Michaelmas Term
[2012] UKSC 54
On appeal from: [2009] EWCA Civ 222; [2010] EWCA Civ 1407

JUDGMENT

Al-Sirri (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

DD (Afghanistan) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Phillips
Lady Hale
Lord Kerr
Lord Dyson
Lord Wilson

JUDGMENT GIVEN ON

21 November 2012

Heard on 14, 15, 16 and 17 May 2012

Appellant (Al-Sirri)
Edward Fitzgerald QC
Alasdair Mackenzie

(Instructed by Birnberg Peirce and Partners)

Respondent
Tim Eicke QC
Iain Quirk
Jonathan Auburn
(Instructed by Treasury Solicitor)

Appellant (DD)
Richard Drabble QC
Christopher Jacobs
Guy Goodwin-Gill
(Instructed by Lawrence Lupin Solicitors)

Respondent
Tim Eicke QC
Jonathan Auburn

(Instructed by Treasury Solicitor)

Intervener (United Nations High Commissioner for Refugees)
Michael Fordham QC
Jessica Simor
Samantha Knights
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LADY HALE AND LORD DYSON (with whom Lord Phillips, Lord Kerr and Lord Wilson agree)

1. These appeals are concerned with a little used provision in article 1F(c) of the Geneva Convention on the Status of Refugees ("the Refugee Convention"). This excludes from refugee status and protection "any person with respect to whom there are serious reasons for considering that . . . he has been guilty of acts contrary to the purposes and principles of the United Nations." For the time being at least, however, the Home Secretary accepts that these appellants cannot be returned to their home countries because they face a real risk of torture or inhuman or degrading treatment or punishment there. It is the grant of refugee status, rather than the right to stay in this country, which is in issue in these proceedings.

2. The issues in the two cases are different. In *Al-Sirri*, the question is whether all activities defined as terrorism by our domestic law are for that reason alone acts contrary to the purposes and principles of the United Nations, or whether such activities must constitute a threat to international peace and security or to the peaceful relations between nations. In *DD*, the question is whether armed insurrection is contrary to the purposes and principles of the United Nations if directed, not only against the incumbent government, but also against a United Nations-mandated force supporting that government, specifically the International Security Assistance Force ("ISAF") in Afghanistan. Although the issues are different, many of the relevant materials are the same, as must be the general approach to article 1F(c), and so we deal with them in one judgment to avoid unnecessary repetition. In all article 1F cases, there is also the issue of the standard of proof: what is meant by "serious reasons for considering" a person to be guilty of the acts in question?

(1) The general approach

Relevant treaty and legislative provisions

3. Article 1F of the Refugee Convention excludes three types of person from the definition of refugee:

> "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."

It will be apparent that a particular act may fall within more than one of these categories. In particular, terrorism may be both a "serious non-political crime" and an act "contrary to the purposes and principles of the United Nations".

4. Member States of the European Union are, moreover, bound to observe the standards laid down in Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"). Its main objective is to ensure common standards in the identification of people genuinely in need of international protection and a minimum level of benefits for them in all Member States (recital 6). Recital 22 deals with article 1F(c):

> "Acts contrary to the purposes and principles of the United Nations are set out in the preamble and articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that '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.'"

5. Article 12 of the Qualification Directive both reflects and expands slightly upon article 1F of the Refugee Convention (the changes and additions are italicised):

> "2. *A third country national or a stateless person is excluded from being a refugee where* there are serious reasons for considering that:

> (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) he *or she* has committed a serious non-political crime outside the country of refuge prior to his *or her* admission [to that country] 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) 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."

6. The Qualification Directive is transposed into United Kingdom law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525). Regulation 2 provides that "'refugee' means a person who falls within article 1(A) of the Geneva Convention and to whom regulation 7 does not apply". Regulation 7(1) states that "A person is not a refugee, if he falls within the scope of article 1D, 1E or 1F of the Geneva Convention". The Immigration Rules provide, in paragraph 334, that a person will be granted asylum, inter alia, if "(ii) he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006".

7. However, section 54 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"), 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 28 July 1951, and

'terrorism' has the meaning given by section 1 of the Terrorism Act 2000."

8. There is no need to set out the definition of terrorism contained in section 1 of the 2000 Act. The essence is the use or threat of certain dangerous actions designed to influence this or any other government or intimidate the public for the purpose of advancing a political, religious, racial or philosophical cause. But if firearms or explosives are involved, the act or threat need not be designed to influence the government or intimidate the public. Terrorism designed solely to achieve political change within the United Kingdom, with no international repercussions, is clearly covered, as is terrorism committed here with a view to achieving internal political change in another country.

9. The Preamble to the Charter of the United Nations recites the determination of the peoples of the United Nations to save succeeding generations from the scourge of war; "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"; to maintain justice and respect for international law; and "to promote social progress and better standards of life in larger freedom"; and for these ends to live together in peace, unite to maintain international peace and security, ensure that armed force is used only in the common good, and employ international machinery for the economic and social advancement of all peoples.

10. The purposes of the United Nations are set out in article 1 of the Charter. The first purpose is

> "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."

The second is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"; the third is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian nature", and in "promoting and encouraging respect for human rights and for fundamental freedoms for all"; and the fourth is to be a centre for harmonising the actions of nations in the attainment of these common ends.

11. Article 2 of the Charter requires the United Nations and its Member States to act in accordance with the seven Principles set out therein. These are: the sovereign equality of all Members; the duties of all Members to fulfil their obligations under the Charter in good faith; to settle their disputes by peaceful means; to refrain from the threat or use of force against the territorial integrity or political independence of any state; to give the United Nations every assistance in taking action in accordance with the Charter and to refrain from assisting any state against which it is taking action; the duty of the United Nations to ensure that non-member states act in accordance with these principles so far as may be necessary to maintain international peace and security; and, finally, that "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . ."

The general approach to article 1F(c)

12. The appellants, with the support of the UNHCR, argue that article 1F must be "interpreted narrowly and applied restrictively" because of the serious consequences of excluding a person who has a well-founded fear of persecution from the protection of the Refugee Convention. This was common ground in *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC 184, in the context of article 1F(a), and must apply a fortiori in the context of article 1F(c). Concern was expressed during the drafting of the Convention that the wording was so vague as to be open to misconstruction or abuse. Professor Grahl-Madsen comments that "It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively": *The Status of Refugees in International Law*, 1966, p 283.

13. Secondly, article 1F(c) is applicable to acts which, even if they are not covered by the definitions of crimes against peace, war crimes or crimes against humanity as defined in international instruments within the meaning of article 1F(a), are nevertheless of a comparable egregiousness and character, such as sustained human rights violations and acts which have been clearly identified and accepted by the international community as being contrary to the purposes and principles of the United Nations. The appellants rely on *Pushpanathan v Canada, Minister of Citizenship and Immigration (Canadian Council for Refugees intervening)* [1998] 1 SCR 982 ("*Pushpanathan*") per Bastarache J at para 65:

> "….In my view, attempting to enumerate a precise or exhaustive list [of acts contrary to the purposes and principles of the United Nations] stands in opposition to the purpose of the section and the intentions of the parties to the Convention. There are, however, several types of acts which clearly fall within the section. The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognised as contrary to the purposes and principles of the United Nations, then article 1F(c) will be applicable."

14. On the other hand, not every act which is condemned by the United Nations is for that reason alone to be deemed contrary to its purposes and principles. In *Pushpanathan* itself, the majority held that international drug trafficking did not fall within article 1F(c), despite the co-ordinated efforts of the international community to suppress it, through United Nations treaties, declarations and institutions. As the UNHCR explains, in its "Background Note on the Application of the Exclusion Clauses: Article 1F…" (September 2003), at para 47:

> "The principles and purposes of the United Nations are reflected in myriad ways, for example by multilateral conventions adopted under the aegis of the UN General Assembly and in Security Council resolutions. Equating any action contrary to such instruments as falling within article 1F(c) would, however, be inconsistent with the object and purpose of this provision. Rather, it appears that article 1F(c) only applies to acts that offend the principles and purposes of the United Nations in a fundamental manner. Article 1F(c) is thus triggered only in extreme circumstances by activity which attacks the very basis of the international community's co-existence under the auspices of the United Nations. The key words in article 1F(c) 'acts contrary to the purposes and principles of the United Nations' should therefore be construed restrictively and its application reserved for situations

> where an act and the consequences thereof meet a high threshold. This threshold should be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security. Thus, crimes capable of affecting international peace, security and peaceful relations between states would fall within this clause, as would serious and sustained violations of human rights."

15. Thirdly, for exclusion from international refugee protection to be justified, it must be established that there are serious reasons for considering that the person concerned had individual responsibility for acts within the scope of article 1F(c): see the detailed discussion at paras 50 to 75 of the UNHCR "Background Note". This requires an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility. As a general proposition, individual responsibility arises where the individual committed an act within the scope of article 1F(c), or participated in its commission in a manner that gives rise to individual responsibility, for example through planning, instigating or ordering the act in question, or by making a significant contribution to the commission of the relevant act, in the knowledge that his act or omission would facilitate the act. In *Bundesrepublik Deutschland v B and D* (Joined Cases C-57/09 and C-101/09) [2011] Imm AR 190 ("*B and D"*) the Grand Chamber of the Court of Justice of the European Union confirmed the requirement of an individualised assessment and held that it was not justifiable to base a decision to exclude solely on a person's membership of a group included in a list of "terrorist organisations". This too is consistent with the approach adopted by this Court in *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2011] 1 AC 184.

16. In our view, this is the correct approach. The article should be interpreted restrictively and applied with caution. There should be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security". And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character. However, those general observations are not enough in themselves to resolve the questions raised by the two cases before us, to which we now turn.

(2) The case of Al-Sirri

The facts

17. The appellant is a citizen of Egypt. He arrived in the United Kingdom in April 1994 and claimed asylum then. His claim was eventually turned down on 11 October 2000, on the ground that article 1F(c) of the Refugee Convention applied to him, but he was told that he would be granted exceptional leave to enter the United Kingdom. That never happened, but on 1 April 2004 he was granted discretionary leave to enter which has been extended for periods of six months at a time ever since. Under section 83 of the Nationality, Immigration and Asylum Act 2002, the grant of discretionary leave for an aggregate of more than a year also gave him the right to appeal against the refusal of asylum. This he did in September 2006.

18. On 2 August 2007, the Asylum and Immigration Tribunal ("the AIT") (Hodge J, President, Senior Immigration Judge Lane and Immigration Judge Woodhouse) dismissed his appeal. On 18 March 2009, the Court of Appeal (Sedley, Arden and Longmore LJJ) set aside the Tribunal's determination and remitted the case to be determined afresh by a differently constituted tribunal: [2009] EWCA Civ 222, [2009] INLR 586. Nevertheless, the appellant has appealed to this Court because he takes issue with some aspects of the leading judgment given by Sedley LJ.

19. The Home Secretary relied upon seven matters to show that there are serious reasons for considering that the appellant has been guilty of acts contrary to the purposes and principles of the United Nations. Four of these are accepted facts:

> (i) that the appellant had published and written the Foreword to an Arabic language book, *Bringing to light some of the most important judgments in Islam*; the author, Rifai Ahmed Musa, has been credibly named as having been a member of the Egyptian organisation, *al-Gamma al-Islamiyya*; the AIT pointed out that that organisation is proscribed under the Terrorism Act 2000, and also in Canada and the United States and within the European Union by Council Common Position 2005/936/CFSP;
>
> (ii) that the appellant was in possession of an unpublished Arabic manuscript, *Expectations of the Jihad Movement in Egypt*; the author, Ayman Al-Zawahiri, is a former leader of the organisation, Egyptian Islamic Jihad;
>
> (iii) that the appellant possesses books and videos relating to Osama bin Laden and Al-Qaeda;

(iv) that the appellant had transferred money to and from foreign countries, allegedly in sums greater than his known income could explain.

20. The AIT relied upon a long and detailed statement from Acting Detective Inspector Dingemans of the Counter-Terrorism Command at Scotland Yard, containing what Sedley LJ described as a "damaging account and analysis of the material found at Mr Al-Sirri's premises" (para 67). Sedley LJ commented that the preferable course would have been for the AIT to be shown the documentary material supporting the allegations, to hear what both sides had to say about it, to consider any explanations given by the appellant, and to make up their own mind about it. The Court of Appeal was not satisfied that this material, together with the more serious allegation referred to in para 22 below, would inevitably have led the AIT to conclude that the appellant fell within article 1F(c); it follows that they would not have been so satisfied on the basis of the above material alone.

21. Two of the matters relied upon were more serious, but the Court of Appeal ruled that the AIT was required by law to give them no weight, and the Home Secretary has not appealed against that ruling:

(i) that the appellant has twice been convicted in his absence by the Supreme Military Court of Egypt: in March 1994, when he was sentenced to death for conspiracy to kill Dr Atef Sidqi, Prime Minister of Egypt; and in January 1999, when he was sentenced to 15 years' imprisonment for membership of a terrorist organisation. These convictions cannot be relied upon because they were probably secured by the use of torture. Although the AIT placed "little weight" upon them, the Court of Appeal correctly ruled that this was a serious error of law, and the only principled way of dealing with them was to afford them no weight at all (para 44);

(ii) that a grand jury in the United States District Court for the Southern District of New York had indicted him for allegedly providing material support to a terrorist organisation, *al-Gamma al-Islamiyya*, and soliciting the commission of a crime of violence. The AIT had accorded this substantial weight, although none of the evidence on which the indictment was based had been disclosed, and as a result (under extradition law as it then stood) the Home Secretary had declined to authorise an extradition request based upon the indictment to proceed. The Court of Appeal ruled that it should be accorded no evidential weight whatsoever.

22. This leaves the most important matter relied upon: that the appellant had conspired in the murder of General Ahmad Shah Masoud in Afghanistan on 9 September 2001, just two days before the atrocities of 11 September 2001. The

background to this is common knowledge, some of which is confirmed by the witness statement of General Masoud's brother, Chargé d'Affaires in London for the Islamic State of Afghanistan. This was then the recognised government of Afghanistan and General Masoud was its Vice-President and Defence Minister. But at the time the Taliban were in control of most of the country, apart from the territory in the north-east of the country which was under the control of the Northern Alliance. General Masoud was leader of the Northern Alliance. Earlier that year he had travelled to Europe to address the European Parliament on the situation in Afghanistan and it is said that he had warned of an impending Al-Qaeda attack upon the United States on a larger scale than the bombing of the US embassies in Kenya and Tanzania in 1998. It is also believed that his assassination may have been ordered by Osama bin Laden to cut off the most obvious source of support for US retaliation against such an attack.

23. Be that as it may, the appellant was indicted at the Old Bailey for conspiracy to murder General Masoud. The case against him was described by the Common Serjeant as follows. The General had been murdered by two Arab suicide bombers posing as a journalist and photographer who had been granted an interview with him. A letter of introduction, purportedly signed by the appellant, from the Islamic Observation Centre (IOC) which was run by the appellant in London, and informing the reader that the two were journalists of Arab News International, a TV subsidiary of the IOC, had played a part in securing this interview. However, the letters actually carried by the assassins at the time of the murder were in fact, as the Common Serjeant put it, "careful and elaborate forgeries" of the letters that the appellant had created. So did the appellant know that the letters which he created were to be used to secure an interview with the General at which he would be killed? Or were they used by the assassins as a template for the letters which they would forge, the appellant being an innocent fall-guy who knew nothing of their intended use? The Common Serjeant concluded that the evidence was as consistent with the innocence of the accused (who had made no secret of his authorship of the templates which could easily be traced to him and had not destroyed any of the relevant documentation in his possession) as it was with his guilt. Accordingly, on 16 May 2002, he dismissed the charge on the ground that the evidence would not be sufficient for a jury properly to convict.

24. The AIT reminded themselves that the standard of proof in criminal proceedings is not the same as that under article 1F(c). They concluded that the evidence "seriously points to some knowing involvement of the appellant in the events which led to the death of General Masoud" (para 46). Sedley LJ considered whether this conclusion, together with the Dingemans evidence referred to in para 19 above, would have been bound to lead to a finding adverse to the appellant (para 62). He concluded that there was a realistic possibility that a tribunal of fact, confining itself to the admissible evidence and excluding the two items ruled

inadmissible by the Court of Appeal, might have rejected the submission that the appellant fell within article 1F(c) (para 64). Hence the case was remitted to be determined afresh on the basis of the admissible evidence.

Why then this appeal?

25. The appellant originally took issue with the Court of Appeal on three matters:

(1) The Court of Appeal rejected his argument that article 1F was aimed only at "state actors" – people who had in some way abused the powers of a sovereign state. Although this had the support both of academic commentators on the Refugee Convention and of the UNHCR, it had been rejected as an absolute rule by the Supreme Court of Canada in *Pushpanathan*. The appellant was originally given permission to argue the point in this Court, but has now abandoned it in the light of the later decision of the Court of Justice of the European Union in *B and D*. In these proceedings, Mr Fordham QC, who appears for the UNHCR, has accepted that it is possible for non-state actors to be guilty of acts contrary to the purposes and principles of the United Nations.

(2) Sedley LJ saw the force of the appellant's submission that "terrorism must have an international character or aspect" in order to come within article 1F(c) (paras 29 and 32). However, he did not think that this helped the appellant. On the face of it, the assassination was in support of a "domestic Afghan quarrel". The international repercussions were referred to but not described by the AIT. But what in his view gave it a dimension which brought it within the purposes and principles of the United Nations was that, "if true, it involved the use of a safe haven in one state to destabilise the government of another by the use of violence" (para 51). The appellant wishes, therefore:

> (i) clearly to establish that "the act in question must have an international character, because the relevant purposes and principles of the United Nations are limited to matters which significantly affect international peace and security"; and
>
> (ii) clearly to establish that it is not enough to supply that "international character" that actions are taken in one state to destabilise the government of another.

(3) Sedley LJ rejected the submission that "serious reasons for considering" the appellant to be "guilty" of acts falling within article 1F(c) imported the

criminal standard of proof (paras 33 to 35). The appellant was originally refused permission to appeal on this ground. But he now wishes to appeal on the different ground that, for there to be such "serious reasons", it must be found more likely than not that the appellant is guilty of the relevant acts. This is of particular importance in his case, because of the Common Serjeant's finding that the evidence was as consistent with his innocence as with his guilt.

An international dimension?

26. The question is whether labelling an act as "terrorism" or a person as a "terrorist" is sufficient to bring the act or the person within the scope of article 1F(c). Before the Court of Appeal, Mr Eicke QC, on behalf of the Home Secretary, did not dispute that article 1F(c) was not as wide as the definition of terrorism in section 1 of the Terrorism Act 2000 (see para 29). Further, "by common consent" the Qualification Directive "conditions and qualifies the application of section 1 of the Terrorism Act to article 1F proceedings" (see para 28). Before this Court, Mr Eicke has withdrawn any such concession and argues that, because the United Nations has condemned terrorism but not defined it, Member States are free to adopt their own definitions and that, therefore, acts falling within the domestic definition of terrorism will also be acts contrary to the purposes and principles of the United Nations, whether or not they have any international dimension or repercussions for international peace and security.

27. In support of his argument, he cites the numerous General Assembly and Security Council resolutions on the subject of terrorism, sometimes with and sometimes without the adjective "international". In 1994, the General Assembly of the United Nations adopted, by resolution 49/60, the annexed *Declaration on Measures to Eliminate International Terrorism*. By article 1:

> "The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, wherever and by whomever committed, including those which jeopardise the friendly relations among states and peoples and threaten the territorial integrity and security of states".

By article 2:

> "Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardise friendly relations among states, hinder international cooperation and

> aim at the destruction of human rights, fundamental freedoms and democratic bases of society."

And by article 3:

> "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."

28. By article 5(f), states were required to take effective measures before, among other things, granting asylum to ensure that the asylum seeker has not engaged in terrorist activities. In 1996, the General Assembly adopted, by resolution 51/210, the *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*. By article 3:

> "The States Members of the United Nations reaffirm that States should take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts, . . . and, after granting refugee status, for the purpose of ensuring that that status is not used for the purpose of preparing or organising terrorist acts intended to be committed against other states or their citizens."

29. Declarations are not, of course, binding in international law. Resolution 51/210 referred to the "possibility of considering in the future the elaboration of a comprehensive convention on international terrorism" and established an ad hoc committee to that end; a draft text has been prepared for discussion but as yet no such Convention has been agreed. In the meantime, a number of specific Conventions requiring states to criminalise certain particular acts of terrorism have been agreed. The Security Council has passed numerous resolutions concerning threats to international peace and security caused by acts of terrorism, including Resolution 1624 of 2005. Paragraph 8 of the Preamble to this reaffirms that "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations", as is "knowingly financing, planning and inciting terrorist acts". But paragraph 2 also stresses that

> "States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law".

30. Mr Fitzgerald QC, on behalf of the appellant, argues that an act of terrorism can only be contrary to the purposes and principles of the United Nations if it impacts in some significant way upon international peace and security. In the "Guidelines on International Protection: Application of Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", 2003, para 17, the UNHCR takes a view of terrorism which is consistent with the general principles quoted above at para 14:

> "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".

31. This position is maintained in the UNHCR's "Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion under Article 1F of the 1951 Convention relating to the Status of Refugees":

> "The focus should . . . continue to be on the nature and impact of the acts themselves. In many cases, the acts in question will meet the criteria for exclusion as 'serious non-political crimes' within the meaning of article 1F(b). In others, such acts may come within the scope of article 1F(a), for example as crimes against humanity, while *those crimes whose gravity and international impact is such that they are capable of affecting international peace, security and peaceful relations between states would be covered by article 1F(c)* of the 1951 Convention. Thus, *the kinds of conduct listed in [preambular paragraph] 8 of Resolution 1624* – ie 'acts, methods and practices of terrorism' and 'knowingly financing, planning and inciting terrorist acts' – *qualify for exclusion under article 1F(c), if distinguished by these larger characteristics.*" (Emphasis supplied)

32. *B and D* was decided by the Grand Chamber of the CJEU after the decision of the Court of Appeal in *Al-Sirri*. The principal question referred by the Bundesverwaltungsgericht was whether mere membership of or support for an organisation listed in the Annex to the Council Common Position of 17 June 2002

on the application of specific measures to combat terrorism constituted a serious non-political crime within article 12(2)(b) or an act contrary to the purposes and principles of the United Nations within article 12(2)(c) of the Qualification Directive.

33. The Advocate General drew a distinction between terrorist acts in general, which depending upon the circumstances were likely to be categorised as serious non-political crimes, and terrorist acts which were contrary to the purposes and principles of the United Nations. As to the latter, in his view, the UNHCR Guidelines and Background Note suggested that

> "it is nevertheless necessary to verify whether they have an international dimension, especially in terms of their seriousness and their impact and implications for international peace and security. Within those limits, it therefore seems permissible to make a distinction between international terrorism and domestic terrorism" (para 70, Adv Gen).

The Grand Chamber confirmed that terrorist acts, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes (para 81). Coming on to acts contrary to the principles and purposes of the United Nations, the Grand Chamber thought it clear from the Security Council Resolutions that "the Security Council takes as its starting point the principle that international terrorist acts are generally speaking, and irrespective of any state participation, contrary to the purposes and principles of the United Nations" (para 83). It is for that reason that the appellant has conceded that non-state actors can be guilty of such acts. The Grand Chamber continued (para 84):

> "It follows that – as is argued in their written observations by all the governments which submitted such observations to the court, and by the European Commission – the competent authorities of the Member States can also apply article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension."

34. The *B and D* case is prayed in aid on each side of the argument. Mr Eicke, for the Secretary of State, correctly points out that the international dimension was not what the case was all about. The principal issue was whether mere membership of and support for a listed organisation was sufficient for either article 12(2)(b) or (c) to apply. The answer to this question was clearly "no". The national authorities

had first to consider whether the acts committed by the organisation fell within those provisions and secondly whether individual responsibility for carrying out those acts could be attributed to the persons concerned. In that context, little weight could be attached to the references to "international terrorism" and "terrorist acts with an international dimension".

35. Against that, argues Mr Fitzgerald, it is clear that both the Advocate General and the Grand Chamber were drawing a distinction between paragraphs (b) and (c) of article 12(2). There is no mention of an international element in the terrorist acts which could fall within paragraph (b), whereas the international element is referred to whenever reference is made to paragraph (c).

Discussion and conclusions

36. Approaching the matter in the light of the general principles discussed earlier, it is clear that the phrase "acts contrary to the purposes and principles of the United Nations" must have an autonomous meaning. It cannot be the case that individual Member States are free to adopt their own definitions. As Lord Steyn said in *R v Secretary of State for the Home Department, Ex p Adan* [2000] UKHL 67, [2001] 2 AC 477, "In principle, there can be only one true interpretation of a treaty". There is, at least as yet, no specialist international court or other body to adjudicate upon Member States' compliance with the Refugee Convention. The guidance given by the UNHCR is not binding, but "should be accorded considerable weight", in the light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention (see *R v Asfaw* [2008] AC 1061, per Lord Bingham at para 13, and *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667, 678). Within the European Union the Qualification Directive is designed to lay down minimum standards with which Member States must comply. Sedley LJ correctly concluded that "the adoption by section 54(2) of the 2006 Act of the meaning of terrorism contained in the 2000 Act has where necessary to be read down in an article 1F[(c)] case so as to keep its meaning within the scope of article 12(2)(c) of the Directive".

37. The United Nations Security Council has declared that "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations" and this is repeated in recital 22 to the Qualification Directive. But it has done so in a context where there is as yet no internationally agreed definition of terrorism, no comprehensive international Convention binding Member States to take action against it, and where the international declarations adopted by the General Assembly are headed "Measures to eliminate international terrorism". Above all, however, the principal purposes of the United Nations are to maintain international peace and security, to remove threats to *that* peace, and to develop

friendly relations among nations. It is also noteworthy that the CJEU, despite recital 22 to the Directive, consistently referred to "international" terrorism, when discussing article 12(2)(c) in *B and D*.

38. In those circumstances, it is our view that the appropriately cautious and restrictive approach would be to adopt para 17 of the UNHCR Guidelines:

> "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."

39. The essence of terrorism is the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international organisation to act or not to act in a particular way (see, for example, the definition in article 2 of the draft comprehensive Convention), as Sedley LJ put it in the Court of Appeal, "the use for political ends of fear induced by violence" (para 31). It is, it seems to us, very likely that inducing terror in the civilian population or putting such extreme pressures upon a government will also have the international repercussions referred to by the UNHCR. In this particular case, the AIT did not consider that any such repercussions were required, but commented that "if we are wrong about that we consider the killing itself to be an act of terrorism likely to have significant international repercussions, as indeed it appears to have done" (para 47). When the case returns to the Tribunal, the Tribunal will have to consider the totality of the evidence and apply the test set out above.

40. Finally, is it enough to meet that test that a person plots in one country to destabilise conditions in another? This must depend upon the circumstances of the particular case. It clearly would be enough if the government (or those in control) of one state offered a safe haven to terrorists to plot and carry out their terrorist operations against another state. That is what the Taliban were doing by offering Osama bin Laden and Al-Qaeda a safe haven in Afghanistan at the time. As the UNHCR says, this would have clear implications for inter-state relations. The same may not be true of simply being in one place and doing things which have a result in another. The test is whether the resulting acts have the requisite serious effect upon international peace, security and peaceful relations between states.

(3) The case of DD

The facts

41. The appellant is a citizen of Afghanistan. He arrived in the United Kingdom on 18 January 2007 and applied for asylum on the same day. The basis of his claim was that he feared persecution because of his association with his brother AD, who was a well known Jamiat-e-Islami commander in Afghanistan. Following the fall of the Najibullah government in 1992, the appellant's brother became responsible for other commanders in the north of Afghanistan and formed a number of strategic alliances, ultimately allying himself with the Taliban. The appellant acted as his deputy and commanded between 50 and 300 men. He was later demoted and reduced to the command of no more than 20 men.

42. Following US military intervention in Afghanistan, the appellant and his brother fled to Pakistan. In 2004, the appellant's brother was assassinated in Pakistan by his enemies who held positions in the Karzai government of Afghanistan. The appellant was also a target of the assassination attempt and sustained gunshot injuries. After about a month, he returned to Afghanistan and sought protection from his enemies by joining a military grouping, Hizb-e-Islami. He commanded 10-15 people and engaged in both offensive and defensive military operations against both the Afghan government and the forces of ISAF.

43. The appellant's nephew (the son of his deceased brother) was killed in Peshawar in about September 2006. The appellant was ordered to fight in his home area. He decided that it would be too dangerous for him to do so as he had enemies there who were high ranking members of the Karzai government. He fled once again to Pakistan and arrangements were made through an agent for him to travel from there to the United Kingdom. He claimed asylum saying that he feared that, if he were returned to Afghanistan, he would be killed by his deceased brother's enemies or by Hizb-e-Islami as a traitor.

44. By letter dated 27 April 2007, the Secretary of State refused the claim on the grounds that the appellant's account was not credible. In particular, he did not accept the account that he gave of his role in Hizb-e-Islami. By letter dated 6 August 2007, the Secretary of State gave supplementary reasons for the refusal. These were that, even if the appellant's claimed activities in Afghanistan were substantiated, he was not entitled to asylum in any event. This was because his claim that he had fought against ISAF, if accepted, meant that he had been guilty of acts contrary to the purposes and principles of the United Nations and was therefore excluded from the definition of refugee by reason of article 1F(c) of the Refugee Convention.

45. The appellant appealed to the Asylum and Immigration Tribunal ("AIT"). IJ Morgan found the appellant to be credible and allowed his appeal under the Refugee Convention and under article 3 of the European Convention on Human Rights ("ECHR"). He had a well-founded fear of persecution by his brother's enemies some of whom were members of the Karzai government. The judge was not persuaded that the appellant had been guilty of acts contrary to the purposes and principles of the United Nations. For reasons that are immaterial to the present appeal, a second stage reconsideration was ordered by SIJ Moulden.

46. The second stage reconsideration was conducted by IJ Simpson who, by a determination promulgated on 28 August 2008, allowed the appellant's appeal on both asylum and article 3 of the ECHR grounds. The judge found the appellant to be credible, except that she rejected his assertion that his actions with Hizb-e-Islami in Afghanistan were defensive. He had 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". There were prima facie grounds for considering his actions were both offensive and defensive. As regards article 1F(c), the judge concluded that section 54 of the 2006 Act (see para 7 above), which came into effect on 31 August 2006, appeared to have effected a substantive change in the law and that, as a matter of natural justice, it applied only to acts after it came into force, that is from September 2006. She concluded at para 151:

> "Having regard to the combined lack of specificity of evidence of the appellant's 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."

The Court of Appeal

47. The issues before the Court of Appeal concerned (i) the interpretation and applicability of the 2006 Act and (ii) whether and, if so, to what extent on the AIT's findings the appellant had been guilty of acts contrary to the purposes and principles of the United Nations within the meaning of article 1F(c) of the Refugee Convention. Pill LJ (with whom Rimer and Black LJJ agreed) allowed the Secretary of State's appeal. He held that, on the findings of the AIT, the appellant had not committed any acts of terrorism within the meaning of section 54 of the 2006 Act. The nub of the court's reasoning on the article 1F(c) point is contained in para 64 of Pill LJ's judgment:

> "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."

48. As we explain below, we substantially agree with this conclusion. The Court of Appeal nevertheless remitted the case for reconsideration by the Upper Tribunal because the AIT had failed to consider the appellant's individual responsibility as required by this Court in *JS (Sri Lanka)* (and by the CJEU in *B and D*) and whether he had been guilty of acts contrary to the purposes and principles of the United Nations.

The United Nations and Afghanistan

49. Ever since the Soviet withdrawal from Afghanistan in 1989, the United Nations has been trying to bring an end to the fighting that has been taking place in that country. As long ago as 28 August 1998, Security Council Resolution 1193 called for a ceasefire and expressed grave concern about the continuing Afghan conflict and the Taliban forces' offensive which was causing "a serious and growing threat to regional and international peace and security, as well as extensive human suffering". Similar resolutions followed. For security reasons, all international United Nations personnel were withdrawn from Afghanistan in September 2001.

50. On 5 December 2001, the participants in the United Nations Talks on Afghanistan entered into the Bonn "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions". The participants pledged their commitment to do all within their means and influence to ensure that security was provided in Afghanistan. They agreed that an Interim Authority should be established (to be the "repository" of Afghan sovereignty) and that, pending the establishment and training of new Afghan security and armed forces, they would request the United Nations Security Council to consider authorising the early deployment in Afghanistan of a United Nations-mandated force to assist in the maintenance of security in Kabul and its surrounding areas. By Resolution 1383 (6 December 2001), the Security Council endorsed the Bonn Agreement.

51. By Resolution 1386 (20 December 2001), acting under Chapter VII of the United Nations Charter, the Security Council authorised the establishment for 6 months of ISAF "to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment". The resolution (i) authorised the Member States participating in ISAF "to take all necessary measures to fulfil its mandate"; called upon ISAF to work in close consultation with the Afghan Interim Authority in the implementation of the force mandate; (ii) called upon all Afghans to cooperate with ISAF; and (iii) called upon the Member States participating in ISAF to provide assistance to help the Afghan Interim Authority in the establishment and training of new Afghan security and armed forces.

52. On 18 March 2002, the Secretary-General submitted a long report entitled "The situation in Afghanistan and its implications for international peace and security". The report contained a good deal of detail about the situation and expressed the hope that the Security Council would support the wish of the Afghan people for the expansion of the operation of ISAF. At para 95, it said: "the next step, to ensure that all United Nations efforts are harnessed to fully support the implementation of the Bonn Agreement, would be to integrate all the existing United Nations elements in Afghanistan into a single mission, the United Nations Assistance Mission in Afghanistan ("UNAMA"). The mission's mandate would be (i) to fulfil "the tasks and responsibilities, including those related to human rights, the rule of law and gender issues, entrusted to the United Nations in the Bonn Agreement, which were endorsed by the Security Council in its resolution 1383 (2001)"; (ii) to promote national reconciliation and rapprochement throughout the country; and (iii) to manage all United Nations humanitarian relief, recovery and reconstruction activities in Afghanistan under the overall authority of the United Nations Special Representative and in coordination with the Interim Authority and successor administrations of Afghanistan.

53. By Resolution 1401 (28 March 2002), the Security Council endorsed the establishment of UNAMA for an initial period of 12 months with the mandate and structure set out in the Secretary-General's report of 18 March 2002.

54. By Resolution 1413 (23 May 2002), the Security Council extended the mandate of ISAF for a further 6 months from 20 June 2002, authorising the Member States participating in ISAF to take all necessary steps to fulfil its mandate. By one of its recitals, the Security Council determined that the situation in Afghanistan still constituted a threat to international peace and security. The mandate was extended for a further year beyond 20 December 2002 by Resolution 1444 (27 November 2002). Once again, the threat to international peace and security posed by the situation in Afghanistan was recorded. The mandate of

UNAMA was extended for a further period of 12 months by Resolution 1471 (28 March 2003).

55. On 23 July 2003, the Secretary-General reported on the situation in Afghanistan and its implications for international peace and security. At para 67 of his report, he said that "the consequences of failing to provide for sufficient security for the Bonn process to succeed may have implications far beyond Afghanistan." On 11 August 2003, NATO assumed command of ISAF.

56. By Resolution 1510 (13 October 2003), the Security Council extended ISAF's mandate for a further 12 months "to allow it, as resources permit, to support the Afghan Transitional Authority and its successors in the maintenance of security in areas of Afghanistan outside Kabul and its environs, so that the Afghan Authorities as well as the personnel of the United Nations and other international civilian personnel 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". It called upon ISAF to continue to work in close consultation with the Afghan Transitional Authority and its successors as well as the Special Representative of the Secretary-General. By its recitals, the Security Council recognised that the responsibility for providing security and law and order throughout the country resided with the Afghans themselves and welcomed the continuing cooperation of the Afghan Transitional Authority with ISAF. Yet again, the resolution recorded that the situation still constituted a threat to international peace and security.

57. By Resolution 1536 (26 March 2004), the Security Council extended the mandate of UNAMA for a further 12 months. By Resolution 1563 (17 September 2004), the mandate of ISAF was extended for a further 12 months beyond 13 October 2004. In subsequent years, the mandates of UNAMA and ISAF were again extended for periods of 12 months at a time.

58. As will become apparent, the differences between ISAF and UNAMA have assumed some importance in this case. ISAF is an armed force, but it is not a United Nations force. It has never been under direct United Nations command. It was initially under the lead command of single nations (starting with the United Kingdom). Since August 2003 it has been under the command of NATO. On the other hand, UNAMA is an assistance mission under United Nations control. It is not an armed force. But the objectives of ISAF and UNAMA are essentially the same, although the means by which they seek to achieve them differ. In particular, they both aim to promote the Bonn Agreement and to maintain peace and security in Afghanistan, thereby reducing the threat to international peace and security posed by the situation in Afghanistan. Some of the more recent Security Council resolutions explicitly make the link between the two organisations. Thus, recital 7

to Resolution 1776 (19 September 2007) is in these terms: "*Stressing* the central role that the United Nations continues to play in promoting peace and stability in Afghanistan, *noting*, in the context of a comprehensive approach, the synergies in the objectives of the United Nations Assistance Mission in Afghanistan (UNAMA) and of ISAF, and *stressing* the need for further sustained cooperation, coordination and mutual support, taking due account of their respective designated responsibilities" (underlining added). Similar language appears in the recitals to Resolution 1806 (20 March 2008), Resolution 1833 (22 September 2008), Resolution 1868 (23 March 2009) and subsequent resolutions.

The appellant's case on article 1F(c)

59. Mr Drabble QC, on behalf of DD, relies upon the general approach to article 1F(c) discussed earlier. In particular, he argues that participation in an armed attack against forces operating under and carrying out a United Nations mandate does not without more engage article 1F(c). Armed insurrection is not, in itself, contrary to the purposes and principles of the United Nations. Internal armed conflict is now covered by international humanitarian law, in the shape of the 1949 Geneva Conventions. United Nations-mandated forces are often deployed during or after an armed conflict, where international humanitarian law provides the appropriate legal framework for determining the lawfulness of armed attacks against them.

60. The distinction between ISAF and UNAMA is crucial to the argument. Armed attacks on UNAMA could be characterised as contrary to the purposes and principles of the United Nations. UNAMA is a non-combatant peacekeeping force which is protected under the 1994 Convention and the 2005 Protocol on the Safety of United Nations and Associated Personnel, whereas ISAF is not. Article 1(a)(i) of the 1994 Convention defines "United Nations Personnel" as "persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation". Article 1(c) defines a "United Nations operation" as an "operation established by the component organ of the United Nations……and conducted under United Nations authority and control". Article 9 provides that various specified acts against any United Nations or associated personnel (including murder or other attacks) shall be made by each State Party a crime under its national law. But article 2(2) provides that the Convention is not to apply "to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organised armed forces and to which the law of international armed conflict applies." Article 2(2) is "consistent with the broad principle that the laws of war apply to UN forces engaged in hostilities, and therefore such forces do not have immunity from attack": p 624 of *Documents on the Laws of War*, ed Roberts and Guelff, 3rd ed (2000).

61. The distinction between combatants and peacekeeping personnel was considered by the Special Court for Sierra Leone in *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case No SCSL-04-15T, 2 March 2009). In that case, the Special Court handed down the first convictions for the war crime of attacking personnel involved in a peacekeeping operation, namely members of the United Nations Assistance Mission in Sierra Leone, who were entitled to the protection given to civilians under the international law of armed conflict.

62. Therefore, it is argued, military activities against United Nations-mandated forces should only provide a basis for exclusion under article 1F(c) where (i) the act or acts in question constitute a crime in international law; or (ii) the act or acts, which must be of sufficient gravity to have a negative impact on international peace and security, have been specifically identified as contrary to the purposes and principles of the United Nations, either by clear decision of the Security Council acting within its competence, or by way of agreement or consensus among states at large; and (iii) there are serious reasons for considering that the individual concerned was personally responsible for the act or acts in question.

Discussion and conclusions

63. The acts relied on by the Secretary of State are acts of violence by the appellant against ISAF, the international force that was mandated by the United Nations for the express purpose of maintaining peace and security in Afghanistan, thereby assisting in the maintaining of international peace and security. Time and again, the resolutions of the Security Council recorded that the role and responsibility of ISAF was to assist in the maintaining of international peace and security. This is one of the most important purposes set out in article 1 of the United Nations Charter (see para 10 above). In these circumstances, it might be thought to be obvious at first sight that such acts are contrary to the purposes and principles of the United Nations.

64. It is noteworthy that Mr Drabble (rightly) accepts that, if the appellant had been guilty of fighting UNAMA, he would in principle have been guilty of acts contrary to the purposes and practices of the United Nations. We say "in principle", because it would still be necessary to examine all the facts (as per *B and D*). So why does it make any difference that the appellant was fighting ISAF rather than attacking UNAMA? That the aims and objectives of ISAF and UNAMA are congruent is amply borne out by the Security Council Resolutions: see para 58 above. The answer given by Mr Drabble and Mr Fordham is that the 1994 Convention and 2005 Protocol would apply to attacks on UNAMA, but not to attacks on ISAF. Peacekeeping forces, unlike combat forces, are entitled to the same protection against attack as that accorded to civilians under international humanitarian law, as long as they are not taking a direct part in hostilities. Under

the Statute of the International Criminal Court (articles 8(2)(b)(iii) and 9(e)(iii)), intentionally directed attacks against personnel involved in a peacekeeping mission in accordance with the Charter of the United Nations constitute a war crime: see rule 33 in *Customary International Humanitarian Law vol 1:Rules* (2005, International Committee of the Red Cross). We accept the points made by Mr Drabble and Mr Fordham about the differences between ISAF and UNAMA which are summarised at paras 60 and 61 above.

65. These differences are not in doubt. But they are not material to the issue of whether the appellant is excluded from the refugee status by article 1F(c). The question which rules of law apply to attacks on ISAF and UNAMA is categorically different from (and irrelevant to) the question whether an attack against either body is contrary to the purposes and principles of the United Nations. This latter question must be determined on an examination of all the relevant facts. These include the terms of the Security Council Resolutions by which ISAF was mandated in the first place, and by which its mandate was renewed from time to time.

66. Mr Drabble submits that it is relevant to the issue in this case that, although the Security Council has mandated many military enforcement operations, it has never sought to characterise opposition, even armed opposition, as contrary to the purposes and principles of the United Nations. In some cases, a United Nations resolution explicitly states that a particular activity is contrary to the purposes and principles of the United Nations. (One example is the condemnation of international terrorism in General Assembly resolution 49/60, referred to in para 27 above.) However, it is not suggested, either by the UNHCR or by the Supreme Court of Canada in *Pushpanathan*, that this is the only criterion. In our view, the principled test is that put forward by the UNHCR in para 17 of its Guidelines and quoted at para 38 above.

67. In *Pushpanathan,* the court did not have to consider whether an attack on a United Nations body or a United Nations-mandated body constitutes acts contrary to the purposes and principles of the United Nations. We conclude that there is no basis for the view that such an attack can only be regarded as an act contrary to the purposes and principles of the United Nations in circumstances where (i) it is by consensus in international law explicitly recognised as being contrary to these purposes and principles, or (ii) it amounts to a serious and sustained violation of fundamental human rights. This conclusion is consistent with Mr Drabble's acceptance that an attack on UNAMA is in principle capable of satisfying article 1F(c), despite the fact that there appears to be no United Nations resolution (or other formal international decision) which explicitly recognises that an attack against UNAMA would be contrary to the purposes and principles of the United Nations.

68. In short, an attack on ISAF is in principle capable of being an act contrary to the purposes and principles of the United Nations. The fundamental aims and objectives of ISAF accord with the first purpose stated in article 1 of the United Nations Charter. By attacking ISAF, the appellant was seeking to frustrate that purpose. To hold that his acts are in principle capable of being acts contrary to the purposes and principles of the United Nations accords with common sense and is correct in law. This conclusion accords with that of Hogan J in the High Court of Ireland in *B v Refugee Appeals Tribunal and others* [2011] IEHC 198 at para 56. For these reasons, we agree with the conclusion of the Court of Appeal, quoted in para 47 above.

(4) Standard of proof

69. This issue arises in an acute form in *Al-Sirri* but could arise in any proposed exclusion under article 1F. The article requires that there be "serious reasons for considering that" the individual asylum seeker has committed the crimes referred to in article 1F(a) or (b) or "been guilty of" the acts referred to in article 1F(c). In *Al-Sirri*, it was argued in the Court of Appeal that this imported the criminal standard of proof beyond reasonable doubt. In rejecting that submission, Sedley LJ said this, at para 33:

> ". . . it clearly sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says."

70. In *JS (Sri Lanka)*, at para 39, Lord Brown was "inclined to agree" with this passage, having also pointed out that

> ". . . 'serious reasons for considering' obviously imports a higher test for exclusion than would, say, an expression like 'reasonable grounds for suspecting'. 'Considering' approximates rather to 'believing' than to 'suspecting'."

71. In *Al-Sirri*, the Common Serjeant had considered that the evidence admissible in a criminal trial for conspiracy to murder General Masoud was as consistent with innocence as with guilt. Thus he, at least, was not satisfied of Al-Sirri's guilt even on the balance of probabilities. Mr Fitzgerald QC argues that it is not possible to have "serious reasons for considering" a person to have committed a crime or be guilty of a particular act unless you can be satisfied that it is more likely than not that he did it. In this he is less ambitious than the UNHCR. Its 2003 *Guidelines*, at para 35, state that "clear and credible evidence is required. It is not

necessary for an applicant to have been convicted of a criminal offence, nor does the criminal standard of proof need to be met." However, the 2003 *Background Note*, at para 107, also states that:

> ". . . in order to ensure that article 1F is applied in a manner consistent with the overall humanitarian objective of the 1951 Convention, the standard of proof should be high enough to ensure that *bona fide* refugees are not excluded erroneously. Hence, the 'balance of probabilities' is too low a threshold."

72. He also relies upon the Australian case of *W97/164 v Minister for Immigration and Multicultural Affairs* [1998] AATA 618, in which Mathews J said this at para 42:

> "The article provides a direction to decision-makers in words that are clear of meaning and relatively easy of application. To re-state this test in terms of a standard of proof is unnecessary and may in some cases lead to confusion and error."

But she went on in para 43 to say this:

> "I find it difficult to accept that the requirement that there be 'serious reasons for considering' that a crime against humanity has been committed should be pitched so low as to fall, in all cases, below the civil standard of proof. The seriousness of the allegation itself and the extreme consequences which can flow from an alternative finding upon it would, in my view, require a decision-maker to give substantial content to the requirement that there be '*serious* reasons for considering' (emphasis added) that such a crime has been committed."

73. On the other hand, in *Arquita v Minister for Immigration and Multi-cultural Affairs* [2000] FCA 1889, 106 FCR 465, at para 54, Weinberg J disagreed. There must be evidence available "upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. To meet that requirement, the evidence must be capable of being regarded as 'strong'." But evidence could "properly be characterised as 'strong'" without meeting either the criminal or the civil standard of proof. He did, however, say at para 58 that "it would have to go beyond establishing merely that there was a 'prima facie' case".

74. The New Zealand courts have followed the Court of Appeal in *Al-Sirri* in taking the view that "the Refugee Convention simply means what it says" and that "adding glosses by analogy with civil litigation or criminal prosecution simply confuses matters": see Hammond J in *Tamil X v Refugee Status Appeals Authority; Attorney-General (Minister of Immigration) v Y* [2009] NZCA 488, [2009] 2 NZLR 73, paras 77, 79; upheld by the Supreme Court in *Attorney General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721, para 39. In Canada, the courts have adopted a "lower standard of proof than the balance of probabilities": see *Ramirez v Minister of Employment and Immigration* (1992) 89 DLR (4th) 173, para 5. But in *Cardenas v Canada (Minister of Employment and Immigration)* [1994] FCJ No 139, it was said that "the Board must base its decision to exclude only on clear and convincing evidence, not simply on suspicion and speculation". And the German Bundesverwaltungsgericht has said that "as a rule, reasons are 'good' when there is clear, credible evidence that such crimes have been committed" (BVerwG 10 C 2.10).

75. We are, it is clear, attempting to discern the autonomous meaning of the words "serious reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions:

(1) "Serious reasons" is stronger than "reasonable grounds".

(2) The evidence from which those reasons are derived must be "clear and credible" or "strong".

(3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker.

(4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.

(5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has *not* committed the crimes in question or has *not* been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious

reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Convention (and the Directive) in the particular case.

(5) Disposal

76. We would dismiss the appeal in *DD*. The object of his argument was to establish that his activities could not be contrary to the principles and purposes of the United Nations. In this he has failed. However, the Court of Appeal were correct to hold that there were material errors of law in the AIT's findings in that they failed to examine the appellant's conduct in the manner prescribed by this court in *JS* and to consider whether he had been guilty of acts contrary to the purposes and principles of the United Nations. The order remitting the case to the Upper Tribunal for reconsideration should stand.

77. The appeal in *Al-Sirri* is rather different. Technically, the appellant has challenged the decision of the Court of Appeal to remit his case to the tribunal, rather than to find that he was not excluded from the status of refugee. We would dismiss that appeal. But the reality is that he was challenging certain aspects of the guidance given to the tribunal which would hear the remitted case. In that he has succeeded to some extent. Consideration will also have to be given to whether it is more appropriate for the case to be remitted to the First-tier or to the Upper Tribunal, given that the evidence will have to be examined afresh.

78. The parties therefore have 14 days from the date of judgment to file their submissions as to the precise form of the order and as to costs.