our emphasis.]

This assessment is readily made from the text. It is reinforced substantially by later evidence. We refer particularly to the witness statements of Mr Chatterton Dickson and, especially, the accounts therein of discussions with other Afghan government members and representatives. Furthermore, subsequent events confound the words spoken by Minister Balkhi, namely the undisputed evidence of actual repatriations and how these unfolded on the ground. This evidence establishes clearly, *inter alia*, that Afghan nationals have been repatriated to provinces which Minister Balkhi had effectively declared "off limits". It establishes equally clearly that, contrary to Minister Balkhi's claims, the MOU, as elucidated and supplemented by the surrounding NVs, has continued to govern repatriations. We consider it probable that one of the motivations stimulating the NVs was to provide clarification and assurance designed to, *inter alia*, quash or eliminate the Minister's statements. Furthermore, taking into account his government portfolio, we find that given subsequent events Minister Balkhi himself has retreated from the stance which he adopted at the beginning of the events under scrutiny.

82. We note also the absence of any corroboration of Minister Balkhi's statements. For example, they are not supported by UNCHR. His statements are further confounded by the contents of the NVs. We consider that, ultimately, the statements of Minister Balkhi were those of an isolated and unauthorised voice, at a particular point in time, ploughing a lonely furrow which the author has since abandoned. This analysis is reinforced by the most recent statement attributed to the Minister in a telephone conversation with a member of the firm of solicitors representing the Applicants: see [53](i) above. In this statement the Minister specifically highlighted three of the provinces of Afghanistan as very dangerous. This stands in marked contrast with his statement at the beginning of this discrete saga, when he claimed that only two of the thirty four Afghanistan provinces were safe. We consider the evolution in his personal stance clear.

The MOU Issue

83. This is a second key aspect of the Applicants' challenges. At the outset, we highlight that it differs in character from the "Minister Balkhi" issue, since, while it requires the Tribunal to evaluate certain segments of evidence, it also entails the detached, clinical exercise of construing certain documents, namely the MOU and the related NVs. This is a pure issue of law and the evidence bearing thereon is, at this juncture, static and complete. We characterise this a pure issue of law because it is trite that the construction of any document is a question of law for the court or tribunal concerned: see In Re McFarland [2004] UKHL 17 at [24], per Lord Steyn. In this instance, the primary document to be construed is the MOU. We consider it appropriate to exclude from this purely objective

84. exercise the subjective claims and assertions contained in the Secretary of State's witness statements and related exhibits. While materials of this kind might be admissible in other documentary construction contexts, we consider that given their unilateral, self - serving and *ad hoc* nature they must be disregarded in this discrete context.
85. It is trite that the MOU and the related NVs are to be construed in the context to which they belong. These documents are the product of high level inter-governmental diplomatic negotiations and activity. They are mechanisms designed to facilitate the practical implementation of arrangements between States. Though somewhat analogous thereto, they are not to be equated with international treaties or conventions. They have an unmistakably precarious dimension, as the evidence in these proceedings confirms. This assessment is fortified by the appellation "Memorandum of Understanding". We consider this to be a species of inter-state arrangements which is to be construed with a suitable degree of breadth and flexibility.
86. The Tribunal's resolution of this issue is to some extent bound up with its determination of the "Minister Balkhi" issue. The first assessment which we make of the MOU is that its text has clearly been supplemented, or varied, by the practice of the two signatory States. The main variation of this species is that while the terms of the MOU do not embrace involuntary returning Afghan nationals, it has been consistently applied to this group. Thus, as it has evolved in practice, the MOU encompasses both voluntary and involuntary returning Afghan nationals.
87. The next issue to which we turn is that of vulnerable persons. The term employed in the text is "*vulnerable groups*". This is not the subject of any attempted exhaustive definition. Rather, while there is some description, this is inclusive in nature. The groups who expressly fall within this inclusive definition are unaccompanied minors, women and children. The words "*other vulnerable groups*" are undefined and unparticularised.
88. We consider that the legal effect of the several NVs is to supplement and elucidate the terms of the MOU. The NVs merge with the MOU. By the first NV a more expansive definition of "*vulnerable groups*" is introduced, under the banner of "*vulnerable people*":

"..... Children, families, women without a male relative and individuals whose permanent residential areas are insecure"

The inclusive nature of this definition is highlighted by the absence of any repeated reference to "*unaccompanied minors*", whose protection against enforced repatriation continues to be found in the MOU. Some further expansion of the definition of vulnerable persons is contained in the third NV, which employs the language "*vulnerable people, such as single mothers, children, elders [and] individuals whose living areas are under security risks*". Herein one finds the first explicit reference to "*single mothers*" and "*elders*". The words "*such as*" perpetuate the

theme of inexhaustive definition.

89. The open textured language and inexhaustive terms of the definition of vulnerable people contained in the MOU and supplementing NVs has the potential to give rise to debate in individual cases. Thus, for example, a physically or mentally handicapped adult would be expected to contend that they are exempted from repatriation on account of their specific vulnerability. Furthermore, while the language includes the word “families”, it is not difficult to conceive of an individual family which may not be considered vulnerable –for example, a unit consisting of two healthy parents aged in the bracket 45–60 and two healthy, able bodied children aged in the range 20–35. These reflections serve to highlight that every case will be unavoidably and intensively fact sensitive. Furthermore, by its very nature, the MOU is capable of evolving with the passage of time, as events during the past three months have demonstrated. That it is not set in stone is further reinforced by the clear evidence of a bilateral commitment of the two Governments concerned to reconsider its terms. This, in our estimation, is properly analysed as a continuation of an exercise already begun.
90. Having construed the MOU we turn to examine its legal status and effect. We have begun this exercise in [81]-[82] above. We consider that the MOU is to be viewed, fundamentally, as a species of agreement between two sovereign States. Those to whom it applies are not parties to this agreement. Accordingly, they cannot rely on the MOU as a source of rights which they can assert or obligations owed to them. Furthermore, it is trite that the MOU does not limit or dilute the international obligations of the United Kingdom Government deriving from the Refugee Convention, the Qualification Directive and the ECHR. The issue of risk upon return is neither addressed nor governed by the MOU. Rather, this issue, which is one of mixed fact and law, is to be evaluated and determined on a case by case basis by reference to the aforementioned international instruments and all available material evidence.
91. We consider that the MOU is, at heart, a bilaterally agreed mechanism regulating the practical implementation of the repatriation of Afghan nationals from the United Kingdom to their country of origin. It is a cocktail of highbrow principles and the purely prosaic. It enshrines a series of norms and principles to be applied by the two Governments to the repatriation exercise. It is not overly prescriptive. It is a relatively high level instrument, with its espousal of governing norms and principles and its lack of dense detail. It is clearly designed to provide the two governments with a workable, viable and flexible tool to achieve the aims of efficacious repatriation and, in the words of one of the recitals, the “*dignified, safe and orderly repatriation to and successful integration in Afghanistan*”, which is clearly one of its overarching purposes.
92. Given our assessment of the legal character of the MOU, the question arises to what extent, if any, individuals can seek to invoke its terms. We consider that the MOU is not simply a bilateral inter-governmental agreement. Rather, it is also an expression of the policy of the United Kingdom Government relating to the

repatriation of Afghan nationals. As such, it has the status of a material consideration which, as a matter of public law, must be taken into account in the case of every proposed repatriation. This we consider to have been the primary public law obligation imposed on the Secretary of State in making the impugned decisions.

93. As regards other possible legal effects, mindful of the confined nature of the challenge in these proceedings, we confine ourselves to some general observations. It is conceivable that the MOU could feature in a challenge based on the common law principle of equality of treatment, sometimes framed as the "*like cases must be treated alike*" maxim: see, for example, R (G) v Barnett LBC [2004] 2 AC 208, at [46]. It is also conceivable that the asserted inconsistent application, or indeed its non-application, in a given case of the MOU could found an irrationality challenge.
94. In addition, there may be scope for asserting a substantive legitimate expectation based on the terms of the MOU, in particular its provisions (as supplemented) relating to vulnerable persons and groups. Challenges of this kind have featured in the analogous context of immigration policies. See, for example, R (Saadi) v Secretary of State for the Home Department [2002] 1 WLR 356, at [7] especially (per Lord Phillips MR), R v Secretary of State for the Home Department, ex parte Popatia [2001] Imm AR 46, R v Secretary of State for the Home Department, ex parte Ahmed [1999] Imm AR 22 (at 36-37 especially), Minister for Immigration and Ethnic Affairs v Teoh [1995] 183 CLR 273 and Thomas v Baptiste [2000] 2 AC 1. In all of these cases the principle that the assumption of an international treaty obligation by the Executive is capable of giving rise to a legitimate expectation is acknowledged. So far as we are aware, the issue of whether this principle extends to inter-Governmental agreements such as the MOU has not been authoritatively decided. Subject to more extensive argument in an appropriate case, there is no evident reason why it should not.
95. For the avoidance of any doubt, we make clear that the possible uses and significance of the MOU in judicial review proceedings canvassed above will have to await future judicial decision in appropriate cases. None of them arises for decision in the present proceedings.
96. We find no evidential basis for concluding that the MOU was not taken into account by the Secretary of State in making the decisions impugned in the present cases. Insofar as the Applicants make the contrary case, the burden of demonstrating this, a pure question of primary fact or inference, has not been discharged. Indeed, any such assertion is positively confounded by both the content and date of the first NV of 10 March 2015: see [46] *supra*. In Counsel's written submissions the Applicants advance the following case:

".... Where there is in prospect a change of policy which is likely to materially affect the returns of those who fall into the categories identified above as 'vulnerable' To remove such persons prior to that is unlawful and unreasonable where that issue goes to protection/ECHR claims and/or

demonstrates that the 'safety valve' of exceptional circumstances under paragraph 353B [Immigration Rules] ought to be properly addressed."

Having measured this submission against conventional public law standards, we consider that there is no illegality or irrationality in decisions to repatriate appropriate Afghan nationals in circumstances where the two governments are committed to discussing the possibility of a revised MOU.

The Paragraph 353 Challenge

97. We have rehearsed above, in [67], the basic principles bearing on this aspect of the Applicant's challenge. This being a "rolled up" hearing, we remind ourselves that the threshold to be surpassed is not the modest one of arguability. The statements attributed to Minister Balkhi and the case made based on the MOU are two of the cornerstones of the Applicants' challenge under paragraph 353 of the Rules. Having regard to the evaluation and conclusions set forth above, two of the main pillars of the Applicant's challenge are without substance. The other elements of this challenge are rehearsed in Chapter V above: the expert evidence, the UNCHR 2013 Guidelines, the various reports of international agencies, the Home Office 2015 Country Information and Guidance publications and the sundry witness statements generated on both sides.
98. Self evidently, the Secretary of State's decisions in these cases fall to be reviewed by the Tribunal by reference to the evidence extant on 31 March and 01 April 2015, when the latest decisions were made, applying the principles rehearsed above and, in particular, the threshold of irrationality. In substance, we prefer the arguments of Ms Glass (summarised in [69] - [70]) on this issue. Within the limitations of a judicial review challenge and the hearing which has taken place we find no warrant for departing from the current country guidance promulgated in AK. In particular, we find that the evidence falls short of satisfying the stringent Article 15(c) test.
99. The Tribunal is equipped to make a further, *ex post facto*, assessment of the impugned decisions having regard to the post-decision evidence which it has received. This includes evidence of the successful repatriation of Afghan nationals from the United Kingdom and other countries to a series of provinces. In this context we refer particularly to the evidence digested in [50] above, which we accept. This evidence reinforces our conclusion that the impugned decisions of the Secretary of State are unimpeachable on the grounds advanced by the Applicants.
100. We are alert to the factor of new evidence in the case of the Applicant SA and our ruling refusing the application to amend his grounds, based thereon: see [14]-[16] above. Thus we consider it inappropriate to adjudicate on the discrete "durable solutions" aspect of his challenge and his reliance upon Article 8 ECHR. Our general findings and conclusions above should be considered in this light in his particular case. We have also considered it inappropriate to consider the challenge of those Applicants who base their case in part on paragraph 276

ADE or paragraph 353B of the Immigration Rules since this case was not made to the Secretary of State and, in consequence, has not been the subject of decision by the executive.

IX ORDER

Dismiss

101. Mindful of the modest threshold of arguability, particularly in the context of challenges to decisions made under paragraph 353 of the Immigration Rules, we conclude that permission to apply for judicial review should be granted to these five lead Applicants and we dismiss their applications substantively. As regards the other Applicants, we dismiss their permission applications. Having considered the parties' further oral and written submissions, we determine the ancillary matters in the following way.

Interim Relief

102. All of the Applicants were the beneficiaries of interim relief in the form of an order prohibiting the Secretary of State from taking steps designed to remove any of them from the jurisdiction pending further order. When judgment was handed down in draft on 17 June 2015 this order was extended to 26 June 2015. On 25 June all of the Applicants made an application seeking a further extension of the order. By a letter of the same date it was represented, in terms, on behalf of the Secretary of State that removal directions were not imminent in respect of any of the Applicants, in circumstances where the final approved version of this judgment remained outstanding. [In passing, this circumstance materialised for the purely prosaic reason that both members of the panel were on leave during the two weeks following upon the hand down in draft.] It was also submitted on behalf of the Secretary of State that the grant of further interim relief would be inappropriate given that the judicial review claims had been dismissed. Given these considerations, the Order of a panel comprising Dove J and Upper Tribunal Judge Blum was to refuse the interim relief applications. This disposed of the interim relief issue.

Further Applications

103. The Order made orally on 17 June 2015 incorporated the following elements: the draft judgment handed down remained under the editorial control of the Tribunal, with the approved final judgment to follow in due course; the substantive applications for judicial review of the five lead Applicants were dismissed and the permission applications of all other Applicants were dismissed, with liberty to apply (included as a precautionary measure of fairness); the interim injunctive relief was extended to midnight on 26 June 2015; a timetable was set for any application for permission to appeal to the Court of Appeal and any response of the Secretary of State thereto; and, finally, the lead

104. Applicants were ordered to pay the Respondent's costs, subject to any submissions in writing to be made in accordance with the timetable directed.
105. This elicited a response on behalf of the Applicants which included eleven formal applications filed on 24 and 25 June 2015. These applications were purportedly made pursuant to the liberty to apply facility. We shall describe the moving parties as the "LTA" Applicants. Three of the LTA Applicants are members of Schedule AB. The other eight belong to Schedule C. All eleven LTA Applicants seek a species of reinstatement of their individual cases upon which we elaborate *infra*.
106. As appears from [1] – [22] above, the procedural history of these proceedings has a number of singular features. These are reflected in, *inter alia*, the three Schedules to which all of the Applicants have been allocated from time to time. From these schedules five lead cases were selected. This exercise was undertaken by the parties' representatives and its outcome was presented to the Tribunal for approval, which was duly granted and recorded in an order. As noted in [5] above:

"This mechanism was deployed in the interests of orderly and efficient case management and with a view to inducing a decision of the Tribunal designed to encompass all members of the group."

As the litigation progressed, the stance adopted on behalf of all of the Applicants in response to the Tribunal's direction of 23 May 2015 is noteworthy: see [17] – [22] above. The approach which this Tribunal ultimately determined to adopt is rehearsed in [70] – [77] above. As we have stated, this approach was dictated by, *inter alia*, the large number of litigants in these proceedings – see [70] and [72] – and certain other factors, including in particular *"the potential for judicial adjudication of the main issues ... to influence future events and decisions, to limit the areas of dispute and to save costs, given the predictable scenario of the parties continuing to join issue in the context of fresh decision making by the Secretary of State."* In [71], we debated whether judicial adjudication of the Applicants' challenges on the basis of all the evidence amassed would be appropriate *"... in circumstances where the proper course is plainly for the Secretary of State to make further, updated decisions, with such consequences as may materialise.* This is linked to the unequivocal acknowledgment on behalf of the Applicants that there will be further representations to the Secretary of State designed to elicit fresh decisions: see [19] above.

107. When handing down judgment in draft on 17 June 2015, the observation was made that it appeared to the Tribunal that unless it had lapsed into some very serious misconception the exercise of the facility of liberty to apply would seem inappropriate, having regard particularly to the matters highlighted in the preceding paragraph. Against this background the aforementioned eleven applications have materialised. The eleven LTA Applicants are, at this belated stage, effectively seeking to retreat from the elaborate case management arrangements which were made, consensually, for the purpose of processing all

32 judicial review applications together and are in substance airbrushing the written concession – unambiguous and unavoidable – made on their behalf that there will inevitably be further representations to the Secretary of State and ensuing fresh decisions. These Applicants now seek to have their individual cases considered and determined by the Tribunal. Or do they? Not quite. The most striking feature of their applications is that while they appear to seek adjudication of their judicial review permission applications they simultaneously request the deferral of such adjudication indefinitely to enable further representations to be made, to be followed by fresh decisions by the Secretary of State and amendment of their judicial review claims if so advised.

108. The impropriety of this proposal is stark. We consider what is proposed by these eleven Applicants inappropriate for the following reasons. First, it is irreconcilable with the consensual case management arrangements made. Second, given the unambiguous concession that fresh representations will be made to the Secretary of State with a view to eliciting new decisions, we consider these applications a misuse of the process of the Upper Tribunal. Third, the judicial review applications initiated by these Applicants have been rendered moot given the indelible fact that there will be further representations to the Secretary of State and new decisions. Fourth, these applications are manifestly irreconcilable with the overriding objective. Fifth, an alternative remedy, namely the opportunity to procure a more favourable decision from the Secretary of State, remains unexhausted. Finally, what is proposed contravenes the strong general prohibition in contemporary litigation against rolling review by the court or tribunal. We are satisfied that the process of the Upper Tribunal should not be invoked for the purpose sought in these circumstances.
109. While we are mindful that there are some variations among the eleven LTA applications, each having its individual context, we consider it unnecessary to dilate on these in adjudicating upon the applications. For the reasons elaborated above we dismiss these applications.

Costs

110. As noted above, the Order made by the Tribunal upon handing down this judgment in draft was that the Applicants pay the Respondent's costs, subject to any written submissions in accordance with the timetable directed. It is represented, unchallenged, on behalf of the Secretary of State that following the hearing on this date the liability of the Applicants to pay the Respondent's costs was conceded and the Tribunal's provisional Order was acknowledged. The associated correspondence was forwarded to the Tribunal. Notwithstanding, on the following two dates, 18 and 19 June 2015, the Applicants' representatives sought to resile from this concession. They did so without seeking to vary the Tribunal's timetable directions. In handing down judgment the Tribunal dealt with the issue of costs in a free standing way. This issue was not embraced by the liberty to apply provision: and the contrary is not suggested. In these circumstances the Tribunal is not seized of a valid costs application on behalf of

the Applicants.

111. Further and in any event, we reject the additional costs submissions on behalf of the Applicants on their merits. The general rule that costs follow the event is a strong one. Nothing to warrant its displacement in this case has been demonstrated. All of the applications have been dismissed and this occurred in circumstances where all of the 32 Applicants subscribed consensually to the case management mechanism reflected in the Order identifying the five lead Applicants. We take into account that the inter-partes dimension of these proceedings has been largely confined to the five lead Applicants. We are also mindful of the usual practice regarding costs at the permission stage. On balance, we decide that there should be an order for costs against the five lead Applicants, coupled with a public funding element if appropriate. We make no orders as to costs, save to reflect public funding status, as regards the others.
112. We note the discrete issue pertaining to the costs in respect of the Court of Appeal “hearing” (evidently a telephonic exercise) on the evening of 21 April 2015, when costs were reserved. We were informed that this particular judicial intervention had the effect of cancelling the charter flight scheduled to depart to Afghanistan. The Tribunal is unclear of the circumstances in which this materialised. However, we are satisfied that further investigation of this discrete issue would be both unnecessary and manifestly disproportionate. The net effect of any successful appeal, or application, by any of the 32 Applicants to the Court of Appeal was to secure the grant of interim injunctive relief and the remittal of all issues, including the reserved costs, to the Upper Tribunal. We have been shown no order suggesting otherwise. None of the parties contests our jurisdiction to determine this discrete issue.
113. It would appear that the appeals, or applications, were brought *ex parte*. Furthermore, it is undisputed that the ingredients of this unusual context included the circumstance of no anterior order of the Upper Tribunal refusing interim relief and the pursuit of relief on behalf of certain persons whose identities were unknown to the lawyers. Ultimately, all 32 judicial review applications having been dismissed by this Tribunal, whether by refusal of permission or substantively, any suggestion that the Respondent should pay these discrete costs of the Applicants concerned is a bold one. We concur with the submission on behalf of the Secretary of State that the pragmatic, reasonable and proportionate course is to make no Order as to costs *inter-partes* regarding this discrete matter.
114. Accordingly, we order that the Upper Tribunal Orders that the five lead Applicants pay the Respondent’s costs of these proceedings, to be assessed in default of agreement and giving effect to the assessment provisions of section 26(1) of the Legal Aid Sentencing and Punishment of Offenders Act 2012. As regards the other Applicants we make no order as to costs *inter-partes* and we make the appropriate order as regards any of these Applicants who are publicly funded.

Permission to Appeal

115. The application for permission to appeal suffers from the manifest flaw that it does not engage with the applicable test, which requires that either an important point of principle or practice or some other compelling reason warranting the grant of permission is raised. Having considered the grounds broadly, and *in bonam partem*, we conclude that this test is not satisfied. These are intensely fact sensitive cases belonging to a unique litigation context. Permission to appeal is refused accordingly.
116. We would add that the application for permission to appeal is also, as a minimum, a dubious invocation of the process of the Tribunal for the reasons highlighted and summarised in [104] above. We take this opportunity to restate what was articulated firmly and unequivocally when judgment was handed down in draft on 17 June 2015. Viewed panoramically, the proper forum for any further engagement between any of the Applicants and the Secretary of State is that of further representations to the Secretary of State and fresh decisions by the latter. Neither the Upper Tribunal nor, in our judgement, the Court of Appeal has any role in this process. We wish to state this emphatically.

Draft judgments

117. As regards the proper practice in the matter of circulation of draft judgments, the Tribunal draws attention to the cautionary words of Lord Hoffman in Edwards & Ors R (on the application of) v Environment Agency & Ors [2008] UKHL 22 at [66]:

"On 23 January 2008 the hearing in this appeal was concluded. On Friday 4 April 2008, after the members of the Appellate Committee had prepared drafts of the speeches which they proposed to deliver, the solicitors to the parties were notified that judgment would be given on 9 April. In accordance with the practice of the House, copies of the draft speeches were provided in confidence with a request that counsel check them for "error and ambiguity". On Monday 7 April the appellant's solicitors notified the Judicial Office that they proposed to submit a memorandum pointing out errors in the judgments but that it could not be submitted until the following morning. Judgment therefore had to be postponed until 16 April. The memorandum when it arrived, consisted of 27 paragraphs of closely typed submissions referring to three directives which had not been mentioned in the appellant's lengthy submissions to the House and repeating other arguments which had already been considered. It contains nothing which causes me to wish to change the views expressed in my draft speech. In my opinion the submission of such a memorandum is an abuse of process of the procedure of the House. The purpose of the disclosure of the draft speeches to counsel is to obtain their help in correcting misprints, inadvertent errors of fact or ambiguities of expression. It is not to enable them to reargue the case."

118. In this case the draft judgment was circulated to the parties' representatives on 16 June 2015. This elicited a response from both parties. The response on behalf of the Secretary of State was confined to highlighting misprints, mis-spellings

and kindred faults. The response on behalf of the Applicants sought, in effect, to re-argue aspects of their case and proposed the extensive rewriting of various passages in the draft judgment. The proposed rewriting of the judgment continued energetically until the eve of final promulgation. The grave misconception underlying this reaction is betrayed in the single word "*analysis*". At the hand down hearing which ensued the following day and in subsequent communications, this was the word used by the Applicants' representatives to describe the exercise in which they were engaged. We trust that the above quotation will cure this fallacy.

119. It is also timely to draw attention to the impending publication of an Upper Tribunal Practice Note pertaining to the topic of draft judgments and associated matters. To date, as all practitioners are aware, the Upper Tribunal has given effect to the Administrative Court practice. A specially tailored Upper Tribunal Practice Note will come into operation in the very near future.

Signed:

Amund McCloskey

**The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber**

Dated: 21 July 2015

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).

APPENDIX 1

FINAL “SCHEDULE AB” APPLICANTS FOLLOWING SEALED CONSENT ORDER OF 6 MAY 2015 SETTLING MATTER OF GHH (JR/2856/2015)

	APPLICANT	DOB	CLAIM NO
1.	HN (LEAD 1)	01.01.1993	JR/2778/2015
2.	NRS	28.05.1991	JR/2812/2015
3.	JN	18.03.1976	JR/2784/2015
4.	SA (LEAD 2)	01.01.1997	JR/2813/2015
5.	AR	05.10.1992	JR/2838/2015
6.	AB	01.01.1982	JR/2786/2015
7.	JG (LEAD 3)	01.01.1990	JR/2781/2015
8.	LMA	06.10.1994	JR/2780/2015
9.	ST	01.01.1982	JR/2779/2015
10.	FK (LEAD 4)	01.01.1990	JR/2793/2015
11.	DT	01.01.1990	JR/2859/2015
12.	MN	02.01.1978	JR/2588/2015
13.	AKK	01.01.1991	JR/2858/2015
14.	SM	07.10.1990	JR/2860/2015
15.	AK	01.01.1990	JR/2885/2015
16.	AB (LEAD 5)	16.07.1988	JR/2772/2015

CONSOLIDATED “SCHEDULE C” APPLICANTS FOLLOWING GRANTS OF INTERIM RELIEF ON 21 APRIL 2015

	APPLICANT	DOB	CLAIM NO
1.	FM (LEAD)	18.03.1995	JR/4389/2015
2.	LT	01.01.1990	JR/4515/2015
3.	WM	19.01.1996	JR/4531/2015
4.	EM	01.01.1996 (disputed)	JR/4519/2015
5.	MAH	27.04.1985	JR/4523/2015
6.	LSH	01.09.1994	JR/4522/2015
7.	JM	01.01.1994	JR/4518/2015
8.	HK	01.01.1982	JR/4514/2015
9.	SUO	01.01.1986	JR/4524/2015
10.	MKA	05.06.1994	JR/4521/2015
11.	RUM	30.05.1976	JR/4525/2015
12.	HMS	01.01.1994	JR/4516/2015
13.	NMP	01.01.1976	JR/4575/2015
14.	AHN	01/09/1994	JR/4572/2015

“SCHEDULE D” AS LODGED ON 21 APRIL 2015

	APPLICANT	DOB	CLAIM NO
1.	AM	01.01.1987	JR/4577/2015
2.	NMP	01.01.1976	JR/4575/2015
3.	HM	23.03.1993	JR/4579/2015
4.	AHN	01/09/1994	JR/4572/2015

Please note that applicants AM and HM no longer formed part of the consolidated Schedule and applications continued separately

APPENDIX 2

SCHEDULE 1

SCHEDULE OF NEW EVIDENCE GENERATED BILATERALLY FOLLOWING GRANT OF INTERIM RELIEF ON 10 MARCH 2015

1. UNHCR, ‘UNCHR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan’ of 06.08.2013 (UNHCR Guidelines 2013);
2. Home Office, “Country Information and Guidance – Afghanistan: persons supporting or perceived to support the government and/or international forces, February 2015” (SSHD’s Risks from Supporting the Government Report, 2015);
3. UNAMA: Afghanistan annual report: Protection of civilians in armed conflict, February 2015 (UNAMA report, 2015);
4. Institute for the Study of War (ISW) The Taliban resurgent: threats to Afghanistan’s security, by Lauren McNally and Paul Bucala of March 2015;
5. First Witness Statement of Robert Chatterton Dickson dated 18 March 2015;
6. Expert Report by Dr Liza Schuster dated 26 March 2015;
7. Expert Report by Professor Susan Clayton dated 23 March 2015;
8. RCD1: Information Note on UK returns and reintegration Programme to Afghanistan (undated);
9. RCD2: Tripartite MOU between the UK and Afghan government, and UNHCR dated 12 October 2002;
10. Note Verbale: Ministry of foreign Affairs (Western Europe Desk) dated 10 March 2015;
11. Witness Statement of Mark Rich dated 18 March 2015.

SCHEDULE 2

SCHEDULE OF NEW EVIDENCE GENERATED BILATERALLY SINCE 31 MARCH 2015

1. EASO Report dated January 2015
2. OGN policy guidance re-issued February 2015
3. Second witness statement of Robert Chatterton Dickson dated 17 April 2015;

4. Note Verbale of Afghanistan Embassy in London dated 13 April 2015;
5. Note Verbale of Afghan Ministry of Foreign Affairs dated 13 April 2015;
6. Note Verbale dated 8 April 2015;
7. Third witness statement of Robert Chatterton Dickson dated 6 May 2015
8. Robert Chatterton Dickson's letter to the Tribunal dated 10 May 2015 enclosing Note Verbale of Afghan Ministry of Foreign Affairs dated 9 May 2015
9. Two page UNAMA update dated 12 April 2015
10. Original untranslated and Appellants' translations of the April Notes Verbales served on 7 May 2015
11. Report of Mr Foxley dated 7 May 2015
12. Witness statement of Jamie Bell dated 7 May 2015
13. Witness statement of Nasir Ata dated 7 May 2015
14. Witness statement of Bahar Ata dated 7 May 2015
15. Red Cross and Asylum Welcome correspondence regarding the Applicant SA dated 10 April 2015; 23 April 2015, and 7 May 2015
16. Country report "Research on IDPs in urban settings-Afghanistan" dated May 2011