

## **AFGHAN HINDUS AND SIKHS: THEIR SITUATION AND RECOMMENDATIONS FOR THE ASSESSMENT OF CLAIMS**

This document contains country of origin information regarding the situation of Hindus and Sikhs in Afghanistan and in India, eligibility guidance, and relevant case law from the Netherlands, Germany, and the United Kingdom. It also contains recommendations to the Belgian authorities (Aliens' Office, Commissioner General for Refugees and Stateless persons (CGRS) and the Council for Aliens' Law Litigation (CALL) in relation to the assessment of credibility and related questions of nationality, assessment of fear of persecution and risk of serious harm, the concept of first country of asylum/country of former habitual residence, the situation of UNHCR mandate refugees, and the best interests of the child.

### **Afghanistan**

#### **Historical background**

- IRIN, Afghanistan: Focus on Hindus and Sikhs in Kandahar, <http://www.irinnews.org/report.aspx?reportid=18421>

The first presence of Hindus and Sikhs in the Central Asian country is said to be roughly 200 years ago.

Of the estimated 50,000 Hindus and Sikhs living in Afghanistan 10 years ago, most have left. Only about 1,000 Sikhs remain in the country today, half of them concentrated in Jalalabad, the provincial and commercial capital of the eastern Nangarhar Province.

Sikhs left Afghanistan en masse, along with thousands of Hindus, after Hindu extremists destroyed the Babri Mosque in Ayodhya, in India, in December 1992, in fear of threats from radical Muslims following large-scale looting of Hindu and Sikh temples all over Afghanistan.

Their properties were looted, they were tortured and treated inhumanely, particularly in Kabul, with women reportedly raped, he said. Under the Taliban, Indians were marginalised and were not allowed to have any major stake in local economies as they had previously done.

The Hindus and Sikhs, with their typical business acumen, had established factories in Kabul and operated a healthy exporting business, trading in Afghan goods such as dried fruit, textiles and precious stones. With the coming to power of the Taliban, however, they had had to resort to operating small shops selling food and textiles.

Their social status prior to the 1990s had also enabled them to be a part of the military and civil services, and some even took up high positions in banking. With the fall of the Taliban, the Indian community in the battered country is hoping to prosper once again and to rehabilitate the local economies.

For generations, Hindus, Sikhs and Jews lived in harmony with Muslim Afghans. Their rights were respected, and they regarded themselves to be Afghans much as the Hazaras, Pashtuns, Tajiks or Uzbeks born and raised in the country did.

[This report does not necessarily reflect the views of the United Nations.]

- UN Commission on Human Rights, Final report on the situation of human rights in Afghanistan submitted by Mr. Felix Ermacora, Special Rapporteur, in accordance with Commission on Human Rights resolution 1992/68, E/CN.4/1993/42, 18 February 1993, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/109/01/PDF/G9310901.pdf?OpenElement>, pp. 8-9:

« 30. [...] a letter addressed to the Secretary-General by the Afghan Hindu Association of North America concerning attacks on members of minority groups, including Hindus and Sikhs, some of whom have been living in Afghanistan for centuries. Numerous Hindus and Sikhs have reportedly been killed while others have fled Afghanistan, leaving behind their land, homes and businesses. According to the letter, their family members have been held hostage for ransom, murdered indiscriminately, female members have been raped, their homes with all belongings have been seized and occupied and their businesses have been looted and ransacked.

31. Owing to his inability to visit Kabul and meet with the competent authorities, the Special Rapporteur is not able to personally confirm the allegations concerning the current situation of Sikhs and Hindus in Afghanistan. He was informed, however, that it is estimated that 50 per cent of the Afghan Hindu and Sikh community have left Afghanistan and have sought refuge in India because they felt persecuted as non-Muslims, because of looting and attacks on their families and temples or because they had been openly encouraged to leave. Attacks on Hindu and Sikh temples were reported in Jalalabad and Kandahar following the incidents related to the Babri mosque in Ayodhya, in India, at the beginning of December 1992. The Special Rapporteur was informed by representatives of the Pakistani authorities that a task force arrangement had been established in cooperation with the Government of India in order to facilitate the safe transit of Sikhs and Hindus through Pakistan on their way to India. »

#### **Recent country of origin information**

- *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December 2010, <http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf>, pp. 19-20: « UNHCR considers that [...] members of minority religious groups may be at risk on the ground of religion, depending on the individual circumstances of the case. [...] According to some reports, members of the Hindu and Sikh communities continue to face societal discrimination, harassment and, in some cases, violence at the hands of members of other religious groups. Sikh and Hindu communities also experience problems with land confiscation by local authorities and commanders, as well as obtaining land for cremation. »
- **United Kingdom:** Home Office, *Operational Guidance Note: Afghanistan*, March 2011, v8, <http://www.unhcr.org/refworld/pdfid/4d8b3a232.pdf>, pp. 9–10:

#### **« 3.9 Hindus and Sikhs**

**3.9.1** Hindus and Sikhs may claim that they face societal discrimination and harassment and that they cannot rely on the protection of the Afghan state authorities.

**3.9.2 Treatment** Reliable data on religious demography is not available, but there are an estimated 2,200 Sikhs and Hindus remaining in Afghanistan.

**3.9.3** There are conflicting reports whether the situation of Afghanistan's small communities of Hindus and Sikhs has improved since the fall of the Taliban. Afghanistan's new constitution promises greater religious freedom. Hindus and Sikhs are allowed to practice their faith publicly, including at a Sikh temple, the Guru Dwara in Karte Parwan, Kabul. Sikhs are also represented in the Afghan parliament, with Awtar Singh the only non-Muslim member. Sikhs and Hindus have recourse to dispute resolution mechanisms such as the Special Land and Property Court, but reportedly in practice feel unprotected. They are also effectively barred from most government jobs.

**3.9.4** Societal hostility and harassment continue. Hindus suffer less from this than Sikhs as they are less visible. However, even Sikhs are generally 'tolerated', with some owning successful businesses, while Hindus report harassment by neighbours. Harassment is not systematic, but the government seems unable to do very much about it. Some Sikh and Hindu children are unable to attend government schools due to harassment from other students. The government has reportedly taken limited steps to address this, but not, for example, to the extent of acceding to requests from the Hindu community in Kandahar for a separate school for Sikh and Hindu children.

[...]

**3.9.6 Conclusion** Sikhs or Hindus are not generally at real risk of persecution at the hands of the Afghan authorities solely because they are Sikhs or Hindus. Nor, generally, is societal harassment and discrimination against Sikhs and Hindus at such a level that it would constitute persecution. However, each case must be considered on its merits.

**3.9.7** If a Sikh or Hindu man or married woman does establish that they would on return face a localised risk amounting to persecution it should generally be possible for them to avoid such treatment by internal relocation, for example to Kabul where there are well-established and close knit Sikh and Hindu communities. Each case must be considered on its merits but where internal relocation would avoid persecution and would be reasonable, a grant of asylum will not be appropriate.

**3.9.8** Single Sikh and Hindu women and female heads of household without a male support network cannot reasonably relocate within Afghanistan. Therefore, if they would face ill-treatment which amounts to persecution they should be granted asylum unless there are clear case specific reasons not to do so. »

- **United States** Department of State, *2010 Report on International Religious Freedom - Afghanistan*, 17 November 2010, <http://www.unhcr.org/refworld/docid/4cf2d0bb64.html> :

« The country's population is almost entirely Muslim. Non-Muslim minority groups, particularly Christian, Hindu, and Sikh groups, were targets of discrimination and persecution. [...]

Non-Muslim minorities such as Sikhs, Hindus, and Christians continued to face social discrimination and harassment and, in some cases, violence. This treatment was not systematic, but the government did nothing to improve conditions during the reporting period. [...]

The Hindu population, which is less distinguishable than the Sikh population (whose men wear a distinctive headdress), faced less harassment, although both groups reported being harassed by neighbors in their communities. The Sikh and Hindu communities, although allowed to practice their religion publicly, reportedly continued to face discrimination, including intimidation, causing 30 families to leave the country during the reporting period. Although Hindus and Sikhs had recourse to dispute resolution mechanisms such as the Special Land and Property Court, in practice the communities felt unprotected.

Many in the Sikh and Hindu communities did not send their children to public school because of reported abuse and harassment by other students. In previous years Hindus and Sikhs sent their children to private Hindu and Sikh schools, but those schools have closed since the community's deteriorating economic circumstances have made private schooling unaffordable for most families. There is one school for Sikh children in Ghazni; one in Helmand; and, since March 2010 one in Kabul that only teaches Dari and Pashto. The Sikh community requested a school in Nangarhar; the government provided one during the reporting period. A few Sikh children attended private international schools. [...] No Hindu children attended school in Kabul during the reporting period. The government took limited steps to protect and reintegrate these children into the classroom environment. »

- **The Netherlands**, Ministerie van Buitenlandse Zaken, Directie Consulaire Zaken en Migratiebeleid - Afdeling Asiel, Hervestiging en Terugkeer, Algemeen ambtsbericht Afghanistan, Juli 2010, <http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/ambtsberichten/2010/07/21/afghanistan-2010-07-21.html>, pp. 57–58 and p. 85:

[unofficial translation]

Non-Muslims, including Hindus, Sikhs and Christians in Afghanistan may in practice face discrimination.

The Hindu and Sikh communities, like other minorities in Afghanistan, suffer discrimination. They are victims of various forms of harassment in public places. There were reports of Hindus who were ill-treated by neighbours. Central and local authorities would discriminate Hindus and Sikhs in some cases in the allocation of land and work. It also happened that Hindu and Sikh youth were prevented from enrolling in school or that they dropped out of school because teachers and students harassed or ill-treated them. The government did nothing to protect this group of students within the school.

Hindus and Sikhs, who have returned from India, have indicated that they were unable to get back their land that had been confiscated by others. Often they don't dare to take legal action for fear of reprisals from the local commanders who occupy their land.

## India

- See UNHCR, Global Appeal 2011 Update, <http://www.unhcr.org/ga11/index.html#/home>:

« India is not party to the 1951 Refugee Convention or its 1967 Protocol and does not have a national refugee protection framework. [...]

For some time now, India's concerns about security have had a more restrictive impact on asylum space in the country. [...]

Refugees and asylum-seekers often live in poverty, dispersed in urban areas, where they can face violence and exploitation. [...]

Women and children appear to be at increasing risk of gender-based violence, partly as a result of sharing living space with strangers, due to rising accommodation costs. [...]

The lack of a national refugee protection framework is an obstacle to providing effective refugee protection. In addition, limited understanding of refugee and statelessness issues among local populations can result in hostile attitudes toward persons of concern.

The steady increase in the number of asylum-seekers from Afghanistan and Myanmar during the last three years has diminished protection space. Against the broader background of difficult socio-economic conditions for large segments of India's population, a rise in racism and xenophobia have undermined the tradition of tolerance in India.

Increased measures to combat terrorism and address security concerns are likely to have a negative effect on refugees and asylum-seekers, who are already finding it harder to regularize their stay in India. [...] »

- **Registration**

In the beginning of the nineties Hindu and Sikh Afghans were recognised on a prima facie basis.

The residential permit issued to Afghan refugees is for a year's duration and normally the same expires on 30 June every year. The refugee certificate may have been issued in the beginning of the nineties, but UNHCR India does a periodic renewal of registration data, including updating the photograph, and the present duration for the same is two years. In the present format of the refugee certificate there is no date of re-issuance. This date was taken off due to some protection concerns.

- **Situation of women and girls**

cf. UNHCR, Regional Dialogue with refugee women and girls in India, November 2010, <http://www.unhcr.org/pages/4d9196906.html>

"The women shared dramatic tales of survival as well as their experiences and difficulties living in a populous urban environment. They described the daily problems they face with documentation, access to basic services and the high cost of living as well as the risks of sexual and gender-based violence. Women experience wage and sexual exploitation in the workplace and at home, but have limited means of pressing for legal redress.

The participants stressed that protection challenges are often interrelated. Sexual- and gender-based violence, for example, can result from a combination of factors such as unsafe housing, exploitative work conditions, family tensions and discrimination."

- **Why did the men leave India for Moscow in the period between 2000 and 2002?**

Immigration and Refugee Board of Canada, *Inde : information indiquant si des Afghans peuvent demeurer illégalement en Inde pendant de longues périodes; si les réfugiés afghans sont reconnus*

*pour demeurer en Inde sans statut ou sans être enregistrés auprès du Haut Commissariat des Nations Unies pour les réfugiés (HCR); si un citoyen afghan qui demeure illégalement en Inde peut avoir accès à une éducation de premier, de second ou de troisième niveau, à un logement, à un emploi, à des activités commerciales et si une telle personne peut quitter l'Inde et y rentrer (janvier 1993-octobre 2004), 20 October 2004, IND43083.EF, <http://www.unhcr.org/refworld/docid/42df61042.html> :*

« (...), entre 1998 et 2000, la situation des réfugiés afghans en Inde a commencé à changer (ibid.). Ce changement a été amorcé par un nouveau gouvernement qui était [traduction] « en général moins tolérant que les gouvernements précédents envers les étrangers, particulièrement les Afghans », et par l'hostilité croissante de la population à l'égard des Afghans, [traduction] « alimentée par la présumée implication des Afghans dans le conflit au Cachemire et le détournement d'un avion indien » (ibid.). Entre autres, la loi de loi de 1946 sur les étrangers a été appliquée plus sévèrement, ce qui a empêché les nouveaux réfugiés afghans d'obtenir des permis de résidence, tandis que les réfugiés afghans qui sont arrivés en Inde avant 2000 devaient présenter un passeport national valide et s'acquitter d'un droit afin de renouveler leur permis (ibid.). Les Afghans étaient en général incapables ou ont refusé de s'acquitter du droit ou d'obtenir un passeport auprès de l'ambassade de l'Afghanistan moyennant un autre droit (ibid.). Dans le cas des Afghans qui demeuraient à New Delhi, la plupart ont été privés de documents de résidence valides et, par conséquent, ils sont devenus des immigrants illégaux [traduction] « passibles de détention et de déportation » (ibid.).

En outre, le gouvernement a ordonné à tous les propriétaires de renseigner la police sur leurs locataires étrangers, entraînant l'expulsion de certains réfugiés afghans et une augmentation du loyer pour d'autres Afghans qui n'ont pu présenter un permis de résidence valide (ibid., 14).

Pour ce qui est de l'accès à l'emploi et aux activités commerciales, le rapport du HCR a mentionné que les biens de réfugiés afghans avaient été saisis et que des réfugiés avaient rencontré de l'opposition lorsqu'ils ont tenté de s'adonner au commerce dans des marchés locaux (ibid.). À la fin de 2000, certains Afghans, par crainte d'être détenus s'ils s'aventuraient trop loin dans la ville, n'ont pu avoir accès à un emploi et participer à des activités commerciales et, par conséquent, gagner leur vie (ibid.). De plus,

[traduction]

[l]es enfants des réfugiés ont été retirés des écoles privées puisque leurs parents ne peuvent plus payer les droits de scolarité. Sans permis de résidence valide, les Afghans éprouvent davantage de difficultés à envoyer leurs enfants dans des écoles publiques qui, de toute façon, sont encombrées. Des preuves laissent aussi entendre que les réfugiés afghans affichent un taux de maladie physique et mentale, ainsi que de délinquance et de violence conjugale, plus élevé que le reste de la population (ibid.).

Quant au droit de quitter l'Inde et d'y revenir, le conseiller du haut-commissariat de l'Inde à Ottawa a expliqué qu'un citoyen étranger demeurant illégalement en Inde ne pouvait quitter légalement le pays et y rentrer, à moins qu'il n'ait déclaré faussement être citoyen de l'Inde ou qu'il n'ait été en possession de faux documents ou de véritables documents obtenus frauduleusement (15 oct. 2004). Le conseiller a souligné que toute l'information qu'il a fournie et qui est contenue dans cette réponse est valide de janvier 1993 à octobre 2004 (haut-commissariat de l'Inde 15 oct. 2004).

Dans le cas des familles sikhes qui ont quitté l'Afghanistan pour l'Inde, la BBC a signalé en octobre 2001 que seules les personnes possédant des titres de voyage valides pouvaient entrer en Inde (11 oct. 2001). L'article de la BBC soulignait que plus de 150 familles sikhes souhaitant entrer en Inde demeuraient au Pakistan, car elles ne possédaient pas de titre de voyage valide et qu'il leur était [traduction] « impossible d'obtenir des visas ou des permis pour entrer en Inde » (11 oct. 2001).

Le rapport de 2000 du HCR mentionnait qu'eu égard aux changements dans la situation des Afghans en Inde, notamment à New Delhi, nombre de réfugiés afghans [traduction] « quittaient le pays de façon "irrégulière" afin de mettre terme [...] à leur [...] insécurité » (Nations Unies nov. 2000, 4).

Aucune information additionnelle sur le droit des Afghans de sortir de l'Inde et d'y rentrer n'a pu être trouvée parmi les sources consultées par la Direction des recherches. »

For more information, see also

- United States Department of State, *2010 Country Reports on Human Rights Practices - India*, 8 April 2011, available at: <http://www.unhcr.org/refworld/docid/4da56dbec.html>, Section 2 Respect for Civil Liberties, Including: d. Freedom of Movement, Internally Displaced Persons, Protection of Refugees, and Stateless Persons, *Protection of Refugees*;
- United Kingdom: Home Office, *Country of Origin Information Report - India*, 21 September 2010, available at: <http://www.unhcr.org/refworld/pdfid/4ca0433e2.pdf>, pp. 147-148.

#### Case law

- On 30 May 2011, the **European Court of Human Rights** approved provisional measures suspending the return to Moscow (based on the Chicago Convention) of a family of Hindus, who had lived as mandate refugees in India. In the beginning of May, a family with the same background had been returned from Belgium to Moscow and from Moscow to Kabul.
- In **the Netherlands** a judge determined an appeal against a first instance decision to be founded with respect to the lack of comprehensive examination of combined factors (situation of women, situation of Hindus as a vulnerable minority) and the insufficient motivation why the female applicants don't qualify for asylum. According to policy the appellants can make it plausible with in itself limited individual indications that there may be a violation of Article 3 of the ECHR upon return. As it appears from the official reports that women find themselves in a (very) vulnerable position, it is not clear with no further motivation why being a woman cannot be seen as a limited individual indication as referred to in WBV 2007/33.<sup>1</sup>
- **Germany**

Case No. K 103/09.KS.A, Verwaltungsgericht (VG) Kassel, Judgment of 27.07.2010, at [http://www.asyl.net/index.php?id=114&no\\_cache=1&tx\\_ttnews\[tt\\_news\]=40231&tx\\_ttnews\[backPid\]=10](http://www.asyl.net/index.php?id=114&no_cache=1&tx_ttnews[tt_news]=40231&tx_ttnews[backPid]=10) with judgment at [http://www.asyl.net/fileadmin/user\\_upload/dokumente/17462.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/17462.pdf), recognizing the refugee status of a Hindu from Afghanistan on the ground of political persecution for reasons of religion and stating that Hindus in Afghanistan face serious human rights abuses in Afghanistan. The judgment refers to the lack of possibility of expressing ones religious beliefs through Hindu burial rights and the general discrimination by the population of access to work which puts their life and limb at risk.

Case No. 7 K 746/09.F.A, VG Frankfurt/Main, Judgment of 11.02.2010, at [http://www.asyl.net/fileadmin/user\\_upload/dokumente/18127.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/18127.pdf), recognizing as a refugee a woman who did not have a fear of persecution when she left, but finding that in the current situation Hindus face persecution as a group.

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<sup>1</sup> Rechtbank 's-Gravenhage, reg. nr. AWB 08/5696, AWB 08/5698, AWB 08/5702, AWB 08/5703, dated 23 April 2010 : «15. Dat verweerder in het nieuw te nemen besluit de door eiseressen gestelde combinatie van factoren in onderling samenhang dient te beoordelen, klemt naar het oordeel van de rechtbank overigens temeer nu hindoes als kwetsbare minderheidsgroep als bedoeld in WBV 2007/33 worden aangemerkt. Conform het beleid kunnen eiseressen dan ook met op zichzelf beperkte individuele indicaties reeds aannemelijk maken dat bij terugkeer een schending van artikel 3 van het EVRM dreigt. Nu uit de ambtsberichten volgt dat vrouwen in een (uiterst) kwetsbare positie verkeren valt zonder nadere motivering niet in te zien waarom het zijn van vrouw niet als een beperkte individuele indicatie als bedoeld in WBV 2007/33 kan worden gezien.

16. Uit het voorgaande volgt dat het bestreden besluit, daar waar geoordeeld is dat eiseressen niet aannemelijk hebben gemaakt dat het bepaalde in artikel 29, eerste lid, aanhef en onder b, van de Vw 2000 op hen van toepassing is, onvoldoende zorgvuldig is voorbereid en onvoldoende deugdelijk is gemotiveerd. Het beroep zal in zoverre gegrond verklaard worden. »

Case No. 7 K 268/09.A, VG Cottbus, Judgment of 18.08.2009 at [http://www.asyl.net/fileadmin/user\\_upload/dokumente/17207.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/17207.pdf), recognizing an Afghan Hindu as a refugee with clear statements that Hindus must hide their religion almost completely to avoid persecution by the Muslim majority.

Case No. 8 A 323/09.A, VGH Hessen, Judgment of 07.05.2009, summary at [http://www.asyl.net/index.php?id=114&no\\_cache=1&tx\\_ttnews\[tt\\_news\]=38048&tx\\_ttnews\[backPid\]=10](http://www.asyl.net/index.php?id=114&no_cache=1&tx_ttnews[tt_news]=38048&tx_ttnews[backPid]=10) with judgment itself at [http://www.asyl.net/fileadmin/user\\_upload/dokumente/16527.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/16527.pdf), recognizing a Hindu from Afghanistan as a refugee on the grounds of being a Hindu, as this group has a high likelihood of facing persecution because of the massive restrictions on Hindus by non-state actors.

Case No. 8 A 1132/07.A, VGH Hessen, Judgment of 02.04.2009, summary at [http://www.asyl.net/index.php?id=114&no\\_cache=1&tx\\_ttnews\[tt\\_news\]=34878&tx\\_ttnews\[backPid\]=10](http://www.asyl.net/index.php?id=114&no_cache=1&tx_ttnews[tt_news]=34878&tx_ttnews[backPid]=10) and judgment at [http://www.asyl.net/fileadmin/user\\_upload/dokumente/15652.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/15652.pdf), recognizing as a refugee a Hindu man from Afghanistan even though he had not been persecuted before leaving Afghanistan as Hindus in Afghanistan face political persecution by non-state actors and there is no internal flight alternative. Well-off Hindus, including the family of the applicant, were subject to attack, killings, hostage taking, rape of women during the time of the Mujaheddin and were now subject to explicit discrimination on account of their religion (along with Sikhs). The current economic and social situation of both groups was now acutely difficult and any religious services had to be extremely discrete, resulting in a serious breach of fundamental rights.

Case No. 14 K 4274/06 A, VG Koeln, Judgment of 25.11.2008, summary at [http://www.asyl.net/index.php?id=114&no\\_cache=1&tx\\_ttnews\[tt\\_news\]=32998&tx\\_ttnews\[backPid\]=10](http://www.asyl.net/index.php?id=114&no_cache=1&tx_ttnews[tt_news]=32998&tx_ttnews[backPid]=10) and judgment at [http://www.asyl.net/fileadmin/user\\_upload/dokumente/14753.pdf](http://www.asyl.net/fileadmin/user_upload/dokumente/14753.pdf), recognizing as a refugee a single mother of three children who would be without male protection and therefore at risk of rape, kidnap or mistreatment resulting in death from men in her neighbourhood and without a possibility of making a living or surviving economically.

- **United Kingdom**

*SL and Others (Returning Sikhs and Hindus) Afghanistan v. Secretary of State for the Home Department*, CG [2005] UKIAT 00137, UK Asylum and Immigration Tribunal / Immigration Appellate Authority, 7 October 2005, <http://www.unhcr.org/refworld/pdfid/43fc2d7911.pdf>

§ 66. « [...] Sikhs and Hindus are not as such at general risk of persecution or treatment in breach of Article 3 rights in Kabul. We are further satisfied, for the reasons which we have given, that this applies generally in Afghanistan. We note that there are significant sections of these communities in other cities and there is no evidence that in general terms their position differs from that of the Sikhs and Hindus in Kabul. There are no reports that any have been killed or tortured because of their religion or ethnicity and the one incident in Kandahar referred to by RS is isolated. There is in our judgment no evidential basis for considering that such communities are generally at risk. »

§ 67. « [...] there is no reason to doubt that life for members of the Sikh and Hindu communities in Afghanistan may be difficult and frequently unpleasant but, looking at all the evidence in the round, the levels of discrimination which these communities suffer are not such as to give rise to a general need for protection. As the UNHCR advises, each case must be approached with care on its own merits, bearing in mind that the Sikh and Hindu minorities are subject to societal discrimination. »

§ 76. « Afghan Sikhs and Hindus are not at risk of either persecution for a Refugee Convention reason or of treatment contrary to their protected human rights under Article 3 of the European Convention simply by reason of being members of those minority communities anywhere in Afghanistan. Nevertheless, the UNHCR guidance that these minority communities are the subject

of societal discrimination must be given due weight in assessing the position of individual claimants on a case by case basis. »

<b>Issues at stake</b>
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- Assessing credibility of asylum-seekers who have been told by smugglers to hide aspects of their story.

Recommendations:

- For applicants who apply for asylum at the border (Brussels airport), it is suggested that police provide the applicant with a list of documents that are being kept by the police as well as copies of the documents to the applicant so that he or she knows which documents are in the file.
  - UNHCR recalls that asylum-seekers need to be well prepared and informed, in a language they understand, that lying during the interview may affect the outcome of their asylum application negatively.
  - UNHCR stresses also the importance of the asylum authorities (CGRS and CALL) taking into account that
    - o « an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. » (UNHCR Handbook § 190)
    - o « the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. » (UNHCR Handbook § 196)
    - o « A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case. » (UNHCR Handbook § 198)
  - If an interviewer has doubts about the statements of the applicant, UNHCR recommends that s/he express these doubts during the interview, reiterate the importance of telling the truth and the possible consequences of not doing so, and allow the applicant to tell the truth, if necessary after having given the applicant the time to think about this. If the applicant is accompanied by a spouse, s/he should be given the opportunity to discuss this together.
- Assessing fear of persecution / real risk of serious harm taking into account the country of nationality.

UNHCR is concerned that in order to prove their nationality some asylum-seekers may find themselves obliged to contact the Afghan Embassy in Brussels (though normally asylum-seekers should not be requested to contact the authorities of their country of origin) as this may place them or their families at risk, in particular since proof issued by the Embassy is in any case not always considered valid.

Recommendations:

- For the assessment of a fear of persecution or risk of serious harm, asylum-seekers need to cooperate in demonstrating or making plausible their nationality.
- It goes too far to require applicants to prove the absence of a particular nationality based on (the suspicion of) previous stay in a third country.
- One approach to verifying nationality may be to ask UNHCR's Regional Representation to contact UNHCR in New Delhi to verify their registration records, though not all Afghans there are registered with UNHCR.
- Asylum-seekers may have relatives who have obtained status in other countries and it may be useful to allow them time to try and obtain proof of such status to support their own asylum application.



- If an applicant has lived for a longer period in a third country but still possesses the nationality of his or her country of origin, when assessing the application and notably credibility and nationality, the asylum authorities should take into account that the applicant may not be aware of the situation and recent events in his/her region of origin. The applicant's alienation from the social mores of the current Afghan society also needs to be taken into account when assessing the fear of persecution / real risk of serious harm.
  - As Afghans rely on traditional extended family and community structures of Afghan society for their safety and economic survival, including to access accommodation and an adequate level of subsistence, the availability of a social support network, including in urban centres needs also be taken into account during the assessment of the fear of persecution / real risk of serious harm.
  - If the asylum authorities (CGRS and CALL) express doubts about the nationality of the asylum applicant and thus do not examine the fear of persecution or real risk of serious harm with respect to Afghanistan, UNHCR recommends this should be clearly stated in the decision with the clarification that the applicant should not be returned, even indirectly, to Afghanistan as the fear of persecution / real risk of serious harm has not been examined with regard to Afghanistan. [This observation does not only concern this group of Afghans and does not only concern Afghans.]
  - It is important that decisions are personalized, even when decisions concern spouses. For instance, if there are doubts about the nationality of one spouse this should not negatively affect the outcome of the asylum application of the other spouse if there are no doubts about his or her nationality.
  - Decisions concerning women need not only take into account the specific situation of Hindus / Sikhs but also the specific situation of women.
  - Decisions need to explain clearly why the applicant's fear of persecution is not well-founded, and if the individual not considered to be a refugee, why no substantial grounds have been shown for believing that s/he, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in Article 15 of the Qualification Directive, (including (b) torture or inhuman or degrading treatment or punishment in the country of origin).
- The concept of first country of asylum / country of former habitual residence.

In its ruling No. 45397 (General Assembly) of 24 June 2010, the CALL acknowledged that Belgian legislation has not incorporated the concepts of "safe third country" or "first country of asylum", stating: "These provisions have not been implemented in Belgian law and have no direct effect." At the same time, however, the jurisprudence would appear to be continuing to use these concepts without naming them as such. For instance, the CALL ruling No. 58 542 of 24 March 2011 states:

"The CALL emphasizes that it is not sufficient for the person who applies for subsidiary protection status to refer to the general situation in the country of origin with regard to the question whether, upon return to the home country, s/he runs a real risk of serious harm within the meaning of Article 48 / 4, § 2, c of the Aliens Act, s/he has also to make any connection with his / her person plausible even though no evidence of an individual threat is required (Council of State 26 May 2009, No. 193.523). The applicant makes the evidence of such a connection with her person impossible by making incredible statements regarding her alleged stay in Afghanistan, so that there is no clarity about her actual origin and nationality. Demonstrating the last place(s) of residence in the country of origin is indeed essential to rule out that the applicant either comes from a region where there is no risk *or, following a stay in a third country before applying for asylum pursuant to Article 49 / 3 of the Aliens Act, already enjoyed a form of humanitarian protection there or meanwhile even has been granted citizenship.* Indeed, in case of a stay of many years abroad it can not be excluded that the applicant obtained citizenship in a third country whereby the right to subsidiary protection in Belgium would not be necessary anymore (Council of State 25 March 2010, nr. 202.357; Council of State 29 March 2010, nr. 202.487). In the absence of elements relating to the origin of an asylum-seeker subsidiary

protection status can not be granted (Council of State, 15 October 2008, decree nr. 3.412)."  
[Unofficial translation from Dutch, emphasis added]

This trend is worrying because the result is that there is no other assessment in this and similar decisions of a possible risk of violation of Article 3 of the ECHR if the applicant concerned were to be returned to either the country from which s/he claims to originate or to the country of presumed nationality.

According to Article 26 of the Asylum Procedures Directive,

"A country can be considered to be a first country of asylum for a particular applicant for asylum if:

(a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or

(b) he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non refoulement;

provided that he/she will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27(1)."

Recommendations:

- If the asylum authorities (CGRS and CALL) consider India or any other third country to be a "first country of asylum" or a "country of habitual residence", it is recommended that before taking a negative decision, they verify that the applicant will be re-admitted to that country. This may, however, be problematic if the asylum authorities approach the country of origin to verify re-admission as "the examiner is not ordinarily entitled to disclose the asylum-seeker's personal data to a third party, whether in the country of origin or elsewhere".<sup>2</sup> A solution may be to request the applicant's consent before verifying re-admission to the country of presumed nationality.
- UNHCR mandate refugee status.

In the case of persons recognised as refugees under UNHCR's mandate, the Office argued in a recent intervention before the Court of Appeal in the United Kingdom:

"12. [...] In some situations, it may be possible to take a *prima facie* group approach, if the entire group has been displaced under circumstances indicating that individual members of the group could be considered as refugees. As each member of the group is regarded *prima facie* as a refugee an in-depth detailed individual refugee status determination is not necessary; an interview to determine membership of the group, and where applicable the absence of exclusion grounds, would suffice. Where such individuals subsequently apply for asylum elsewhere, the case may need to be considered anew through an individual assessment, taking into account the objective circumstances giving rise to the displacement and up-to-date country of origin information.

14. It is accepted that a prior recognition of 'mandate refugee status' does not bind a State to recognise as a refugee the person who has benefited from that earlier recognition. However, it is submitted that in determining the asylum claim of a person whose refugee status has been recognised by UNHCR, the [...] decision-maker must give that prior recognition considerable weight and must seriously take it into account when determining the risk and assessing credibility. The fact that a person has moved to another country since being granted mandate status, does not mean that this status is forfeited or lost and should therefore be discounted. The definition of refugee status in paragraph 6B of the

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<sup>2</sup> UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation*, February 2004, available at: <http://www.unhcr.org/refworld/pdfid/403b2522a.pdf>, p. 15, paragraph 42.

Statute makes it clear that it is a status that is dependent upon a person's past or present fear of persecution.

27. The European Court of Human Rights, in determining whether an individual is entitled to protection under Article 3 of the 1950 European Convention on Human Rights, has given 'due weight' to UNHCR's recognition of that person's mandate refugee status.

33. [...] in assessing the credibility of a person claiming asylum who has previously been recognised as a mandate refugee, the [...] decision maker must first give due weight to that prior recognition. The decision maker must not make a finding as to the person's credibility and only then consider the effect of the recognition of mandate refugee status."<sup>3</sup>

This position was essentially supported by the Court of Appeal in its judgment in this case.<sup>4</sup>

Recommendations:

- Mandate refugee status and residence permit in India may be verified by contacting UNHCR in New Delhi, though not all Afghans are registered with UNHCR.
- UNHCR recommends that the asylum authorities (CGRS and CALL) give prior recognition of 'mandate refugee status' considerable weight and take this seriously into account when determining the risk and assessing credibility.

- Best interests of the child

According to Article 3 of the Convention on the Rights of the Child (20 November 1989), « In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. » This principle is confirmed in Article 22*bis* of the Belgian Constitution, which reads: « [...] Dans toute décision qui le concerne, l'intérêt de l'enfant est pris en considération de manière primordiale. »

If an asylum-seeker is accompanied by a child or children, the decision on their asylum application will also affect the children.

Recommendation:

- UNHCR recommends that, if an asylum-seeker is accompanied by children, the determination on the asylum application also include an assessment of the best interests of the child (boy/girl) taking into account the child specific considerations in the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December 2010, HCR/EG/AFG/10/04, available at: <http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf>, and the *UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <http://www.unhcr.org/refworld/pdfid/4b2f4f6d2.pdf>. It is also recommended that decision-makers refer to the attached additional country guidance regarding children in Afghanistan.

UNHCR Regional Representation for Western Europe  
Brussels, July 2011

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<sup>3</sup> Cf. UNHCR, *MM (Iran) v. Secretary of State for the Home Department* - Written Submission on Behalf of the United Nations High Commissioner for Refugees, 3 August 2010, C5/2009/2479, available at: <http://www.unhcr.org/refworld/pdfid/4c6aa7db2.pdf>.

<sup>4</sup> *MM (Iran) v. Secretary of State for the Home Department*, [2010] EWCA Civ 1457, United Kingdom: Court of Appeal (England and Wales), 17 November 2010, available at: <http://www.unhcr.org/refworld/docid/4d2b1ca92.html>.