Case No: C5/2008/2765

Neutral Citation Number: [2010] EWCA Civ 1407
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM & IMMIGRATION TRIBUNAL
Immigration Judge EN Simpson

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2010

Before :

LORD JUSTICE PILL
LORD JUSTICE RIMER
and
LADY JUSTICE BLACK

- -

Between :

Secretary of State for the Home Department	**Appellant**
- and -	
DD (Afghanistan)	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Jonathan Auburn (instructed by **The Treasury Solicitors**) for the **Appellant**
Christopher Jacobs (instructed by **Duncan Lewis**) for the **Respondent**

Hearing date : 6 October 2010

- -

Judgment

Lord Justice Pill :

1. This is an appeal against a decision of the Asylum & Immigration Tribunal ("the Tribunal"), Immigration Judge EN Simpson, dated 27 August 2008, in which, following a reconsideration, the appeal of DD (Afghanistan) ("the respondent") against a decision of the Secretary of State for the Home Department ("the Secretary of State") dated 27 April 2007, refusing him asylum and protection on human rights grounds, was allowed. The Secretary of State has submitted that the appellant is not entitled to protection because of the provisions of article 1F of the Geneva Convention relating to the Status of Refugees (1951) ("the Refugee Convention"). It is submitted that the Tribunal erred in law in failing to apply that provision of the Convention, and also section 54 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"). It is also submitted that the Tribunal erred in its approach to the evidence of the respondent's conduct in Afghanistan.

2. The respondent is a citizen of Afghanistan and is aged 34. He arrived in the United Kingdom on 18 January 2007 and claimed asylum on that day. He claimed a history of involvement with Jamiat-e-Islami, the Taliban and Hizb-e-Islami. He was in fear of his life if returned to Afghanistan because elements in the Government there sought vengeance on his family.

3. The Tribunal found, and, subject to article 1F, the finding is not challenged, that there were substantial grounds for believing that, if returned, he would face a real risk of being exposed to serious harm amounting to persecution in breach of the Refugee Convention and contrary to article 3 of the European Convention on Human Rights ("ECHR"). The Immigration Rules confirm the applicability of the Refugee Convention to decisions on asylum. Rule 328 provides: "all asylum applications will be determined by the Secretary of State in accordance with the Geneva Convention". The rule is not claimed to be unlawful.

4. Article 1F of the Convention provides that its provisions "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."

5. The Tribunal referred, as have counsel, to the rationale for article 1F(c) stated in the judgment of Bastarache J in the Canadian Supreme Court in *Pushpanathan v Canada, Minister of Citzenship and Immigration Control*

(Canadian Council for Refugees intervening) [1999] INLR 36, at paragraph 63:

> "What is crucial, in my opinion, is the manner in which the logic of the exclusion in Art 1F generally, and Art 1F (c) in particular, is related to the purpose of the Convention as a whole. The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees."

6. The purposes and principles of the United Nations, which are relevant considerations under article 1F(c), are set out in articles 1 and 2 of its Charter. Article 1 provides:

> "1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Article 2 imposes on states which are members of the United Nations an obligation to act in accordance with certain principles. These include:

> "2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
>
> 3. . . .
>
> 4. . . .
>
> 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

7. Section 1 of the Terrorism Act 2000 ("the 2000 Act") provides:

> "(1) In this Act 'terrorism' means the use or threat of action where—
>
> (a) the action falls within subsection (2),

> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it—
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system."

8. The definition of terrorism was considered in *T v SSHD* [1996] AC 742. The main issue was the definition of a political crime in article 1F(b) but Lord Mustill, at p 773 B-C, referred to the draft League of Nations Convention of 1937, article 1.2:

> "'acts' of terrorism means criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."

Lord Mustill was content to adopt that definition of terrorism.

9. Reliance is placed by the Secretary of State on resolutions of the UN Security Council. Resolution 1373 (2001) (28 September 2001) provides:

> ". . . acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations."

10. Resolution 1377 (2001) (12 November 2001) recalled the earlier resolution and reaffirmed:

> ". . . its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed."

All states were called on "to take urgent steps to implement fully resolution 1373" and to "intensify their efforts to eliminate the scourge of international terrorism".

11. Resolution 1624 (2005) (September 2005) called upon states to "adopt measures, consistent with international obligations, to prohibit, by law, incitement to commit a terrorist act or acts and to deny safe haven to those guilty of such conduct". There are also General Assembly resolutions declaring that acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, for example 49/60 of 9 December 2004.

12. The International Special Assistance Force ("ISAF") in Afghanistan is authorised and mandated by Security Council Resolution 1386 (2001) (20 December 2001). It was mandated to assist the Afghan Interim Authority in the maintenance of security and to protect and support the work of that authority and the UN's work in Afghanistan so that ". . . the personnel of the United Nations can operate in a secure environment". The temporal and geographical scope of ISAF's mandate have been extended by subsequent Security Council Resolutions from 2002 to 2006. Resolution 1510 (2003), paragraph 1, authorises expansion of the mandate outside Kabul and its environments "so that the . . . personnel of the United Nations . . . engaged, in particular, in reconstruction and humanitarian efforts, can operate in a secure environment, and to provide security assistance for the performance of other tasks in support of the Bonn Agreement". The Secretary of State's reasons for refusing asylum included the statement, at paragraph 14: "ISAF in Afghanistan . . . is a UN mandated operation (UN Security Council Resolution, 1707, (2006))".

13. Section 54 of the 2006 Act, which may well have been enacted in response to Security Council resolutions about terrorism, and in order to comply with the UK's international obligations under the UN Charter, is headed "Refugee Convention: Construction". It provides:

> "(1) In the construction and application of Article 1F(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular-
>
> (a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and
>
> (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).
>
> (2) In this section-
>
> 'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on

> 28th July 1951, and 'terrorism' has the meaning given by section 1 of the Terrorism Act 2000 (c 11)."

14. Mr Auburn, for the Secretary of State, submitted that the respondent had disentitled himself to protection by reason of conduct in Afghanistan which amounted to terrorism and also to acts contrary to the purposes and principles of the United Nations. Article 1F should be applied to the respondent's conduct at all material times, as should section 54 of the 2006 Act, it was submitted.

15. Section 54 came into operation on 31 August 2006. It was submitted by the Secretary of State that it applies to the decision making process and applies to conduct before as well as on and after that date. Even if section 54 does not apply to conduct before that date, the Secretary of State was entitled to assess that conduct in the context of article 1F, it was submitted.

16. Mr Jacobs, for the respondent, accepted that the Tribunal should have considered, whether or not section 54 of the 2006 Act was in force, the respondent's overall conduct in Afghanistan to decide whether it brought him within the article 1F(c) exemption. For the period up to September 2006, however, he submitted that the conduct should be assessed without reference to section 54. Mr Jacobs further submitted that the Tribunal was justified in finding a "lack of specificity" in the evidence of the respondent's conduct with Hizb-e-Islami, such that the exemption did not apply.

17. The Tribunal concluded:

> "150. Section 54 of the Immigration, Asylum and Nationality Act 2006 came into effect on 31 August 2006. It contained no transitional provisions. It appears to have effected a substantive change of law. I consider, as a matter of natural justice, therefore, that it applies only to acts occurring after it came into force, that is, from September 2006.
>
> 151. Having regard to the combined lack of specificity of evidence of the Appellant's [now the respondent] conduct with Hizb-e-Islami and the highly reasonable likelihood, given the chronology, that his involvement with Hizb-e-Islami was at its end stage after September 2006 and the coming into effect of Section 54, I find in sum there are not serious grounds for considering he committed a barred act(s). I find Article 1F(c) does not apply."

18. Paragraph 151 of the decision is not, with respect, entirely clear. Given the respondent's concession mentioned at paragraph 16 above, the finding that article 1F(c) "does not apply" is surprising. I read the paragraph as concluding that article 1F(c) does not operate in this case, first, because of the lack of "specificity" at all times and, secondly, because the broader test which may be appropriate under section 54 could not operate until September 2006 by which

time involvement with Hezb-e-Islami was "at its end stage". It is conceded that article 1F(c) operated throughout.

19. Apart from the temporal point, what concerned the Tribunal was the "lack of specificity of evidence of the appellant's conduct with Hizb-e-Islami". Neither at interview nor in cross-examination had there been elicited "any specificity about his actions or incidents".

20. In seeking to uphold the Tribunal's finding on the temporal issue, Mr Jacobs relied on the presumption against the retrospective operation of statutes. He referred to the approval by Lord Nicholls of Birkenhead in *Wilson v First County Trust Ltd (No.2)* [2004] 1 AC 816, of the statement of the underlying rationale of the presumption by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724:

> "The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears."

Lord Nicholls added, at paragraph 19:

> "Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle."

Tribunal's findings

21. I have already stated the Tribunal's overall conclusions expressed at paragraphs 150 and 151. It is necessary to consider the evidence about the respondent's conduct in Afghanistan and the findings of the Tribunal. The Immigration Judge conducted a lengthy analysis of events in Afghanistan and of the respondent's involvement. References to the "appellant" are of course to the present respondent.

22. The Tribunal summarised the respondent's evidence at paragraphs 44 and 45:

> "44. As to what the Appellant did in Kunar, he reported directly to Kashmir Khan and was involved in fighting. Hikmatyir commanded Kashmir Khan. He fought people that Kashmir Khan called the enemy, foreigners or Afghans. He had ten to fifteen people, and there were two Arabs and one Afghan training them. As to whether he fought NATO forces:
>
> 'I was fighting anyone who tried to take over the area in Kunar, whether it was NATO or Afghan forces. I was told to resist the occupation and by fighting I was doing just that'.

> 45. It was easy to tell the difference between foreign forces and Afghan forces, and he referred to appearance, and also foreign forces were well-protected, and with weapons he had not seen before."

23. The appellant was the brother of YD described as Commander YD and "a famous" and "prominent" commander in Afghanistan (paragraphs 112 and 116). The Tribunal found:

> "114. The Appellant at interview consistently gave an account of having been with his older brother from a young age. There was an age difference between the two. In the context of Afghanistan and its politics, inter-ethnic and like civil conflicts, international conflict, the prevalence of warlords/commanders, and in the light of the evidence of the prominence of Commander YD and his shifting allegiances I consider it is not without reasonable likelihood that he would seek to have close to him from an early age a younger brother, whereby sibling loyalty would continue to be inculcated."

The Tribunal added:

> "120. Altogether in the context of the above background evidence I consider plausible that Commander YD would have gathered close to him those who he could trust, and having a brother younger than him would reasonably have had that brother close to him from a young age, increasingly assisting him in all ways, and with time and experience being given increasing responsibilities, including the position of deputy. It was the consistent evidence of the Appellant that he was simply 'always' with his brother, and it was effectively when interviewed and in detail when specifically asked about his role in respect of the brother that the evidence emerged that 'at the end' of his brother's time in Jamiat he was his deputy commander."

24. The respondent described his brother as "becoming disenchanted" with Jamiat, and being "courted" by the Taliban:

> "125. I consider the Appellant gave a substance of plausible detail of the background of Commander YD's departure from Jamiat/Northern Alliance and joining the Taliban and remaining with the Taliban until after its fall in 2001.
>
> 126. . . .

> 127. With regard to the credible detail of the Appellant’s evidence as to his familiarity with military matters I consider to be the familiar ease he had in describing the differing modes of fighting as between the Mamiat-e-Islami and the Taliban, and the dynamic of the Taliban in its small group fighting, seeking to ensure that individual commanders do not have command of large numbers of men, and furthermore those men of whom they have command not necessarily including their own militia.
>
> 128. . . . I consider that the Appellant did give a continuing credible account of his activities with the Taliban, and in describing himself as a fighter in his first statement, and when interviewed that he was deputy commander and commanded up to twenty men that these are not exclusive statements, but credible facets of what was in all likelihood from 1996 to 2001, some five years, a complicated, changing and diverse period for the Appellant.
>
> 129. . . .
>
> 130. . . . the evidence of Commander YD’s efforts to regroup the Taliban, and the evidence of increasing Taliban activity in Afghanistan after its fall, Commander YD reputed to have responsibility for the provinces of Parwan, Kapisa, Wardak and Kabul, that is effectively in opposition to the incipient central government, actual battles recorded in 2003 in Afghanistan, led by Commander YD, and mention of the increasing presence of Hezb-e-Islami Hekmatayar I find this altogether to form a credible background of building adverse interest in YD. . . .”

25. YD was killed in 2004 in Pakistan. The Tribunal found that the respondent was present but survived the attack, though he was injured:

> “133. In the context of Afghanistan and its deeply patriarchal society with groups invariably drawn along ethnic-religio/political lines, and the close involvement I find of the Appellant with his brother and in fighting, I accept the reasonable likelihood of the Appellant’s claim that in seeking vengeance and the ‘settling of scores’, that in such a context this would include not only the primary individuals but the male members of their immediate family.
>
> 134. . . .

> 135. I find altogether that the Appellant did show and to the lower standard of proof that he was the brother of Commander YD, and he was closely involved with his brother from his time with Jamiat-e-Islami followed by the Taliban, and that when the brother was killed there is a reasonable likelihood that, as his brother and close associate, that this was an attempt on the Appellant's life too."

26. The Tribunal found:

> "138. I consider altogether there is a reasonable likelihood in his continuing close association with his brother that like his brother the Appellant did continue to have a presence in Afghanistan with the Taliban and prior to his brother's assassination.
>
> 139. Although differing organisations or movements the various background evidence does show degrees of association between the Taliban and Hizb-e-Islami Hekmatayar, and also the presence of Hizb-e-Islami Hekmatayar led by Kashmir Khan in Kunar. The Appellant described methods of organisation and fighting in Hezb-e-Islami not dissimilar to the Taliban, which would be consistent with their degree of association. Having faced and been in the thick of the assassination of his older brother with whom he had spent much of his life, I do not consider inconsistent that having faced this mortal risk in Pakistan, that he sought, together with others from their village, to return to Afghanistan and its isolated areas and seek the protection of a military grouping. I accept that the Appellant therefore did show to the lower standard he became involved with Hizb-e-Islami in Afghanistan.
>
> 140. . . .
>
> 141. Having regard to his close association with Commander YD, a prominent member both in Jamiat-e-Islami followed by the Taliban, I consider that the Appellant's involvement in Hizb-e-Islami has to be evaluated against that history, and that there is a reasonable likelihood that he would have as he claimed a high profile."

27. These findings led to the Tribunal's conclusion, at paragraph 144, that the respondent "did have aggravated real fears about risk to himself of facing serious harm arising from his family's political history more particularly his elder brother with Jamiat-e-Islami followed by the Taliban, and that the 'settling of scores' remained unfinished" but the findings are also relevant,

when considering the operation of the exemption in article 1F(c), on the extent of the respondent's involvement.

28. At paragraph 145, the Tribunal summarised the Secretary of State's submissions on UN involvement:

> "The Respondent invoked Article 1F(c) of the Refugee Convention (incorporated in the Protection Regulations), that the protection of the Convention does not apply where a refugee has committed an act contrary to the purposes and principles of the UN, and further relying on resolutions of the UN Security Council (variously 1373 (2001), 1377 (2001) and 1707 (2006) reaffirming previous resolutions in Afghanistan). More particularly that coalition forces in Afghanistan operated in pursuance of the UN resolutions and that the UN had determined that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations'."

29. The Tribunal went on to find:

> "146. I accept that the Appellant was a fighter with Hizb-e-Islami Hekmatayar in the province of Kunar in Afghanistan prior to leaving Afghanistan. As to the period of involvement there appeared some uncertainty concerning its duration but I do consider the Appellant's estimate of some five to six months reasonably likely to be low and given in an effort to minimize his involvement, having regard to his earlier evidence at interview to have gone to Kunar to Hizb-e-Islami after recovering from being shot in Ramadan 2004.
>
> 147. The Appellant's evidence was that they were fighting both Afghan government forces and also foreign forces, that is the UN authorised forces. The Appellant was clearly familiar with the differences between the two sets of forces. There was no positive evidence that Hizb-e-Islami Hekmatayar actions were not against the international forces, rather Hizb-e-Islami actions were about resisting Afghan government forces and the 'occupation'. The Appellant described at certain stages his military involvement with Hizb-e-Islami as being defensive. However having regard to the evidence of increasing counter-insurgency in Afghanistan I consider this to be implausible. I found the appellant credibly to have a longstanding history of military involvement in Afghanistan, including at a high level, deputy to his Commander brother, and independently a commander in Hizb-e-Islami Hekmatayar in Kunar. I consider that there are prima

> facie grounds for considering that his actions with Hizb-e-Islami Hekmatayar in Afghanistan were both offensive and defensive. However I accept neither at interview or in cross-examination was there elicited any specificity about his actions or incidents.
>
> 148. Under UK law Hizb-e-Islami Hekmatayar is a proscribed terrorist organisation. . . ."

It was proscribed under s1, Schedule 2, to the 2000 Act, as amended, as from October 2005.

30. The following paragraphs in the Tribunal's decision have already been cited. The respondent was a fighter with Hizb-e-Islami Hekmatayar. He was fighting UN authorised forces and was familiar with the differences between them and Afghan government forces. The respondent had "a long standing history of military involvement in Afghanistan, including at a high level". Prima facie, his actions were "both offensive and defensive".

31. When assessing risk on return, the Tribunal considered, at paragraph 153:

> "The recency of his involvement in Hizb-e-Islami, and his historical involvement with his brother in the Taliban, following double-crossing Jamiat-e-Islami."

<u>The issues</u>

32. The potential issues include:

    (a) On the Tribunal's findings, to what extent, if at all, are the acts of the respondent acts of terrorism within the meaning of the 2000 Act?

    (b) Are these acts contrary to the purposes and principles of the United Nations?

    (c) To what extent, if at all, do those acts contravene article 1F(c) of the Refugee Convention?

    (d) Do the respondent's acts, even if capable of being acts of terrorism and/or acts contrary to the purposes and principles of the United Nations, fail, by reason of lack of specificity, to attract the application of article 1F(c)?

    (e) Was the respondent's personal involvement and role in the organisations he was supporting such as to contribute in a significant way to the organisation's ability to pursue terrorist purposes and/or activities contrary to the purposes and principles of the United Nations?

    (f) If so, was he aware that his assistance would further such purposes and/or activities?

(g) Does section 54 of the 2006 Act apply only to acts done after the section came into operation on 31 August 2006?

The general question which arises from those specific questions is whether the Tribunal erred in law in its findings at paragraphs 150 and 151.

KJ (Sri Lanka)

33. Mr Jacobs accepted that acts of terrorism are incompatible with the purposes and principles of the United Nations. On issue (a) he submitted that the Tribunal's findings were of military and not terrorist activity by the respondent. Fighting United States and coalition forces in defence of his homeland was not terrorism. Mr Jacobs cited the judgment of Stanley Burnton LJ, with which Waller LJ and Dyson LJ agreed, in *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292, which involved the conduct of a Tamil in Sri Lanka:

> "36. Lastly, so far as paragraph (c) is concerned, it is common ground that acts of terrorism, such as the deliberate killing of civilians, are contrary to the purposes and principles of the UN.
>
> 37. The application of Article 1F(c) will be straightforward in the case of an active member of 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 acts contrary to the purposes and principles of the United Nations.
>
> 38. However, the LTTE, during the period when KJ was a member, was not such an organisation. It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka. The application of Article 1F(c) is less straightforward in such a case. A person may join such an organisation, because he agrees with its political objectives, and be willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations.
>
> 39. It remains to apply these principles to the case of KJ. In my judgment, the Tribunal failed to focus on the

> crucial question: were there serious reasons for considering that he had personally been guilty of acts contrary to the purposes and principles of the United Nations? . . ."

34. Having considered the facts, Stanley Burnton LJ added, at paragraph 40:

> "40. . . . The Tribunal failed to define what acts that were not terrorist in nature were acts contrary to the purposes and principles of the United Nations, and did not identify any facts that constituted serious reasons for considering that KJ had been guilty of them. The word "complicit" is unenlightening in this context. In my judgment, the facts found by the Tribunal showed no more than that he had participated in military actions against the government, and did not constitute the requisite serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations. I would therefore allow his appeal on this issue."

An important distinction from the present case is the absence of the involvement in Sri Lanka of UN mandated military operations.

UNHCR Guidelines

35. On issues (a), (b) and (c), Mr Jacobs referred to the UNHCR Guidelines on International Protection in relation to article 1F of the Refugee Convention (4 September 2003). It is stated, at paragraph 18:

> "For exclusion to be justified, individual responsibility must be established in relation to a crime covered by article 1F. Specific considerations in relation to crimes against peace and acts against the purposes and principles of the UN have been discussed above. In general, individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice."

36. As to the concept embraced in the expression "the purposes and principles of the United Nations", Mr Jacobs relied on paragraph 17:

> "Given the broad, general terms of the purposes and principles of the United Nations, the scope of this category is rather unclear and should therefore be read narrowly. Indeed, it is rarely applied and, in many

> cases, Article 1F(a) or 1F(b) are anyway likely to apply. Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category. Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. In cases involving a terrorist act, a correct application of Article 1F(c) involves an assessment as to the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security."

<u>KK (Turkey)</u>

37. For the Secretary of State, Mr Auburn relied on the decision of the Tribunal in *KK (article 1F(c)) (Turkey)* [2004] UKAIT 0010, Mr CMG Ockleton (Deputy President), His Honour Judge Huskinson and Professor Casson. The Tribunal considered comprehensively the ambit of article 1F(c) and the impact of international instruments. At paragraph 20, the Tribunal stated that it was "perfectly content to hold that a private individual may be guilty of an act contrary to the purposes and principles of the United Nations". The Tribunal considered the views expressed by UNHCR and the effect of UNHCR's Guidelines. It was noted that the guidance was not binding on the Tribunal (*Sivakumuran v SSHD* [1988] AC 958). UNHCR's position was that the phrase "acts contrary to the purposes and principles of the United Nations" "does not include all acts which the United Nations has condemned as contrary to its purposes and principles". The acts must impinge on the international plane.

38. The Tribunal added, at paragraph 69:

> "Merely to state that position is to show how difficult it would be to adopt it. It appears to us that the major difficulty in accepting the UNHCR's reasoning is its confining of the identification of the purposes and principles of the United Nations to those set out in Articles 1 and 2 of the Charter, without any real recognition, in the way we have described above, of subsequent Acts of the organs of the United Nations. To fail to give full effect to these Acts is not merely to ignore the Vienna Convention: it is to prevent the Charter of the United Nations being regarded as a living instrument, capable of being adapted by interpretation

> and use, by agreement and endorsement, to the circumstances of changing ages."

Further doubting in that case the applicability of the UNHCR stance, the Tribunal referred, at paragraph 70, to the opening words of article 1F stating that the provisions of the Refugee Convention shall not apply to any person "with respect to whom there are serious reasons for considering" that article 1F has been infringed.

39. The Tribunal stated its conclusion at paragraph 88:

> "Where, therefore, there are serious reasons for considering that an act contrary to the purposes and principles of the United Nations has been committed, it does not matter when or where it was committed, or whether it is categorised by municipal law as a crime. It leads to exclusion from the Refugee Convention. For acts of a political character which are not contrary to the principles and purposes of the United Nations, however, there is no exclusion, and the individual is protected internationally by the Refugee Convention, although the application of Article 32 or 33 may lead to his expulsion from the host country."

40. Reliance on the Vienna Convention on Law Treaties (1969) as an aid to construction of article 1F(c) was based on the effect of article 31. Article 31(1) provides:

> "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty and their context and in the light of its object and purposes."

41. Article 31(3) provides:

> "3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties."

42. In *KK*, the Tribunal held, at paragraph 26, that article 31(3)(b) "clearly demonstrates that resolutions of the Security Council are relevant in

interpreting the phrase 'the purposes and principles of the United Nations'". They further stated, at paragraph 29, that General Assembly resolutions are, in the light of article 31(3)(a), "clearly relevant in determining the purposes and principles of the United Nations". Mr Auburn submitted that resolutions of the Security Council, which are binding on Member States of the UN, demonstrate, first, that terrorist acts are contrary to the purposes and principles of the United Nations and, secondly, that acts against forces mandated by a resolution of the UN Security Council are acts contrary to those purposes and principles.

<u>SS v SSHD</u>

43. The issues were considered by the Special Immigration Appeals Commission ("SIAC") Mitting J presiding, in *SS v SSHD* (SC/56/2009, 30 July 2010), a decision after that of the Tribunal in the present case. A Libyan national claimed asylum and asylum was refused on the ground that the applicant was an active member of the Libyan Islamic Fighting Group ("LIFG"). SIAC cited UN Security Council Resolutions, the domestic legislation (no point was taken on the temporal effect of section 54), and Council Directive 2004/83/EC of 29 April 2004. Reliance has not been placed on the Directive in the present case, it presumably being accepted that the UK legislation is to the same effect. That is supported by the conclusion of SIAC in *SS*, at paragraph 15:

> "The common ground between the two instruments is far greater than the differences. The fundamental definition of terrorism in both is the use or threat of action designed to influence a government or to intimidate a population by serious acts of violence and some acts of economic disruption.
>
> 16. We have not been referred to and are not aware of any widely accepted international definition of terrorism which differs in any essential respect from that summarised above . . . but we doubt that any international organisation or reputable commentator would disagree with a definition of terrorism which had at its heart the use or threat of serious or life threatening violence against the person and/or serious violence against property, including economic infrastructure, with the aim of intimidating a population or influencing a government, except when carried out as lawful act of war."

44. SIAC considered the approach to terrorism in the decision of this court in *KJ* and stated, at paragraph 17, that "it was driven to the conclusion that the observations in *KJ* were made per incuriam and do not bind us". No reference had been made in *KJ* to section 54 of the 2006 Act or to the definition of terrorism in section 1 of the 2000 Act.

45. Having considered the evidence, SIAC stated, at paragraph 19:

> "We are satisfied that [the acts] fall within the definition of terrorism in section 1 Terrorism Act 2000, article 1.3 of the Council's common position, and the core of any generally accepted definition of terrorism."

46. SIAC considered the submission that terrorism must have an international character or aspect to bring the exemption into existence. That submission was rejected at paragraph 21:

> ". . . Secondly we do not accept that terrorism must have an international character or aspect in order to come within Article 1(F)(c). As Security Council Resolution 1624 makes plain, it is the duty of states to deny safe haven to those who have committed a terrorist act. The assassination of a political leader by a national of the same state pursuant to a plot entirely organised and financed within that state can be just as much capable of disturbing the peace of the word as an identical attack financed from abroad. There is no rational basis for distinguishing between the two."

The conclusion of SIAC, at paragraph 26, was "that there are serious reasons for considering that *SS* had been guilty of acts contrary to the principles and purposes of the United Nations and so is excluded from recognition as a refugee . . ."

JS (Sri Lanka)

47. In *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, decided since the decision of the Tribunal in this case, the main issue was the degree of involvement required when considering whether an applicant was disqualified from asylum by virtue of article 1F(a) of the Convention, the question posed at 32(e) above. It appears to me that the same criteria inevitably apply when it is article 1F(c) which is under consideration. Lord Brown of Eaton-under-Heywood JSC, with whom the other members of the court agreed, set out the common ground between the parties, at paragraph 2:

> "It is common ground between the parties (i) that there can only be one true interpretation of article 1F(a), an autonomous meaning to be found in international rather than domestic law; (ii) that the international instruments referred to in the article are those existing when disqualification is being considered, not merely those extant at the date of the Convention; (iii) that because of the serious consequences of exclusion for the person concerned the article must be interpreted restrictively and used cautiously; and (iv) that more than mere membership of an organisation is necessary to bring an individual within the article's disqualifying provisions. The question is, I repeat, what more?"

Those propositions may be applied in this case when assessing the respondent's involvement in events.

48. Lord Brown stated:

> "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 *KJ (Sri Lanka)*, at para 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."

49. Lord Brown added, at paragraph 38:

> "Returning to the judgment below with these considerations in mind, I have to say that paragraph 119 does seem to me too narrowly drawn, appearing to confine article 1F liability essentially to just the same sort of joint criminal enterprises as would result in convictions under domestic law. Certainly paragraph 119 is all too easily read as being directed to specific identifiable crimes rather than, as to my mind it should be, wider concepts of common design, such as the

> accomplishment of an organisation's purpose by whatever means are necessary including the commission of war crimes. 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."

Lord Kerr of Tonaghmore JSC stated, at paragraph 59, that it was not an "automatic consequence" that membership of LTTE equated to complicity.

50. *JS* was concerned with an allegation of complicity in war crimes or crimes against humanity and not with article 1F(c). Lord Brown cited *KJ* with approval including the passage distinguishing military actions from terrorist activities. It could not be concluded, Lord Brown stated, that LTTE was "predominantly terrorist in character". Beyond that, he stated, at paragraph 27, that military action against government forces is not to be regarded as a war crime. Lord Brown did not, however, address the definition of "terrorist" and there was no need in that case to do so, the allegation being of war crimes and crimes against humanity. The importance of the judgment is mainly in its consideration of the complicity issue and the personal role of the claimant.

<u>R v F</u>

51. In *R v F* [2007] QB 960, the Court of Appeal Criminal Division, Sir Igor Judge P presiding, considered whether conduct targeted at removing an allegedly tyrannical regime was terrorism within the meaning of section 1 of the 2000 Act. It was held that the ambit of the Act's protection of the public was not limited to states with governments of any particular type and there was no reason to deprive the inhabitants of states not governed by democratic principles of the protection afforded by the Act.

52. Sir Igor Judge stated, at paragraph 26:

> ". . . We can see no reason why, given the random impact of terrorist activities, the citizens of Libya should not be protected from such activities by those resident in this country in the same way as the inhabitants of Belgium or the Netherlands or the Republic of Ireland. More important, we can see nothing in the legislation which might support this distinction.
>
> 27. What is striking about the language of s1, read as a whole, is its breadth. It does not specify that the ambit of its protection is limited to countries abroad with governments of any particular type or possessed of what we, with our fortunate traditions, would regard as the desirable characteristics of representative government. .

> . . Terrorism is terrorism, whatever the motives of the perpetrators."

53. Sir Igor Judge added, at paragraph 29:

> "In the context of the ECHR, we draw attention to Article 2, and the right to life, and the obligation on the state to take appropriate steps to safeguard life and, for that purpose, to ensure an effective system of criminal law. By its nature terrorism is indiscriminate. An assassin may target an individual national leader. If Mr Robertson is right it may then be argued that his fatal stroke would not amount to terrorism for the purposes of the Act. It was however open to Parliament to decide that because of the evils of terrorism and the manifold dangers that terrorist activities create, it should impose a prohibition on the residents of this country from participating or seeking to participate in terrorist activities, which may have a devastating impact wherever in the world they occur."

54. The court in *F* did not have to consider whether an armed insurrection of the type contemplated in the findings of the Tribunal in the present case was or was not terrorism but there is nothing in the judgment to cast doubt on the distinction made by this court in *KJ* that participation in military actions against the government was not terrorism. By its nature, Sir Igor Judge stated, "terrorism is indiscriminate".

Analysis and Conclusions

55. *KJ* appears to be authority for the proposition that military action directed against the armed forces of the government does not as such constitute terrorism or acts contrary to the purposes and principles of the United Nations. SIAC in *SS* stated that these observations were made per incuriam. I am not prepared, in the absence of argument beyond that addressed to this court to hold that the observations were per incuriam and it does not appear to me that they were, though the circumstances in which acts of violence against a government are acts of terrorism is a difficult question. Serious violence against members of the government forces would normally be designed to influence the government and be used for the purpose of advancing a political, religious or ideological cause, within the meaning of those words in section 1 of the 2000 Act. On the other hand, it is difficult to hold that every act of violence in a civil war, the aim of which will usually be to overthrow a legitimate government, is an act of terrorism within the 2000 Act.

56. It is significant, and may explain the form of submissions to this court, that the Tribunal's finding in the present case was based on the temporal issue and also the lack of specificity of evidence to justify the application of the exemption. On the Tribunal's findings, the issue of classification of the acts of the respondent as terrorist or as contrary to the purposes and principles of the United Nations did not arise. However, on the authority of *KJ*, military

actions against the Afghan Government, even if conducted by proscribed organisations, are not necessarily terrorist in nature. If that is so, they are not, as terrorist acts, contrary to the purposes and principles of the UN Charter.

57. It is not a pre-requisite for a finding in relation to the article 1F(c) exemption that a specific identifiable crime or act of terrorism, such as a particular killing on a particular date, must be proved. I have referred to the Tribunal's findings at paragraph 30 above. The Tribunal found a genus of activity by the respondent, over a prolonged period, which is capable of disentitling him to the protection of the Convention. As a deputy commander, and one familiar with military matters, he conducted offensive operations not only against Afghan government forces but against UN mandated forces. The Tribunal found that he was a fighter and himself commanded up to 20 men. He was closely involved with his brother, Commander YD, a prominent commander. If other criteria are satisfied, it was not necessary, on the test laid down in *JS* at paragraphs 30 and 38, for the appellant, or the Tribunal, to be more specific.

58. The participation issue was not considered by the Tribunal as a discrete issue but, applying the *JS* test, the application of the exemption does not fail in law for lack of evidence of contribution to Hezb-e-Islami's purpose or for lack of participation in it. The Tribunal has erred in law in those respects.

59. On an application of *KJ*, however, there were no findings of terrorist acts, as distinct from armed action against the authorities, which would attract the operation of the exemption. It is unlikely that the distinction was in mind at the hearing before the Tribunal but there was no finding of paradigm terrorist acts such as random bombings, indiscriminate violence and attacks on the civilian population, as distinct from military action targeted at government and coalition forces. It is difficult to detect, in the Tribunal's findings, evidence of gross human rights violations on the civilian population. Following *KJ*, I am not able to hold, on the Tribunal's findings, that acts of terrorism had been committed. Further analysis, with the *KJ* distinction in mind, might have revealed acts of terrorism.

60. If that is right, the temporal issue does not arise but, had it done so, I would have found that the Tribunal should have taken into account, in considering whether acts of terrorism as defined in the 2006 Act had been committed, acts done before it came into force. I would accept that the section was concerned with the decision making process and that the test could be applied to earlier acts.

61. I agree with the submission on behalf of the Secretary of State that section 54 of the 2006 Act is a statutory aid to the construction of article 1F and is designed to make clear the correct approach to the article. It permits a broad view to be taken of the article as covering acts, for example, of instigating terrorism, which may not amount to an actual or inchoate offence. I also agree that it is intended to apply to decisions made from the date of its coming into force and that the decision maker is not then limited to considering only acts performed after the section had come into force. The section enables the decision maker, from 31 August 2006 onwards, to assess conduct in accordance with its terms. In context, I do not regard that as unfair, in *Wilson*

terms, to those concerned. (Given the approach which is to be taken to article 1F(c), as article 1F has been construed in *JS*, I would not expect section 54 to have much impact in many cases).

62. That leaves the issue whether findings of acts directed against forces mandated by UN Security Council Resolutions are acts contrary to the purposes and principles of the United Nations, as defined in article 1F(c). On a consideration of the original Convention, I do see, with respect, some force in the views of UNHCR which would confine the application of the article to acts impinging on the international plane.

63. However, I accept the submission that the UN Charter is a living instrument and that the range of activities subsequently conducted under the auspices of the United Nations requires that the words be given a less limited construction. I accept that individual conduct is capable of being conduct contrary to the principles and purposes of the United Nations and I accept that military action against ISAF is action contrary to those purposes and principles.

64. The UN Security Council has mandated forces to conduct operations in Afghanistan. The force is mandated to assist in maintaining security and to protect and support the UN's work in Afghanistan so that its personnel engaged in reconstruction and humanitarian efforts can operate in a secure environment. Direct military action against forces carrying out that mandate is in my opinion action contrary to the purposes and principles of the United Nations and attracts the exemption provided by article 1F(c) of the Convention. Broadly, I agree with the reasoning of the Tribunal in *KK*.

65. Indeed, fighting against UN mandated forces would appear to be a clear example of action contrary to purposes and principles of the United Nations, acting in accordance with its Charter. Military actions mandated by decision of the UN Security Council are conducted on behalf of the entire international community. The expressed purpose of the UN is to establish peace and security in the areas in which ISAF forces are mandated to operate, in order to achieve the goals set for UN involvement in Afghanistan. It does not follow that violence against anyone bearing UN colours anywhere is necessarily action contrary to the purposes and principles of the United Nations. Situations will differ and require specific analysis.

66. I refer again to section 54 of the 2006 Act. Because the case is to be approached on the basis of an absence of findings of terrorist activity, following *JK*, the section has no direct application in this case. However, the section does throw light on the approach to be adopted to article 1F(c) in confirming by statute that the acts of individuals may be acts contrary to the purposes and principles of the United Nations. Acts contrary to those purposes and principles 'include' acts instigating terrorism. That involves a broad view of the expression, a broader one than that contemplated by UNHCR in its Guidelines. If individual acts of terrorism come within the expression, I find it difficult to conclude that acts directed against UN mandated forces are not capable of coming within the expression. In *KJ*, it was confirmed, at paragraph 36, that acts of terrorism, such as the deliberate

killing of civilians, are contrary to the purposes and principles of the United Nations.

67. In my judgment, there were material errors of law in the Tribunal's findings in the failure to approach the respondent's conduct and participation in events in the manner now specified in *JS* and in failing to go on to consider whether the respondent's conduct involved acts contrary to the purposes and principles of the United Nations. I would remit the case to the Tribunal. I would not leave it open to the Tribunal so to conduct the reconsideration as to make possible findings of terrorism as such. That would be unjust to the respondent. The Tribunal should conduct such enquiries as are necessary to decide whether the conduct of the respondent includes action contrary to the purposes and principles of the United Nations, as so defined. The issue as to what evidence was before the Tribunal in August 2008 need not be resolved in this court.

68. I would allow the appeal to that extent.

Lord Justice Rimer :

69. I agree.

Lady Justice Black :

70. I also agree.