Case No: C5/2011/1301

Neutral Citation Number: [2012] EWCA Civ 395
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
SENIOR IMMIGRATION JUDGE LATTER AND
SENIOR IMMIGRATION JUDGE P.R. LANE
AA/03394/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2012

Before:

LORD JUSTICE WARD
LORD JUSTICE RIX
and
LORD JUSTICE SULLIVAN

- -

Between:

	AH (ALGERIA)	Appellant
	- and -	
	SECRETARY OF STATE FOR THE HOME DEPARTMENT	Respondent

- -
- -

Raza Husain QC and Amanda Weston (instructed by Messrs Luqmani Thompson & Partners) for the Appellant
Alan Payne (instructed by Treasury Solicitors) for the Respondent

Hearing dates: 30th & 31st January 2012

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Judgment **Lord Justice Sullivan:**

Introduction

1. 1. This is an appeal against the determination dated 19th January 2010 of the Asylum and Immigration Tribunal (Senior Immigration Judges Latter and Lane) confirming on reconsideration the Respondent's decision that the Appellant is excluded from the Refugee Convention under Articles 1F(b) and (c).

Article 1F

1. 2. Article 1 of the Refugee Convention defines the term "Refugee". The Respondent accepts that the Appellant falls within the definition of a refugee in Article 1A. Article 1F provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The Qualification Directive

1. 3. Article 12(2) of Council Directive 2004/83/EC ("the Qualification Directive") excludes a third country national or a stateless person from being a refugee

> "where there are serious reasons for considering that;

a. a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b. b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

c. c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."

Factual Background

a. 3. The Tribunal summarised the material facts as follows in paragraphs 4 – 11 of its determination:

"4...The appellant was born in 1963 and is a citizen of Algeria. In August 1992 there was a bombing at Houari Boumediene Airport in Algiers. In October 1992 the appellant left Algeria for France on business. He was told that the Algerian authorities were seeking him for questioning in connection with the bombing and in 1993 he was convicted in Algeria in his absence of complicity in, or involvement in the explosions and sentenced to death.

5. The appellant remained in France. In November 1994 he was granted a UN Stateless Person's Document but the French authorities refused to recognise it. He was subsequently advised by the Val de Marne Prefecture that he could seek asylum. The appellant attended the offices of OFPRA to make his application. In August 1995 he returned to the Prefecture to present his new OFPRA asylum seeker card. Two officials from the DST (Division Securite du Territoire) attended and arranged to interview him. The appellant claims that when interviewed in August 1995 he was pressured to become an informant and threatened with deportation. As he was in fear of being deported he obtained a false passport but on 3 October 1995 he was arrested of suspicion of possessing false documents and imprisoned on remand.

6. He was charged with the following offences (taken from the translation of the judgment of the Paris Court of Appeal, more fully set out in paragraph 2 [of the Tribunal's determination]

"At Paris, Nanterre, and in the Lyon region, in the course of 1994, 1995, 1996, specifically until October 1995 and in any event in France since an unspecified time, been a member of an association created or a grouping formed with a view to the preparation, taking the form of one or more material acts, of acts of terrorism relating to an individual or collective enterprise intended to seriously disrupt public order by intimidation or terror; in Paris, during 1995, and in any event since an unspecified time, made a fraudulent representation such as to adversely affect documents issued by a department of the public administration for the purpose of attesting a right, an identity or a capacity or to grant an authorisation, namely a passport in the name of Gutierrez and an identity card in the name of Wane and with using the aforementioned document.

All of which offences referred to above were committed as or in connection with an individual collective enterprise intended seriously to disrupt public order by intimidation or terror.

i. 7. The appellant was tried with others in June 1998 at the Tribunal de Grande Instance de Paris. He was convicted of the offence of falsifying administrative documents and sentenced to six months in prison but acquitted of the offence of being a member of an association or grouping formed with a view to preparing acts of terrorism. However, the prosecution appealed against the Tribunal's decision and the appeal was heard by the Paris Court of Appeal. The Court overturned the acquittal and substituted convictions as imposing a total sentence of two years with an order that the appellant leave France.

ii. 8. It made the following findings in respect of the appellant. It noted from the chronology of events that the appellant, after arriving in France, waited until his tourist visa had expired before obtaining a residence permit. He did not make an asylum application until August 1995. After the filing of that claim deportation was prohibited and, in the court's view, there was therefore no justification for the possession of false documents. The appellant had admitted having taken steps to obtain false documents, a false passport for himself and a false identity card for his brother, before the expiry of his residence permit, the making his asylum application and his interview with the officers of the DST in August 1995. It was the court's finding that it was clear that the appellant was to use the false documents to travel clandestinely within and outside France and that the reason why he subsequently entrusted the documents to his cousin was his fear that the French police would attend his home as a result of his activities in France since his arrival in October 1992.

iii. 9. The appellant had said that he knew no one by the name of Ali Drif but the court found that this was untrue because there was evidence of contact between the appellant, Ali Drif and another man, Mehdi Ghomri. The appellant had also claimed not to know Ghomri but he was forced to admit that he recognised him when Ghomri had admitted that he knew the appellant. The Court rejected the appellant's claim that he only had a remote relationship with Ghomri, because that appeared to be inconsistent with the appellant's anxiety to make contact with him. Ghomri was found to be in contact with a member of the Lyons GIA group. The appellant had admitted having tried to obtain information about the circumstances of Ali Ben Fattoum, who had been questioned in relation to the investigation of Karim Koussa, a member of the Lille GIA group assigned to commit an attack on the Wazemmes Market. The appellant had not disputed that he was in contact with Ali Touchent, the main leader of the group assigned to commit an attack on the market.

iv. 10. The Court held that:

"Although it is true, as the trial court stated in the judgment appealed from, that the finding that AH was involved in and possibly guilty of the attack on Algiers Airport in 1992 is not within the competence of the French courts, and (although it is true) that his involvement cannot serve to establish that he was a party to a conspiracy relating to a terrorist enterprise operating in France in 1994 and 1995, this Court must find, contrary to the trial court, that [the appellant] was indeed during that period and whilst he was in France, in close contact with men implicated in terrorist acts committed in the Lyon region and in the north of France, and that his concern to ascertain whether his summons was in connection with those of Ghomri and Kheder shows that they belonged to a common organisation.

The Court therefore does not share the analysis of the trial court which led it to acquit him of the charge of being party to a conspiracy or to a grouping formed with a view to committing terrorist acts, and it was so that he could travel in connection with unlawful activities of that organisation or grouping, where necessary to escape any investigations which might be carried out by the French police as a result of acts committed by that organisation or grouping in France, that the acts of falsification of administrative documents and use of falsified administrative documents found by the trial court were committed.

The terms of the judgment appealed from relating to the guilt of the defendant shall therefore be set aside.

It shall also be set aside as regards the sentence, since that imposed by the trial court was not proportionate to the serious nature of the acts and the disruption to public order. The court is of the opinion that, by reason of the nature and seriousness of the acts, only a non-suspended custodial sentence can be an appropriate penalty for the offences committed by the defendant and shall set that sentence at 24 months. Further, as the presence of [the appellant] on French territory is undesirable by reason of the facts found against him, and since the person concerned is unmarried and has been in France since 1992, definitive deportation shall be ordered by way of an additional penalty."

i. 11. No challenge was made to the expulsion order and the appellant travelled to the UK on 27 July 2001. He applied for asylum in October 2001. In November 2001 a warrant for his extradition was issued in relation to the bombing of the airport in Algeria. The appellant was remanded in custody. There were a number of hearings at Bow Street Magistrates' Court but on 14 February 2002 the Secretary of State decided not to issue authority to proceed with the extradition on the basis that the evidential basis for extradition was not made out. The appellant was released from custody on 15 February 2002 and subsequently interviewed about his claim for asylum. His application was refused for the reasons given in decision letter of 8 March 2004 and the decision, the subject of this appeal, made was on 28 February 2006."

5. In a letter dated 10th September 2009 the Respondent explained the basis for the decision that the Appellant was excluded from refugee status under Article 1F. In summary, the letter made it clear that the exclusion of the Appellant under Articles 1F(b) and (c) was based on the findings of the French Court of Appeal.

The Tribunal's Determination

i. 6. The Appellant gave evidence before the Tribunal. He contended that the hearing before the Appeal Court in Paris was very short, and by inference unfair; and he provided an innocent explanation for his possession of false documents and his contact with the Algerians referred to in the Appeal Court's judgment. The Tribunal was satisfied that the Appellant had received a fair hearing before the Appeal Court; and it did not believe the Appellant's explanation for his conduct. The Tribunal therefore concluded that:

"There is no proper reason for us to revisit or reopen the findings of the French Court." (paragraph 30)

i. 7. The Tribunal assessed "whether the appellant's conviction in the French Court is sufficient to show that there are serious reasons for considering that the provisions of Article 1F(b) and (c) are met" (paragraph 28) against the background of its statement of "The Law" in paragraphs 23-27 of the determination. In paragraph 25 the Tribunal referred to the decision of the Immigration Appeal Tribunal in Gurung v Secretary of State for the Home Department [2003] Imm AR 115:

"25. In Gurung the Tribunal said that it would be wrong to say that an appellant only came within the exclusion clauses if the evidence established that he had personally participated in acts contrary to the provisions of Article 1F. If the organisation was one whose aims, methods and activities were exclusively terrorist in character, very little more would be necessary. Voluntary membership in such an organisation could be presumed to amount to personal and knowing participation in the crimes in question."

i. 8. Against this factual and legal background, the Tribunal rejected the submission made on behalf of the Appellant that the proper inference to be drawn from his conviction in France was simply that "he had been in possession of false documents and knew other Algerians who may or may not have been involved in terrorist-related activities." The Tribunal said:

"31…That is not what the French judgment finds. The appellant admitted to obtaining a false passport for himself and a false identity card for his brother. The Court held that after the appellant had filed his asylum claim, deportation was prohibited by law and there was therefore no justification for possession of false documents. The appellant admitted taking steps to obtain the false documents before the expiry of his residence permit, making his asylum application and the interview with the DST who allegedly put pressure on him to become an informant. The Court found that the reason the appellant gave to justify having the false French passport was contradicted by the chronology of the alleged events.

32. The Court also found it "clear that the appellant was to use the documents to travel clandestinely within and outside France" and that the reason why he entrusted false documents to his cousin was his fear that the French police would attend his home as a result of his activities in France since his arrival in October 1992. The appellant had stated "for certain" that he knew no one by the name of Ali Drif but that was untrue because there was evidence of contact between the appellant, Ali Drif and Mehdi Ghomri. The appellant had claimed not to know Ghomri but was forced to admit that he recognised him when Ghomri admitted that he knew the appellant. The court rejected the appellant's claim that he only had a remote relationship with Ghomri because that was inconsistent with how anxious the appellant had been to make contact with him using a procedure requiring the involvement of his sister and a radio station. Ghomri was found to be in contact with a member of the Lyon GIA group. The appellant admitted trying to obtain information about the circumstances of Ali Ben Fattoum someone who had been questioned in relation to the investigation of Karim Koussa who was a member of the Lille group apparently assigned to commit an attack on the Wazemmes Market. The appellant also admitted that he was in contact with Ali Touchent, the main leader of the Lille group assigned to commit the attack on Wazemmes Market.

i. 33. It is therefore clear from the judgment of the Appeal Court that it found that the appellant was "in close contact with men implicated in terrorist acts committed in the Lyon region and in the north of France" and

"The court therefore does not share the analysis of the trial court which led it to acquit him of the charge of being party to a conspiracy or to a grouping formed with a view to committing terrorist acts, and it was so that he could travel in connection with unlawful activities of that organisation or grouping; and where necessary to escape any investigations which might be carried out by the French police as a result of acts committed by that organisation or grouping in France, [that] the acts of falsification of administrative documents and use of falsified administrative documents found by the trial court were committed."

34. The Appeal Court found that the appellant belonged to the same organisation as Ghomri and Kheder. He was found to be party to a conspiracy or grouping formed with a view to committing terrorist acts and to have obtained false documents so that he could travel in connection with unlawful activities of that group and could escape consequential investigations. As a result of its finding the French Court increased the appellant's sentence from six months to two years.

35. We are therefore satisfied that the French court did not simply find that the appellant knew or associated with people allegedly involved in terrorism but that he was knowingly part of a criminal conspiracy or grouping formed with a view to committing terrorist acts. These findings in our judgment bring the appellant within the definition set out in s54(1) of the 2006 Act of someone involved in acts of instigating or encouraging or inducing others to commit, prepare or instigate terrorism.

36. Accordingly we are satisfied that there are serious reasons for considering that the appellant does come within the provisions of Articles 1F(b) and (c). His involvement and connection with terrorist activities was voluntary and the court accepted that he had knowledge of the aims of the group. His participation in and provision of

assistance relating to planned acts of terrorism in France in our judgment clearly bring him within the exclusion provisions."

The Grounds of Appeal

i. 9. In a nutshell, Mr. Husain QC submitted that the Tribunal had materially erred in law in concluding that the findings of the French Court were of themselves sufficient to bring the Appellant within paragraphs (b) and (c) of Article 1F. The Tribunal had failed to carry out a close examination of the Appellant's own role in the "criminal conspiracy or grouping", and thus the degree of his personal responsibility. In respect of paragraph (c), the Tribunal had misdirected itself by applying the approach in Gurung which at the time of the Tribunal's determination had "oracular standing", but which had subsequently been disapproved in R (JS (Sri Lanka)) v Secretary of State for the Home Department [2011] 1 AC 184, see per Lord Brown at paragraph 29. In respect of paragraph (b) the Tribunal had not applied the proper threshold of seriousness. The offence of which the Appellant had been convicted and sentenced to two years imprisonment was not sufficiently serious to be a "serious" non-political crime in the context of Article 1F(b).

Article 1F(c)

i. 10. In paragraph 29 of his judgment in JS (Sri Lanka) Lord Brown said that the proposition in Gurung referred to by the Tribunal in paragraph 25 of its determination (paragraph 7 above) was unhelpful. In paragraphs 30 and 31 he said:

"30. Rather, however, than be deflected into first attempting some such sub-categorisation of the organisation, it is surely preferable to focus from the outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.

31. No doubt, as Stanley Burnton LJ observed in the KJ (Sri Lanka) case [2009] Imm AR 674, paragraph 37, if the asylum seeker was

> "an active member of [an] organisation that promotes its objects only by acts of terrorism [there] will almost certainly be serious reasons for considering that he has been guilty of [relevant] acts."

I repeat, however, the nature of the organisation itself is only one of the relevant factors in play and it is best to avoid looking for a "presumption" of individual liability, "rebuttable" or not. As the present case amply demonstrates, such an approach is all too liable to lead the decision-maker into error."

i. 11. Lord Brown summarised the position in paragraph 38, as follows:

"Put simply, I would hold an accused disqualified under Article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose."

i. 12. Lord Hope endorsed this approach: see paragraph 49 of his judgment. In paragraph 44 Lord Hope emphasised the need "for a close examination of the facts and the need for a carefully reasoned decision as to precisely why the person concerned is excluded from protection under the Convention."

ii. 13. JS (Sri Lanka) was concerned with paragraph (a) of Article 1F, but this Court has decided that "the same criteria inevitably apply when it is Article 1F(c) which is under consideration": see paragraph 47 of the judgment of Pill LJ (with whom Lord Justice Rimer and Lady Justice Black agreed) in Secretary of State for the Home Department v DD (Afghanistan) [2010] EWCA Civ 1407. In paragraphs 48 and 49 Pill LJ cited paragraphs 30, 31, and 38 of Lord Brown's judgment (see paragraphs 10 and 11 above).

iii. 14. In Bundesrepublik Deutschland v B and D (Cases C-57/09 and C-101/09) [2011] Imm AR 190, the Court of Justice of the European Union (Grand Chamber) decided that the mere fact

of membership of a terrorist organisation could not automatically exclude a person from refugee status under Article 12(2) of the Qualification Directive (paragraph 3 above). In paragraphs 94-98 of its judgment the Grand Chamber said:

"[94] It follows from all those considerations that the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of Article 12(3) of Directive 2004/83.

[95] Before a finding can be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned – regard being had to the standard of proof required under Article 12(2) – a share of the responsibility for the acts committed by the organisation in question while that person was a member.

[96] That individual responsibility must be assessed in the light of both objective and subjective criteria.

[97] To that end, the competent authority must, *inter alia*, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

[98] Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances."

i. 15. On behalf of the Respondent, Mr. Payne submitted that both the Supreme Court in JS and the Grand Chamber in B and D were concerned with cases where there had been no conviction. In the latter case the issue was whether membership of an organisation that was on a list of "persons, groups and entities involved in terrorist acts" compiled pursuant to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism was, of itself, a sufficient ground for exclusion under Article 12(2) of the Qualification Directive. In the present case, the Tribunal's task was far easier because the Appellant had been convicted and the Tribunal had concluded that there were no grounds for re-opening the French Appeal Court's findings.

ii. 16. I readily accept that the fact of a conviction by a court may well make the task of assessing whether a person falls within Article 1F much easier, but it will do so only if the nature of the offence of which the person has been convicted and/or the findings made by the court are sufficient to enable the Tribunal to reach a conclusion as to the individual's "own personal involvement and role in the organisation", or the "true role" played by the individual in the acts perpetrated by the organisation: see JS and B and D (above).

iii. 17. In JS the claimant was a member of the LTTE. There is an obvious factual distinction between membership of a large organisation which has engaged at various times in both lawful (political) and unlawful (terrorist) activity, and the present case in which the Appellant was found to be a member of an organisation or grouping whose only purpose was terrorism, but JS makes it clear that "the nature of the organisation itself is only one of the relevant factors in play": see per Lord Brown at paragraph 31 (paragraph 10 above); also B and D at paragraph 94 (paragraph 15 above).

iv. 18. If the underlying objective for the purpose of Article 1F is to establish the individual's personal role and responsibility, the nature of the particular offence with which this Appellant was charged presents a problem. In "The Investigation and Prosecution of Terrorists Suspects in France", an independent report commissioned by the Home Office, dated November 2006, Professor Jacqueline Hodgson says that the expanded definition of terrorism in 1996:

"widened the scope of the *magistrates*' powers significantly, allowing them to open investigations into those involved with terrorist organisations (within and outside France) before any terrorist act had taken place ….This offence pushes back the boundary of criminality, enabling the judge to act very much earlier when no act has been committed, but when the 'suspect' is perhaps buying materials, is in the very early stages of preparation towards a terrorist act, or is simply associating with a group established to prepare acts of terrorism – even when the judge is unable to identify a specific date or terrorist target to which these activities are linked." (emphasis added)

i. 19. While it is true that the French Appeal Court did not simply find that the Appellant was in close contact with men involved in terrorist acts, it went further and concluded that he belonged to a "common organisation", it was not necessary for the French Appeal Court to form any view as to the Appellant's role in the "conspiracy or grouping formed with a view to committing terrorist acts", nor was it necessary to establish that the group had carried out any particular preparatory act: it was sufficient that the conspiracy or grouping had been "formed with a view to the preparation, taking the form of one or more material acts, of acts of terrorism …." (emphasis added).

ii. 20. It is not clear what "material acts" were relied upon by the Appeal Court in allowing the prosecutor's appeal. The only specific conduct attributed to the Appellant was that he falsified a French passport by affixing his own photograph in place of the genuine holder

"so that he could travel in connection with unlawful activities of that organisation or grouping, and where necessary to escape any investigations which might be carried out by the French police as a result of that organisation or grouping in France."

The conviction relates to the falsification of administrative documents. The Appellant had also falsified a French national identity card by affixing a photograph of his brother. While the Appeal Court found his explanation for this unconvincing, it said that "the actual circumstances in which his brother in Algeria was to use this falsified document are unknown."

i. 21. There can be no dispute that, as an instrument of state policy, "nipping terrorism in the bud" is eminently sensible. However, if the criminal law framed in aid of the policy foils the aspiring terrorist's intentions well before he has undertaken any, or any significant, preparatory acts, then the consequence for the purpose of Article 1F may well be that the offence of which he is convicted, at the outer boundary of criminality, will not be an offence which is so serious as to exclude him from protection under the Convention.

22. Mr. Payne submitted that although the Tribunal had referred to Gurung, which was the relevant authority at the time of its determination, it had not applied the presumption: that voluntary membership of an organisation whose aims methods and activities were exclusively terrorist in nature could be presumed to amount to personal and knowing participation in the crimes in question. He submitted that the Tribunal had carefully analysed the French Appeal Court's findings in order to determine the Appellant's "personal involvement and role" within the conspiracy or grouping.

i. 23. I do not accept that submission for two reasons. Absent the Gurung presumption, the facts found by the French Appeal Court (while adequate for the purpose of convicting the Appellant of this particular offence under French criminal law) were so sparse that they did not enable the Tribunal to determine the Appellants "personal involvement and role", or "true role" in the grouping. The bare fact that the Appellant was knowingly part of a criminal conspiracy or grouping formed with a view to committing terrorist acts could not, unless the presumption was applied, have justified the Tribunal's conclusion in paragraph 35 of its determination that the Appellant fell within the definition in section 54(1) of the Immigration, Asylum and Nationality Act 2006 of someone involved in the acts of instigating or encouraging or inducing others to commit, prepare or instigate terrorism. There was simply no evidence of instigation, encouragement or inducement.

ii. 24. Secondly, the Tribunal's conclusion in paragraph 36 of its determination (paragraph 8 above) echoes the presumption:

"[The Appellant's] involvement and connection with terrorist activities was voluntary and the [French] court accepted that he had knowledge of the aims of the group. His participation in and provision of assistance relating to planned acts of terrorism clearly bring him within the exclusion provisions."

The Appellant's voluntary membership of a terrorist group with knowledge of its aims meant that, without more, it could be concluded that he had not merely provided assistance (by obtaining a false passport so that he could travel in connection with the group's activities) but had also participated in planned acts of terrorism in France. There was no evidence of participation or of any planning, much less of any particular plan.

i. 25. The Tribunal is not to be criticised for applying the presumption in Gurung. It was the relevant authority at the date of its determination. However, in the light of JS, as applied to Article 1F(c) cases by DD, it is now clear that this was a misdirection, and the Tribunal erred in law in this respect. This error in respect of paragraph (c) would not be material if the Tribunal did not err in concluding that the Appellant was excluded under paragraph (b) of Article 1F.

Article 1F(b)

i. 26. Before the Tribunal it was submitted that the Appellant's conduct was not so serious as to deprive him of protection under the Refugee Convention. Although the main focus of this submission was upon the Appellant's contention that he was merely "someone who had had a nebulous connection with others who may have been involved in terrorist activities", which was rejected by the Tribunal, it was still necessary for the Tribunal to consider whether the offence of which the Appellant had been convicted was a "serious" non-political crime for the purpose of Article 1F(b).

ii. 27. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, reedited in January 1992, having referred to the fact that the term "crime" has different connotations in different legal systems, states that in the context of Article 1F

"a "serious crime" must be a capital crime or a very grave punishable act."

28. Macdonald's Immigration Law and Practice 8th Edn. refers in paragraph 12.97 to the guidance in the UNHCR Handbook and observes:

"However, the Secretary of State applies a far lower threshold for the purpose of identifying what is a 'serious non-political crime', drawing by analogy from the definition of 'particularly serious crime' in the Nationality, Immigration and Asylum Act 2002, s. 72."

29. The Respondent's letter dated 10th September 2009 referred to section 72 of the 2002 Act, and Mr. Payne accepted that the Respondent was applying a lower threshold for the purpose of determining whether a crime was a serious non-political crime than that which had been suggested by the UNHCR. He submitted that the guidance in the UNHCR's Handbook was not binding on domestic courts; the Convention left the issue of seriousness to be determined by the domestic courts of the signatory states; and the Respondent was entitled to rely upon the rebuttable presumption in section 72 of the 2002 Act that a person convicted of an offence and sentenced to at least two years imprisonment would have been convicted of a 'very serious crime'.

30. I do not accept the submission that each signatory state is free to adopt its own definition of what constitutes a serious crime for the purpose of Article 1F(b). In JS Lord Brown recorded in paragraph 18 of his judgment that it was common ground between the parties "that there can be only one true interpretation of Article 1F(a), an autonomous meaning to be found in international rather than domestic law." This approach was endorsed by Pill LJ in DD in the context of Article 1F(c): see paragraph 47 of his judgment.

i. 31. It seems to me that the same approach must apply to paragraph (b) in Article 1F. While the Convention leaves it to the domestic courts of the signatory states to decide whether, in any particular case, a non-political crime is "serious", that determination must be founded upon a common starting point as to the level of seriousness that must be demonstrated if a person is to be excluded from the protection of the Convention by reason of his past criminal conduct.

32. Although the parties' researches did not identify any binding domestic authority on the point, the proposition that signatory states do not have an unfettered discretion when deciding whether an offence is "serious" for the purpose of Article 1F(b) is supported by academic authority. In The Refugee in International Law 3rd Edn. Professor Goodwin-Gill says:

"Each State must determine what constitutes a serious crime, according to its own standards up to a point, but on the basis of the ordinary meaning of the words considered in context and with the objectives of the 1951 Convention. Given that the words are not self-applying, each party has some discretion in determining whether the criminal character of the applicant for refugee status in fact outweighs his or her character as *bona fide* refugee, and so constitutes a threat to its internal order. Just as the 1951 Conference rejected 'extradition crimes' as an *a priori* excludable category, so *ad hoc* approaches founded on length of sentence are of little help, unless related to the nature and circumstances of the offence. Commentators and jurisprudence seem to agree, however, that serious crimes, above all, are those against physical integrity, life and liberty." (page 176)

i. 33. There would appear to be a degree of uniformity among the commentators that the Handbook sets the threshold at or about the correct degree of seriousness. Thus, Professor Grahl-Madsen concluded in "The Status of Refugees in International Law" that:

"As we see it, Article 1F(b) should only be applied in cases where the person in question is considered guilty of a major offence (a '*crime*' in the French sense of the word), and only if the crime is such that it may warrant a really substantial punishment, that is to say: the death penalty or deprivation of liberty for several years, and this not only according to the laws of the country of origin, but also according to the laws of the country of refuge." (page 297)

i. 34. In "The Law of Refugee Status" Professor Hathaway agrees with Grahl-Madsen:

"Atle Grahl-Madsen interprets this clause to mean that only crimes punishable by several years' imprisonment are of sufficient gravity to offset a fear of persecution. UNHCR defines seriousness by reference to crimes which involve significant violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs traffic, and armed robbery. These are crimes which ordinarily warrant severe punishment, thus making clear the Convention's commitment to the withholding of protection only from those who have committed truly abhorrent wrongs." (page 224)

i. 35. Professor Gilbert in "Current issues in the application of exclusion clauses", a background paper commissioned by the UNHCR, points out that the statement in the Handbook is not supported by authority in international or domestic law, but suggests that while capital crimes may not in and of themselves be a sufficient test, "offences of sufficient seriousness to attract very long periods of custodial punishment might suffice to guide states as to what might fulfil Article 1F(b)." (page 449)

36. In a statement provided to the Grand Chamber in the B and D case, the UNHCR set out its view as to the seriousness of the acts covered by Article 1F, as follows:

"All the types of criminal acts leading to exclusion under Article 1F of the 1951 Convention involve a high degree of seriousness. This is obvious regarding Article 1F(a) and (c), which address acts of the most egregious nature such as "war crimes" or "crimes against humanity" or "acts contrary to the purposes and principles of the United Nations". In light of its context and the object and purpose of the exclusion grounds highlighted above, a "serious non political crime" covered by Article 1F(b) must also involve a high threshold of gravity. Consequently, the nature of an allegedly excludable act, the context in which it occurred and all relevant circumstances of the case should be taken into account to assess whether the act is serious enough to warrant exclusion within the meaning of Article 1F(b) and 1F(c)." (paragraph 2.2.1)

37. The four questions answered by the Grand Chamber in B and D did not directly address this issue, but the Grand Chamber did say in paragraph 108 of its judgment:

"[108] Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive."

i. 38. In paragraph [109] of its judgment the Grand Chamber accepted the submission of, inter alia, the UK Government, that Article 12(2) did not require a proportionality assessment, but it did so upon the basis that the competent authority would already have undertaken an assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, so that "a fresh assessment of the level of seriousness of the acts committed was not required." It is clear, therefore, that for the purpose of Article 12(2)(b) or (c) there must be an assessment of the level of seriousness of the acts committed, and the seriousness must be of such a degree that the offender cannot legitimately claim refugee status.

ii. 39. The Tribunal did not give separate consideration to paragraphs (b) and (c) in Article 1F. While terrorism is a grave international threat, merely labelling an offences a terrorist offence is not sufficient, of itself, to establish that the offence is a serious offence for the purpose of Article 1F(b). There is no discussion in the Tribunal's determination of either the seriousness of this particular terrorist offence, or the appropriate threshold of seriousness for the purpose of Article 1F.

iii. 40. While I would accept that an offence which carries a maximum sentence of 10 years imprisonment is capable of being the kind of offence which warrants "severe" or "really substantial" punishment, or which attracts a "very long period" of custodial punishment, the fact that this Appellant was sentenced to 2 years imprisonment suggests that such facts as were found in respect of his particular offence placed it at the lower end of seriousness of this kind of offence.

iv. 41. I do not overlook the fact that the Appeal Court said that the original sentence of six months imprisonment was "not proportionate to the serious nature of the acts and the disruption to public order", and was of the opinion that "by reason of the seriousness of the acts" only a non-suspended sentence was appropriate, but these observations are simply a reflection of the fact that "seriousness" is bound to be a relative concept when a domestic court is considering the appropriate

sentence for a particular offence. Nor do I overlook the fact that "definitive deportation" was ordered as an additional penalty.

v. 42. Taking all of these factors into account, I do not see how it could have been concluded on the basis of the very limited findings of the French Appeal Court that the particular offence of which this Appellant was convicted crossed the threshold of seriousness for the purpose of Article 1F(b), as that threshold has been variously described by the academic commentators referred to in paragraphs 32-36 (above). Further discussion of the threshold is unnecessary because there is another, fatal, flaw in the Tribunal's reasoning.

vi. 43. Even if the Tribunal had considered the seriousness of the Appellant's offence in the context of the appropriate threshold of seriousness for the purpose of paragraph (b) of Article 1F, it would have done so in the context of its conclusions in respect of paragraph (c) of Article 1F, and those conclusions – that the Appellant was someone who had been involved in acts of instigating or encouraging or inducing others to commit, prepare or instigate terrorism (paragraph 35), and was someone who had participated in and provided assistance relating to planned acts of terrorism in France (paragraph 36) – were reached, and could only have been reached, by the application of the, now discredited, Gurung presumption: see paragraphs 22-24 above. Thus, the Tribunal's erroneous approach to paragraph (c) fatally infected its conclusion in respect of paragraph (b) of Article 1F.

Conclusion

i. 44. I would allow the appeal, and invite the parties' submissions as to the proper disposal of the appeal.

Lord Justice Rix:

i. 45. I agree that, as explained by Lord Justice Sullivan, the critical flaw in the Upper Tribunal's determination was its application of the now discredited *Gurung* presumption. Subject to that, I agree with Lord Justice Ward's concerns over the question of what is "serious". I therefore agree that the matter should be remitted to the Upper Tribunal and their expertise. Indeed, I have been left uncertain as to the gravamen of the offence of which AH was convicted by the French court of appeal. On the one hand, a sentence of two years, serious as it is (but I do not even know if it represents what in England would be a sentence of two years or four years (two years to serve)), is not at the higher end of possible sentences for terrorist activities. On the other hand, any involvement in terrorist related activity may be thought of as particularly worrisome. Yet again, I have found it hard to assess the findings of the French court. Mr Husain QC has submitted that they are to be understood as amounting to little, if anything, more than guilt by association. On another possible view, however, those findings are very serious indeed, viz that AH was not simply in close contact with but committed to assisting others, all part of a common organisation, in terrorist activities such as an attack on the Wazemmes Market: see the findings cited from the French court of appeal at para 10 of the Tribunal's determination, set out above within para 4 of the judgment of Sullivan LJ.

Lord Justice Ward:

i. 46. It may seem astonishing to many that the French courts were able to seek to exclude this appellant but that the United Kingdom may be obliged to tolerate his presence in our midst. How could that come about?

ii. 47. The appellant is now a stateless person, formerly of Algerian nationality. In 1993 he was convicted in Algeria of being involvement in a bombing at the Algiers Airport and in his absence he was sentenced to death. At the time of that trial he was in France. On 22nd October 1999 he was convicted in France of being a member of an association created with a view to the preparation of acts of terrorism, sentenced to two years imprisonment and made subject to an exclusion order. He arrived in the United Kingdom on 27th July 2001 and claimed asylum. That claim was rejected, not because he did not have a well-founded fear of persecution if returned to Algeria where he faced execution, but because he was excluded from the protection of the Refugee Convention by Article 1F(b) and/or (c) which provide:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) …

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

That decision taken by the Secretary of State was upheld by the Asylum and Immigration Tribunal on 26th October 2009. The appellant now appeals to this Court.

i. 48. Through no fault of their own, the Senior Immigration Judges Latter and Lane erred because the decision upon which they relied and upon which they based their approach, namely, *Gurung v SSHD* [2003] Imm. A.R. 115, was subsequently disapproved of by the Supreme Court in *R (JS) (Sri Lanka) v Home Secretary* [2010] UKSC 15, [2011] 1 A.C. 184. I am therefore constrained to allow the appeal and would remit the matter back to the Tribunal for further hearing.

ii. 49. If we are to send it back for re-hearing, we should leave the Tribunal absolutely free to decide where the line is to be drawn and I would not wish to express any view as to whether or not the appellant falls within or outwith either limb of Article 1F. The question is whether we can give any helpful guidance as to the meaning of the words "serious crime" in Article 1F(b).

iii. 50. Being an international convention, it must be given an autonomous meaning. They are ordinary words and should be given their ordinary universal meaning. "Crime" surely means any illegal act punishable at law.

iv. 51. Furthermore, in my judgment, "serious" needs no further qualification. Where further qualification is required, the Convention gives it: compare Article 1F(b) with Article 33.2 which refers to "a refugee … who, having been convicted by a final judgment of a *particularly* serious crime, constitutes a danger to the community of that country", with the emphasis added by me. The same distinction is drawn in the EU Qualification Directive 2004/83/EC between Article 17 ("committed a serious crime") and Article 21 ("convicted … of a particularly serious crime").

v. 52. Although an ordinary word, "serious" has shades of meaning and the appropriate colour is given by the context in which the word is used. What may be serious for one purpose may not be serious for another. The context here is that the crime which the refugee has committed must be serious enough to justify the withholding of the protection he would otherwise enjoy as a person having a well-founded fear of persecution and owing to such fear is unwilling to avail himself of the protection of the country of his nationality or to return to the country of his former habitual residence. This seems to be the view of the Grand Chamber in *Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09)* [2011] Imm. A.R. 190 expressed with regard to Articles 12(2)(b) and (c) of the European Directive but, it seems to me, equally apposite for the Refugee Convention:

"108. Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83 … is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that Directive."

i. 53. Beyond that I would not go. Like Lord Brown of Eaton-under-Heywood at paragraph 39 of *JS (Sri Lanka)*,

"It would not, I think, be helpful to expatiate upon Article 1F's reference to there being "serious reasons for considering" the asylum-seeker to have committed a war crime."

54. I certainly do not find it helpful to determine the level of seriousness by the precise sentence of imprisonment that may have been imposed upon the accused. Sentence is, of course, a material factor but it is not a benchmark. In deciding whether the crime is serious enough to justify his loss of protection, the Tribunal must take all facts and matters into account, with regard to the nature of the crime, the part played by the accused in its commission, any mitigating or aggravating features and the eventual penalty imposed. I would leave that decision to the good sense of the Tribunal.