Neutral Citation Number: [2009] EWCA Civ 364

Case No: C4/2008/1229

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
IN THE MATTER OF A JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2009

Before:
LORD JUSTICE WALLER
VICE PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION
LORD JUSTICE SCOTT BAKER
and
LORD JUSTICE TOULSON

- -

Between:

THE QUEEN ON THE APPLICATION OF JS (SRI LANKA)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Shivani Jegarajah (instructed by **Messrs K Ravi**) for the **Claimant**
Jasbir Dhillon (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 25 February 2009

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Judgment

Lord Justice Toulson :

Introduction

1. The central issue in this case concerns the proper interpretation and application of article 1F(a) of the Refugee Convention. This provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."

2. The case comes on appeal from a judgment of Blair J dismissing the claimant's application for permission to apply for judicial review of a decision of the defendant dated 14 September 2007. Leave to appeal was given by Tuckey LJ. Subsequently a direction was given by Laws LJ that Tuckey LJ's order should stand as a grant of permission to seek judicial review and that the substantive application should proceed in this Court.

3. Paragraph 36 of the decision letter stated:

> "It is…considered that you have been complicit in war crimes and crimes against humanity. Accordingly, pursuant to article 1F(a) it is considered that you are excluded from the protection of the Refugee Convention and that you are also excluded from the protection of Humanitarian Protection."

The claimant challenges the basis on which the defendant arrived at that conclusion.

The facts

4. The claimant is a citizen of Sri Lanka and is Tamil.

5. He arrived at Heathrow Airport from Sri Lanka on 7 February 2007, travelling on a false passport, and claimed asylum 2 days later. He had a screening interview on 9 February 2007 and a substantive asylum interview on 19 February 2007. For the purposes of his judicial review application he made a witness statement dated 16 June 2008.

6. His claim for asylum was based on his fear that if returned he would face mistreatment due to his race and membership of the Liberation Tigers of Tamil Eelam ("LTTE"). He also claimed humanitarian protection based on his fear that, if returned, he would face a real risk of unlawful killing and torture or inhuman or degrading treatment or punishment.

7. The defendant accepted the credibility of the claimant's description of his involvement with the LTTE.

8. He joined the LTTE at the age of 10. He was trained in the use of small weapons and attended classes on the history of the LTTE. He was then sent to a military school in Jaffna.

9. On 28 December 1993 the claimant joined the Intelligence Division of the LTTE. He received lessons in intelligence and further military training.

10. Between 1997 and 2000 he took part in various military operations against the Sri Lankan army. In March 2000 he was fighting as a platoon leader in charge of 45 soldiers trying to protect the LTTE's supply lines to the coast when he was injured. He required medical treatment for 6 months. He reached his 18th birthday in September 2000.

11. After his recuperation he was moved to a mobile unit responsible for supplying arms by foot from Vanni to Vavuniya. He continued doing this job until April 2002.

12. In February 2002 a ceasefire was agreed between the LTTE and the Sri Lankan government.

13. The leader of the Intelligence Division was Pottu Amman. At the end of April 2002 the claimant went with him to Batticaloa as one of his chief security guards. In July 2002 he returned to the mobile unit in Vanni. At this stage he was able to travel freely because of the ceasefire and visited his family, whilst still based with the mobile unit in Vanni. In September 2002 the LTTE was de-proscribed by the Sri Lankan government and peace talks began between them.

14. From 2004 to September 2006 he served as second in command of the Intelligence Division's combat unit. During this period training classes were conducted in order to prevent a change in the attitude of fighters during the period of peace.

15. In October 2006 he was sent to Colombo where he was told to wait for further instructions. He stayed with a family to whom he paid rent, but the family had no idea of his LTTE involvement. While he was there one of the members of the family had a birthday and various photographs were taken. To avoid arousing suspicion, he allowed himself to be photographed with the family.

16. In December 2006 he moved to the home of a work colleague in Mount Lavinia. In January 2007 there was a festival known as Thai Pongal. The claimant rang the family he had previously been staying with to give them his best wishes for the festival. They told him that members of the Sri Lankan government's Intelligence Division had searched their home, made enquiries about him and taken photographs of him at the birthday party. Two days later the officers had returned and informed the family that the claimant was a member of the LTTE. They also knew his LTTE name. At this point the claimant spoke to his father and arrangements were made for him to leave Sri Lanka.

The Defendant's decision letter

17. After summarising in some detail the claimant's account of his involvement with the LTTE, the decision letter cited various extracts from independent reports regarding the LTTE's activities in recent years. These included:

> "The US State Department Report 2006 (USSD), Sri Lanka, released on 6 March 2007 noted that "The LTTE routinely used excessive force in the war, including attacks targeting civilians. Since the peace process began in 2001, the LTTE has engaged in targeted killings, kidnapping, high-jackings of truck shipments and forcible recruitment, including of children."
>
> "The USSD 2006 reported that "During the year the LTTE continued to detain civilians, often holding them for ransom…"
>
> "As noted in the Amnesty Intentional report "Sri Lanka – A climate of fear in the East", published on 3 February 2006: "Amnesty International has received regular reports of abductions of adults by the LTTE following the 2004 split. Most of those abducted have reportedly been Tamil civilians whom the LTTE suspects of working against it or whom it wishes to interrogate…"
>
> "The USSD 2006 noted that the LTTE engaged in torture."
>
> "As noted in the International Crisis Group document "Sri Lanka's Human Rights Crisis Asia Report No 135" 14 June 2007: "The LTTE has from its inception used assassination of its Tamil opponents as a way of suppressing rival nationalist movements. It also has a long history of assassinations and attempted assassinations against political and military leaders…"

18. The decision letter continued:

> "31. In the light of the above country objective evidence it is considered that the LTTE and the intelligence wing of the LTTE have, over an extended period of time, including between 2000 and 2006 when you were both an adult and an active member of the LTTE, been responsible for a wide range [of] war crimes and crimes against humanity.
>
> 32. From the evidence provided by you in your claim it is considered that you have shown that you were a long-term voluntary member of the LTTE who served in the intelligence wing of the LTTE in a variety of roles. The fact that you were appointed to be the bodyguard for Pottu Amman, the head of the intelligence wing, provides evidence of how highly trusted you were within the LTTE.
>
> 33. It is noted that although you joined the LTTE in 1993 at the age of 10 you nevertheless continued operations with the LTTE from your 18th birthday in September 2000 until you left Sri Lanka in February 2007. It is considered that if you were acting against your will as a member of the LTTE you would

> have had opportunities to leave the organisation during this latter 6 year period.
>
> 34. However, it is considered that you continued to operate within the LTTE and even gained promotions. This shows that you were a voluntary member of the LTTE. In this regard the case of Gurung [2002] UKIAT 04870 (starred) has been considered in which it was determined that voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence, amounting to complicity in the crimes in question.
>
> 35. Accordingly, it is concluded that your own evidence shows voluntary membership and command responsibility within an organisation that has been responsible for widespread and systematic war crimes and crimes against humanity. From the evidence you have provided it is considered that there are serious reasons for considering that you were aware of and fully understood the methods employed by the LTTE."

19. This reasoning provided the basis for the conclusion in paragraph 36 (set out in para 2 above) that the claimant was considered to have been complicit in war crimes and crimes against humanity, and that he was therefore ineligible for protection under the Refugee Convention or for humanitarian protection.

The judgment on the judicial review permission application

20. Blair J recorded that Ms Jegarajah, who represented the claimant both before him and before this court, essentially advanced a twofold argument. First, it was not enough to say that he was a member of the LTTE; it had to be shown in what way he had supposedly committed a crime against peace or a crime against humanity. Secondly, for the present purposes the LTTE could properly be regarded as a political rather than a terrorist organisation.

21. The judge rejected both arguments. As to the first, he relied on the decision in *Gurung* and referred, in particular, to paragraphs 103-105 of the judgment. This was a starred decision of the Immigration Appeal Tribunal (Collins J (President), Dr H H Storey and Mr A Mackey), which it will be necessary to consider in further detail. At this point it is sufficient to say that at para 104 the IAT accepted that mere membership of organisations such as the LTTE was not enough to bring a person within article 1F(a), but at para 105 it continued:

> "…it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of article 1F. If the organisation is one or has become one whose aims, methods and activities are predominantly terrorist in character, then very little more will be necessary."

22. Blair J cited and applied that paragraph, saying that there was ample material to show that the present case went "far beyond mere membership". He said that it was obviously a case in which the claimant had been:

> "a significant member of the LTTE, involved in some significant operations by that organisation, culminating, as I have said, in his position in the Combat Unit of the Intelligence Division where he ended up in charge of the Attacking Unit."

23. As to the nature of the LTTE, he referred to the conclusion in para 31 of the decision letter (quoted above) and held that there was no basis for review of the defendant's decision on public law grounds.

Grounds of appeal

24. The claimant's principal arguments may be summarised as follows:

1. The defendant had failed to identify the war crime(s) or crime(s) against humanity which there were allegedly serious reasons for considering that he had committed.

2. War crimes and crimes against humanity are not terms which can be used interchangeably but are groups of specific offences defined by international instruments.

3. The LTTE is not an organisation solely or mainly devoted to the commission of terrorist acts. It is a political organisation which has been openly engaged in armed combat against government forces.

4. All of the claimant's activities were carried out in the legitimate course of war. There was no evidence that he had been directly or indirectly involved in acts, or had followed orders that led to acts, amounting to the commission of war crimes or crimes against humanity.

5. The defendant had made a general reference to acts committed by the LTTE and had inferred from the claimant's position in the LTTE that he bore criminal responsibility for them. The defendant had adopted that approach in the absence of any causative proximity between the admitted conduct of the claimant and the acts of the LTTE described in the decision letter. The approach was wrong.

6. The judge fell into the same error in concluding that because the claimant had held a significant position within the LTTE there was sufficient material to provide serious reasons for considering that he had been responsible for "a wide range of war crimes and crimes against humanity".

25. Mr Dhillon on behalf of the defendant made it clear that it was not the defendant's case that the claimant had personally participated in any war crime or crime against humanity. At one stage in his submissions Mr Dhillon argued that it was reasonable to infer from the claimant's account that at times he was involved in the supply of weapons for use against civilians, which would amount to a crime against humanity, but this was not a point which had been put to the claimant or formed the basis of the defendant's decision.

26. Mr Dhillon advanced three main submissions:

> 1. There was evidence in the material before the court that during the period that the claimant was an adult member of the LTTE, the LTTE was responsible for widespread acts amounting to war crimes or crimes against humanity, despite the fact that a ceasefire was supposedly in place for most of that time. The Intelligence Division was an elite, feared and highly secretive branch of the organisation, believed to be involved (among other things) in political assassinations and the use of torture to extract information. There was also material to suggest that its activities included guiding suicide bombers to their targets and forming hit squads to target civilians.
>
> 2. There is a significant difference between the defendant having serious reasons for considering that a person has committed a war crime or a crime against humanity and an international criminal tribunal having sufficient evidence to prosecute that person. A person may fall within the exclusion provided by article 1F(a) although further investigations and evidence gathering may be needed before that person could be charged with a particular offence.
>
> 3. The information given by the claimant himself about his involvement in the LTTE was sufficient to provide serious reasons for considering that he had committed war crimes or crimes against humanity, applying the complicity doctrine as it has been developed as a matter of international criminal law and international humanitarian law.

27. I was initially troubled by the lack of any attempt to identify more precisely the activities of the LTTE which were said to amount to war crimes or crimes against humanity and for which the defendant considered the claimant to be criminally liable. During the oral argument Mr Dhillon persuaded me that his first submission was correct but I think that it would have been preferable if the decision letter had identified instances of the relevant types of crime. Not least, that is relevant when examining the grounds for considering the claimant to be criminally responsible for such crimes.

28. I would also accept Mr Dhillon's second submission, which was not seriously challenged.

29. That leaves the critical question whether the defendant's reasoning for considering the claimant to be guilty under international criminal law of war crimes or crimes against humanity was sound.

International Instruments

30. Article 1F(a) refers to a person having committed a war crime or a crime against humanity "as defined in the international instruments drawn up to make provision in respect of such crimes".

31. The leading international instrument is now the Rome Statute of the International Criminal Court ("ICC"), but I will refer first to the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY") because it has generated a good deal of case law.

32. The ICTY Statute defines the war crimes or crimes against humanity covered by the statute in relatively succinct terms (articles 2 - 5). Article 7 sets out the following principles for determining the question of individual criminal responsibility:

> "1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of crime referred to in articles 2 – 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in articles 2-5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
>
> 4. The fact that an accused person acted pursuant to an order of Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

33. The Appeals Chamber of the ICTY has considered the principles on which a person may incur criminal responsibility through participation in a joint criminal enterprise in a series of judgments beginning with *Tadic*, 15 July 1999.

34. Tadic, a Bosnian Serb, was originally charged with 34 crimes under the statute. He was acquitted of the majority and appealed against his conviction of the remainder. The prosecution successfully cross-appealed against his acquittal of the murder of 5 men in the village of Jaskici. The facts were that on 14 June 1992 he was an armed member of an armed group which entered the village and killed the 5 men. The attack was part of a joint criminal enterprise the object of which was ethnic cleansing, that is, to drive the non-Serb civilian population out of the territory by inhumane acts in order to achieve the creation of a Greater Serbia. The bodies of the victims were found after the raiding party had left. There was no evidence to show which member or members of the attacking group had killed any particular victim. The basis on which Tadic was acquitted at first instance was that the Trial Chamber considered that it could not exclude the possibility that the killing might have been carried out by a different group. The Appeals Chamber considered that possibility to be unrealistic on the evidence. It identified the issues of law which arose as follows (para 185):

> "The question therefore arises whether under international criminal law the Appellant can be held criminally responsible for the killing of the 5 men from Jaskici even though there is no evidence that he personally killed any of them. The two central issues are:
>
> (i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and
>
> (ii) what degree of mens rea is required in such a case."

35. It began by acknowledging and affirming the following basic assumption (para 196):

> "The basic assumption must be that in International law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (nulla poena sine culpa)."

36. It also recognised that personal liability could be incurred through participation in a joint criminal enterprise. It said (para 190):

> "It [the Statute] does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in the execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below."

37. The tribunal then proceeded to consider a number of international criminal cases dating back to the second world war before attempting to analyse the ingredients and limits of joint enterprise liability.

38. It classified the relevant precedents as falling broadly into three categories.

39. The first category contained what might be regarded as the standard type of case, where co-defendants play different roles in the execution of a crime or in assisting or encouraging its execution, but all have the same intent to commit it.

40. The second category was illustrated by concentration camp cases, where those responsible for the running of a concentration camp had been held guilty of crimes committed against individual inmates. The tribunal said (para 203):

> "This category of cases…is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective "position of authority" within the concentration camp system and because they had "the power to look after the inmates and make their life satisfactory" but failed to do so. It would seem that in these cases the required actus reus was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The mens rea element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates."

41. The third category comprised cases where in pursuance of a common criminal design the principal offender committed a crime which was not itself part of the design, but which was a foreseeable way of effecting the common design and the defendant knowingly took the risk of it happening. The tribunal said (para 204):

> "An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."

42. Drawing the threads together, the tribunal summarised the core principles at para 227 of its judgment. For there to be joint enterprise liability, there had first to be a common design which amounted or involved the commission of a crime provided for in the statute. The actus reus requirement was participation by the accused in the

common design involving the perpetration of one of the crimes provided for in the statute. The mens rea element would differ according to the category of common design under consideration. In the first category, the required mens rea was an intent to perpetrate the crime. In the second category (which the tribunal reiterated was a variant of the first) the mens rea requirement was knowledge of the system of ill-treatment and intent to further that common concerted system of ill-treatment. In the third category, there had to be an intention to participate in the criminal activity and to further the criminal purpose of the group; and responsibility for a crime other than the one agreed upon in the common plan would arise only if, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.

43. On the facts of the case, the tribunal concluded that Tadic had taken part in an armed attack on members of the non-Serb population with the criminal purpose of driving the non-Serb population from the region, that he was aware that the actions of the group of which he was a member were likely to lead to killings, and that he willingly took that risk. He was therefore judged to be guilty of the murders.

44. The Appeals Chamber amplified the actus reus requirement for guilt through participation in a joint criminal enterprise in its judgment in *Brdjanin* (3 April 2007), paras 428-431. It emphasised that joint criminal enterprise "is not an open-ended concept that permits convictions based on guilt by association", and held that the accused's contribution to the common criminal purpose must "at least be a significant contribution to the crimes for which the accused is to be held responsible."

45. It is not necessary for present purposes to examine all the cases in which the tribunal has considered and applied the principles of criminal liability through a joint criminal enterprise; but its decision in the case of *Krajisnik* (17 March 2009) is noteworthy, not only because it contains the most recent consideration of the subject by the tribunal but also because in that case Professor Alan Dershowitz , as counsel for the claimant, mounted a root and branch attack on the principles which have been applied by the tribunal.

46. *Krajisnik* was a founder member of the Serbian Democratic Party ("SDS"), which was formed in July 1990. He became the president of the Bosnia and Herzegovina Assembly in December 1990. In July 1991 he was elected to the SDS main board. When the Bosnian-Serb Republic was created, he held several high-ranking positions in its institutions. From October 1991 to November 1995 he was president of the Bosnian-Serb Assembly. He was also a member of the National Security Council.

47. He was tried on an indictment charging him with criminal responsibility for a large number of crimes committed in 35 municipalities between 1 July 1991 and 30 December 1992.

48. The Trial Chamber found that he participated in a joint criminal enterprise whose objective was ethnically to recompose the territories under the control of the Bosnian-Serb Republic by drastically reducing the proportion of Bosnian Muslims and Bosnian Croats through the commission of various crimes. It found that he not only participated in the implementation of that objective but was one of the driving forces behind it. It stated that his overall contribution was to "help establish and perpetuate the SDS Party and state structures that were instrumental to the commission of the

crimes". His particular participation which led to his conviction on a number of counts in the indictment was his support and maintenance of SDS and Bosnian-Serb government bodies from the top down to local levels. The Trial Chamber made a large number of detailed findings in support of those overall conclusions.

49. The Trial Chamber was criticised for finding that the joint criminal enterprise included a "rank and file consist[ing] of local politicians, military and police commanders, paramilitary leaders, and others". The Appeals Chamber upheld this criticism. It ruled that a Trial Chamber must identify the parties belonging to the joint criminal enterprise, and that while that does not necessarily require it to identify every person by name (and, depending on the circumstances, it may be sufficient to refer to categories or groups of persons), the group description in question was impermissibly vague.

50. However, the attack on the principles applied by the Trial Chamber was put much more broadly. Professor Dershowitz argued that the concept of joint criminal enterprise had no textual basis in the statute; that it had been created and developed by the Tribunal's judges as an improper expansion of criminal liability beyond that contemplated by the statute's drafters and in circumvention of article 7(3); that it expanded domestic doctrines of vicarious liability, and that it indiscriminately combined civil and common law concepts (paras 652, 657, 660 and 667).

51. The Tribunal rejected those submissions. In the course of its judgment it reiterated that participation in a joint criminal enterprise was a form of commission under article 7(1) of the statute, and that to have committed a crime by participation in a joint criminal enterprise the accused must have contributed to the common purpose in a way that contributed significantly to the commission of the crime (paras 662 and 695). It also reiterated that there had to be proof that the participants, including the accused, had a common state of mind, namely the state of mind that the statutory crime(s) forming part of the objective should be carried out (paras 704 and 707). It said (para 707):

> "The "bridge", to use JCE's counsel's term, between the JCE's objective and *Krajisnik's* criminal liability, as far as his mens rea is concerned, consisted of the shared intent that the crimes involved in the common objective be carried out."

52. The ICC Statute, which was drafted after a lengthy period of international consultation and has been ratified by more than 100 States, contains much more detailed definitions of crimes against humanity (article 7) and war crimes (article 8). Crimes against humanity comprise a list of crimes "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". War crimes similarly comprise a list of crimes "when committed as part of a plan or policy or as part of a large-scale commission of such crimes". The ICC Statute also contains much more detailed provisions than the ICTY Statute governing principles of liability. They include:

> "Article 25
>
> Individual criminal responsibility

1. The court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

    (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

    (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

    (c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

    (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

        (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

        (ii) be made in the knowledge of the intention of the group to commit the crime;

    (e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;

    (f) attempts to commit such crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose"

Article 28

Responsibility of commanders or other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes committed within the jurisdiction of the Court;

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her reasonable power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a) a superior shall be criminally responsible for crimes within the jurisdiction of the court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the

> jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
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> (a) in relation to conduct, that person means to engage in the conduct;
>
> (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

Canadian cases

53. I refer to some Canadian cases principally because the IAT drew support from them for its approach in *Gurung.*

54. In *Ramirez v Canada (Minister of Employment and Immigration)* (1992) 89 DLR (4th) 173, the Federal Court of Appeal heard an appeal from a decision of the Refugee Division, which had found that the claimant was excluded from protection under the Refugee Convention by article 1F(a). The Refugee Division had found that there were serious reasons for considering that he was guilty of international crimes as an aider and abettor. MacGuigan JA, who gave the judgment of the court, noted that it was on this finding that the defendant's case must rest. He identified the legal issue as follows:

> "The Convention provision refers to "the International Instruments drawn up to make provisions in respect of such crimes". One of these instruments is the London Charter of the International Military Tribunal article 6 of which provides in part (reproduced by Grahl-Madsen, at page 274):
>
> "Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".
>
> I believe this evidence is decisive of the inclusion of accomplices as well as principal actors, but leaves to be answered the very large question as to the extent of participation required for inclusion as an "accomplice" ."

55. As to that question, he said as follows:

> "What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that

> mere membership in an organisation which from time to time commits international offences is not normally sufficient for exclusion from Refugee status. Indeed, this is in accord with the intention of the signatory states, as is apparent from the post-war International Military Tribunal already referred to. Grahl-Madsen, supra at page 277, states:
>
> > "It is important to note that the International Military Tribunal excluded from collective responsibility "persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal via article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations".
>
> It seems apparent, however, that where an organisation is principally directed to a limited, brutal purpose, such as secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts.
>
> …
>
> At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law…and I believe is the best interpretation of international law."

56. In that passage MacGuigan JA did not state in terms, as the ICTY Appeals Chamber was later to state in *Tadic*, *Krajisnik* and other cases, that to have committed a crime by participation in a joint criminal enterprise the accused's contribution to the common criminal purpose must have been at least a significant contribution to the commission of the crime. However, MacGuigan JA did conclude the part of the judgment dealing with general principles by saying:

> "In my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts."

57. In *Moreno v Canada (Minister of Employment and Immigration)* the Federal Court of Appeal cited and commented on certain passages in *Ramirez.* Robertson JA, giving the judgment of the court, said:

> "Guilt By Association
>
> It is well settled that mere membership in an organisation involved in international offences is not sufficient basis on which to invoke the exclusion clause…An exception to this

> general rule arises where the organisation is one whose very existence is premised on achieving political or social ends by any means deemed necessary. Membership in a secret police force may be deemed sufficient grounds for invoking the exclusion clause; see *Naredo and Arduengo v Minister of Employment and Immigration* (1990) 37 FTR 161 (FCTD), but see *Ramirez…*
>
> …
>
> It is settled law that acts or omissions amounting to passive acquiescence are not a sufficient basis for invoking the exclusion clause. Personal involvement in persecutorial acts must be established. In this regard the reasoning in *Ramirez* is both binding and compelling: at bottom, complicity rests in such cases, I believe, on the existence of a shared, purpose and the knowledge that all of the parties in question may have of it.
>
> At page 320, MacGuigan JA concluded: In my view, it is undesirable to go beyond the criterion of personal and knowing participation in prosecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts."
>
> Applying the above reasoning, we must determine whether the appellant's conduct satisfies the criterion of "personal and knowing participation in persecutorial acts". "

58. *Sivakumar v Canada (Minister of Employment and Immigration)* (1993) Can LII 3012 (FCA), [1994] I FC 433 concerned a Tamil who had been head of the LTTE's Intelligence Service. The court observed that the closer a person is to a position of leadership or command within an organisation, the easier it will be to draw an inference of awareness of its crimes and participation in the plan to commit them. It allowed the appeal because the Refugee Division had failed to document adequately the LTTE's actions or the claimant's knowledge of, and intent to share in, the purpose of those acts, but had expressed its findings in broad generalisations.

Domestic cases

59. The leading domestic authority is the decision of the IAT in *Gurung*, which was recently approved, obiter, by the Court of Appeal in *MH (Syria) v Secretary of State for the Home Department* [2009] EWCA Civ 226.

60. The tribunal noted (para 36) that since the provisions of article 1F are exclusionary, it will almost always be appropriate to apply them restrictively. (In the later case of *KK v SSHD* [2004] UKAIT, paras 64-65, the IAT said that the exclusion clause should be *interpreted* restrictively, rather than *applied* restrictively.) The IAT in *Gurung* also noted (para 61) that even if a person is found to be excluded from the Refugee Convention for article 1F reasons, a decision to deport him may still be unlawful if it exposes the claimant to a real risk of treatment prohibited by article 3 of the ECHR,

which prohibits in absolute terms torture or inhumane or degrading treatment and punishment.

61. At paras 92-114, the tribunal set out general guidelines as to the proper approach to the exclusion clauses. The first step was to identify the precise basis on which the claimant had been excluded, be it 1F(a), (b) or (c) (para 92). In the present case we are concerned with article 1F(a). The tribunal observed that "One of the most difficult issues arising under the Exclusion Clauses is that of terrorism" (para 98). It said (para 102):

> "In certain cases raising article 1F issues, an adjudicator will be confronted with someone who has acted on his own, having committed, for example, an ordinary serious crime such as murder. However, in many cases involving exclusion issues an adjudicator will be faced with evidence that an individual is a member of an organisation committed to armed struggle or the use of violence as a means to achieve its political goals. To take typical examples, the appellant may have been a member of the PKK in Turkey, the LTTE in Sri Lanka, the FLN or GIA in Algeria, or, as in the instant case, the CPN (Maoist) in Nepal. Or he may be linked to a multi-national organisation vowing armed struggle such as Al-Qaeda."

62. The tribunal stated (para 104) that "mere membership of such organisations is not enough to bring an claimant within the Exclusion Clauses…" but it continued (para 105):

> "…it would be wrong to say that an appellant only came within the Exclusion Clauses if the evidence established that he has personally participated in acts contrary to the provisions of art 1F. If the organisation is one or has become one whose aims, methods and activities are predominately terrorist in character, very little more will be necessary. We agree in this regard with the formulation given to this issue by the UNHCR in their post September 11, 2001 document, Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective, at para 18:
>
> > "Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the 11 September attacks, voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question…" "

63. The tribunal observed (para 109) that international criminal law and international humanitarian law should be the principal sources of reference in dealing with issues such as complicity. It referred in the same paragraph to article 25 of the ICC Statute and article 7(1) of the ICTY Statute and to the case of *Tadic*, but without further analysis of them.

64. The tribunal suggested that it was useful to consider cases along a "continuum" which it explained as follows:

> "112. On one end of the continuum, let us postulate an organisation that has very significant support amongst the population and has developed political aims and objectives covering political, social, economic and cultural issues. Its long-term aims embrace a parliamentary, democratic mode of government and safeguarding of basic human rights. But it has in a limited way or for a limited period created an armed struggle wing in response to atrocities committed by a dictatorial government. In such a case an adjudicator should be extremely slow to conclude that an appellant's mere membership of such an organisation raises any real issue under art 1F, unless there is evidence that the armed actions of this organisation are not in fact proportionate acts which qualify as "non-political crimes" within art 1F(b) and, if they are not, that he has played a leading or actively facilitative role in the commission of acts or crimes undertaken by the armed struggle wing.
>
> 113. At the other end of this continuum, let us postulate an organisation which has little or no political agenda or which, if it did originally have genuine political aims and objectives, has increasingly come to focus on terrorism as a modus operandi. Its recruitment policy, its structure and strategy has become almost entirely devoted to the execution of terrorist acts which are seen as a way of winning in the war against the enemy, even if the chosen targets are primarily civilians. Let us further suppose that the type of government such an organisation promotes is authoritarian in character and abhors the identification by international human rights law of certain fundamental human rights. In the case of such an organisation, any individual who has knowingly joined such an organisation will have difficulty in establishing he or she is not complicit in the acts of such an organisation.
>
> 114. In operating this continuum…useful guidance has been furnished by several Canadian cases, *Ramirez* in particular, where the test is formulated as a two-fold one of assessing firstly, whether an individual occupies a leadership role or other position of authority in the organisation; and secondly, whether the organisation's principal or dominant purpose has come to be one of the commission of acts contrary to art 1F."

65. In *PK v Secretary for State for the Home Department* [2004] UKIAT 00089 the Secretary of State appealed to the IAT against an adjudicator's decision to allow the applicant's appeal, on human rights grounds, from the Secretary of State's rejection of his application for leave to enter the UK. The applicant cross-appealed against the adjudicator's dismissal of his appeal on asylum grounds.

66. The applicant was a Tamil who had joined the LTTE and become a full time member of its military wing. The adjudicator found that it was reasonably likely that he had committed a crime against peace, a war crime or a crime against humanity, on the basis that he had been a willing member of a terrorist group in Sri Lanka and had been responsible for the deaths of a number of wounded soldiers.

67. The IAT allowed the applicant's cross-appeal. It was not satisfied that his participation in fighting for the LTTE brought him within the exclusion clause nor that his participation in the conflict amounted to a crime against peace, a war crime or a crime against humanity. It said (para 11):

> "It was the applicant's admission that he had killed about eight Sri Lankan army soldiers in battle not that he had unlawfully killed wounded soldiers. The Tribunal is not satisfied on this basis that he is disqualified from the protection of the Convention under article 1F(a). His participation in the war does not give rise to serious reasons for considering that he has committed either a crime against peace, a war crime or a crime against humanity…The applicant's activities were carried out in the course of combat and cannot be characterised as serious non-political crimes."

68. In *Pushparajah v Secretary of State for the Home Department* [UKAIT] AA/000124/2007, 18 January 2008, the claimant had joined the LTTE and become a full time soldier fighting in various engagements against the Sri Lankan army. He rose to the rank of major. In addition to his field command he did some intelligence work. The tribunal said that there was "no evidence linking him in terms of personal activity, command responsibility, organisational responsibility or complicity to any acts" falling within article 1F of the Refugee Convention. It allowed his appeal against the Secretary of State's decision to refuse him asylum. After referring to *Gurung* and *PK* the tribunal said:

> "21. There is much background from a wide spectrum of sources on the activities of the LTTE. Its political objective is Tamil self-determination and self-government in the northern areas of Sri Lanka. In some of those areas it has a functioning alternative government with a police force and social services. It has a regular, structured and uniformed military force, which engages in armed conflict with the Sri Lankan army. It is ruthlessly controlled and disciplined. It commits as a matter of policy and not of lack of control or individual zeal widespread acts of criminality and terror against soldiers and civilians,

> including ethnic cleansing, intimidation, massacres, murder, torture and suicide bombing.
>
> 22. The LTTE plainly falls somewhere within the spectrum described in paragraphs 112/3 of *Gurung*. Exactly where is a matter of individual judgment. Although in our view not falling too far short, we find that the principal or dominant purpose of the LTTE has not come to be one of the commission of acts contrary to article 1F. On the basis of our findings, the appellant occupied within the LTTE an intermediate position of leadership and authority, with responsibility for battlefield command and surveillance but not for atrocities and human rights abuses. In the light of these conclusions, and mindful of the non-binding decision in *PK*, we conclude that article 1F and Immigration Rule 339D do not serve to exclude him from refugee and humanitarian protection."

69. In *Arokiyanathan v Secretary of State for the Home Department* UKAIT AA/09777/2006, 24 June 2008 an immigration judge allowed the claimant's asylum and human rights appeal, but reconsideration was ordered. The claimant was a Tamil who joined the LTTE and remained with it for about 10 years. He took part in a number of military campaigns and sustained a severe wound in action. He reached the rank of major and was in charge of 40 soldiers. He was of interest to the army because he was one of the senior members of the LTTE militants and he knew most of its senior members and supporters.

70. The AIT upheld the original determination. In its conclusion it said:

> "21. Conclusions
>
> Returning to the facts of the case, the important ones fall into two categories:
>
> (a) The appellant's admitted participation in military field action and administration
>
> This no doubt involved treason or other serious crimes, contrary to the law of Sri Lanka; but equally clearly it formed part of an attempt by the Tamil Tigers to change the government of that part of Sri Lanka to which they refer as Tamil Eelam, and they cannot be described as non-political or come within article 1F(b). It was not suggested before us that article 1F(c), or the limb of (a) involving crimes against peace, were involved in this case. It follows that, unless there was material in the facts as found at least to suggest that the appellant had himself been involved in war crimes, or crimes against humanity, which there is not, then his own actions could not form the basis for any obvious case for exclusion.
>
> (b) The involvement of the Tamil Tigers as a movement in attacks on the civil population

> It will already be quite plain from the brief history set out…that these raised about as obvious a case as there could be of war crimes or crimes against humanity…This was just as savage a campaign of terrorism (to avoid argument on our use of that word, we mean in this context war crimes, crimes against humanity, or "serious non-political crimes") as those directed in recent years against the civil population of New York or London.

22. That campaign of terrorism was well known to anyone who took any interest in the recent history of Sri Lanka…If the facts before [the immigration judge] showed any obvious case for the appellant himself being held responsible for it, then that raised a case under article 1F which she needed to consider. Whether they did or not was what we see as the real question before us."

71. The tribunal noted that the furthest that the claimant's admitted responsibilities went was to the command of 40 men. It considered whether the LTTE should be seen as on a par with Al-Qaeda but rejected the comparison. It said (para 26):

> "As well as the savage campaign of terrorism in Colombo and elsewhere to which we have referred, they also conduct an ordinary shooting war in the north, and it was only that in which this appellant admitted to being involved: we cannot see how someone in command of no more than 40 troops could be held obviously responsible for anything done in either the east, Colombo, or the particularly repugnant outrage at the holy shrine in Kandy. While it is possible that further evidence about the Tamil Tigers' structure or chain of command, if available at all, might shed further light on his position, no such evidence was before the judge…"

72. *MR v Secretary of State for the Home Department* UKAIT AS/00192/2007, 21 July 2008, was not a case involving Tamils, but I refer to it because it was a decision of the AIT, presided over by Hodge J, which considered the judgment of the IAT in *Gurung.* It noted (correctly) that *Ramirez* did not in fact propound the two-fold test stated in *Gurung* in para 114 (see para 64 above). It went on to hold that the leadership role of the claimant and the dominant or principal purpose of the organisation afforded separate and independent grounds on which a person might be subject to the exclusion clauses. As to the latter, the tribunal said that "if the dominant or principal purpose of an organisation is to commit acts falling within the exclusion clauses, as, for instance, with terrorist groups, then membership of such an organisation might of itself be enough for the exclusion clauses to apply" (para 31).

73. It is to be noted that this goes further than *Gurung*, where the AIT said explicitly (paras 102-105) that mere membership of a terrorist organisation was not sufficient to bring an claimant within the exclusion clauses, although it added that if an organisation had become predominantly terrorist in character "very little more will be necessary".

74. In *Sivanantharajan v SSHD* UKAIT AA/01049/2008, 4 December 2008, the AIT dismissed an appeal on asylum grounds on the basis that the claimant was excluded

from the Refugee Convention, but allowed his appeal on human rights grounds. Both parties challenged the decision and reconsideration was ordered.

75. There was no challenge to the claimant's credibility. He joined the LTTE in 1992 at the age of 16. He was deployed to the intelligence wing and from 1993-1998 acted as bodyguard to the second in command of the wing. After 1998 he continued to work for the intelligence wing. His job was to detect civilians suspected of spying for the Sri Lankan government in Tamil controlled areas. In this role he arrested about twenty people under orders approved by the head of intelligence. He would then hand over the suspects for questioning. Of the twenty whom he arrested, some were exonerated and freed but he was aware that two of them were executed. In interview he said that "if they are innocent they are freed". He also took part in two raids on army camps. He held the rank of major.

76. Senior Immigration Judge Southern held (for reasons which it is unnecessary to repeat) that the claimant's conduct in the arrest of suspected spies was not itself a war crime or crime against humanity. Nor was it suggested that the attacks on army camps in which he participated involved war crimes or crimes against humanity. Having disposed of those points, the senior immigration judge continued (para 32):

> "Thus, as the appellant has not himself engaged in acts such as to be correctly categorised as war crimes or crimes against humanity the only remaining possible route to exclusion is on the basis of complicity with the wider acts of the LTTE beyond those with which the appellant was personally involved."

77. After considering *Gurung* and other authorities, the senior immigration judge observed (para 36):

> "Although it is clear from all that is said above that membership of an organisation will not be enough [to exclude an appellant from the Refugee Convention], the nature of the organisation may be that not very much more than that is required. But something more is required…"

78. He went on to consider whether there was "something more" on the claimant's evidence to exclude him from the protection of the Refugee Convention. As to that, he said (para 38):

> "Exclusion is not established by a label or rank entitlement. It is necessary to look at what the appellant actually did and what his involvement with the LTTE was. The evidence is that he was involved only in two attacks on army camps some years ago, which the respondent accepts should not lead to exclusion, and in the identification and arrest of those in respect of whom there was reason to suspect as spies. The LTTE is regarded by the United Kingdom as a terrorist organisation. But it acts in the areas were it holds control as a de facto state with responsibilities for security. As such it is to be expected that it should take steps to identify and remove spies in order to

> promote the safety of the civilian population it has accepted responsibility for."

79. The senior immigration judge concluded that the defendant had not established any activity which would "visit the appellant with a wider responsibility for any abuses committed elsewhere that the LTTE are to be held responsible for". Accordingly, the appeal on asylum grounds was allowed.

80. In *MH (Syria) v Secretary of State for the Home Department* [2009] EWCA Civ 226 the Court of Appeal heard two appeals which gave rise to issues under article 1F.

81. *MH* was a Syrian Kurd. Her claim for asylum was refused by the Secretary of State and her appeal to the AIT was rejected on the ground that she was excluded from the Refugee Convention by article 1F(c). However, she succeeded in her human rights appeal under article 3 of the ECHR. *MH* appealed against the dismissal of her asylum appeal and the Secretary of State cross-appealed against the decision to allow her human rights appeal.

82. *MH* had been a member of the PKK. She had not taken part in military operations but she had supported the infrastructure of the organisation by nursing the wounded and other duties. Applying *Gurung*, the tribunal found that there were serious reasons for considering that she had been guilty of acts contrary to the purposes and principles of the United Nations because, although she did not have a high level role in the PKK, she was fully aware of its activities and supported its infrastructure by her conduct.

83. On the hearing of the appeal neither party directly challenged the guidance given in *Gurung*. The court was not referred to any decisions of international tribunals. Allowing MH's appeal, the court held that the evidence could not reasonably be said to disclose serious reasons for considering that she had been guilty of acts contrary to the purposes and principles of the United Nations. The court also dismissed the Secretary of State's cross-appeal.

84. Richards LJ drew attention to the fact that s54 of the Immigration, Asylum and Nationality Act 2006 stipulates that in the construction and application of article 1F(c) acts contrary to the purposes and principles of the United Nations shall be taken as including:

> "(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)."

For this purpose terrorism has the meaning given by s1 of the Terrorism Act 2000.

85. No reference was made to those provisions in the present case, no doubt because in this case the ground of exclusion relied upon by the Secretary of State was under article 1F(a).

86. The other case considered by the Court of Appeal with *MH (Syria)* involved essentially a perversity challenge and turned on the particular facts of the case.

87. In *KJ (Sri Lanka) v Secretary State for the Home Department* [2009] EWCA Civ 292 the appellant claimed asylum and humanitarian protection on the grounds that he feared persecution by government forces and article 3 ill-treatment at the hands of the LTTE if he were returned to Sri Lanka. He was a Tamil who had joined the LTTE at a young age and had fought in various battles. He was not a leader, but he had been involved in surveying and reconnaissance operations in support of LTTE military operations. It was his case that he came under suspicion by the LTTE of assisting the Sri Lankan army and was taken for questioning to a camp in dense jungle. He escaped but was caught in a roundup by the Sri Lankan army. He initially denied membership of the LTTE, but after being badly beaten he admitted his involvement as a member of the LTTE planning unit. Eventually he bribed his way out of army custody and fled the country.

88. The AIT did not believe his account of being detained by the LTTE, and then by the Sri Lankan army, and escaping from both. It rejected his claim that he would be at risk from government forces on his return to Colombo. It accepted that there was a real possibility that he would be at risk from the LTTE, because there was a real possibility that he was a deserter, but it held that he was not entitled to protection under the Refugee Convention because there were serious reasons for considering that as a member of the LTTE he had been guilty of acts contrary to the purposes and principles of the United Nations within the meaning of article 1F(c). It said in its determination:

> "It is clear on the evidence before us that the appellant was no mere member of the organisation as on his own evidence he had an active role to play. That role was one that was valued by the LTTE because the appellant had particular skills that enabled them to be more accurate in their targeting of Sri Lankan forces…We have no hesitation in finding the appellant played a crucial role for the LTTE in its armed campaign against the government. Whilst we have noted his evidence that he was never involved in any conflict that caused injury or death to civilians, nevertheless we are of the view that, in the light of his role, the appellant must have known the type of organisation he was joining; its purpose and the extent to which the organisation was prepared to go to meet its aims."

89. The Court of Appeal overruled the decision of the AIT on the issue whether the appellant was excluded from refugee protection.

90. Stanley Burnton LJ, giving the leading judgment, set out the terms of article 1F and observed that each paragraph required the personal guilt of the individual concerned. He observed (para 35):

> "It follows that mere membership of an organisation that, *among other activities*, commits such acts does not suffice to bring the exclusion into play. On the other hand, in my judgment a person who knowingly participates in the planning

> or financing of a specified crime or act or is otherwise a party to it, as a conspirator or an aider or abettor, is as much guilty of that crime or act as the person who carries out the final deed." (Original emphasis)

91. He said that the application of article 1F(c) would be straightforward in the case of an active member of an organisation that promotes its objects *only* by acts of terrorism, and that 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. He continued (para 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.

92. Applying those principles to the case of *KJ*, he concluded that the facts found by the tribunal showed no more than that the claimant 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.

General principles

93. Ms Jegarajah did not on the surface challenge the guidance given by the IAT in *Gurung*, but she relied on subsequent decisions of the AIT in cases of members of the LTTE (*Arokiyanathan*, *Pushparajah* and *Sivanantharajan*) in support of her arguments summarised in para 24 above, particularly as to the nature of the LTTE and what inferences might properly be drawn from the claimant's involvement in it. To those authorities may be added the observations of Stanley Burnton LJ in *KJ* para 38 (set out at para 91 above).

94. However, in order to deal satisfactorily with the arguments as they were developed, it is necessary to re-examine the underlying principles governing liability for war crimes and crimes against humanity within the meaning of article 1F(a) (which for present purposes I will refer to as international crimes).

95. Since article 1F(a) refers specifically to the definition of such crimes in the international instruments drawn up to make provision in respect of them, I agree with the IAT in *Gurung* that those instruments, and the jurisprudence of international criminal tribunals which have had to interpret and apply them, must be the principal sources of reference for domestic courts.

96. However, I would not approve the further guidance given by the IAT in *Gurung* for determining whether there are serious reasons for considering that a person is guilty of such a crime, in a number of respects and for a number of reasons.

97. As I have previously said, although the IAT in *Gurung* made a reference in para 109 to article 25 of the ICC Statute, article 7(1) of ICTY Statute and *Tadic,* it did not examine or explore the principles of liability set out in those statutes or in the ICTY case law. Moreover, with all respect to the tribunal, its approach to liability for international crimes, in the context of an organisation which uses criminal methods on a regular but not exclusive basis, is to my mind less structured, less clear and (as a result) potentially wider than is to be found in the ICC Statute (or other international instruments to which we have been referred) or in the ICTY case law.

98. Everyone agrees that mere membership of an organisation committed to the use of violence as a means to achieve its political goals is not enough to make a person guilty of an international crime. That was correctly reiterated by the IAT in *Gurung* at para 104.

99. The tribunal went on to say, at para 105, that if the organisation has become one whose aims, methods and activities are predominantly terrorist in character, very little more will be necessary. But it did not identify what more is necessary.

100. Senior Immigration Judge Southern put his finger on precisely this point in *Sivanantharajan.* He concluded that it could not be participation in activities which did not involve or promote the commission of international crimes. Thus he excluded the fact that the claimant had taken part in attacks on Sri Lankan army camps, or had been involved in the identification and arrest of those suspected of spying for the Sri Lankan government in Tamil controlled areas, as matters giving rise to criminal responsibility for abuses committed elsewhere by the LTTE. The evidence showed no other activity by the claimant which could be regarded as promoting the criminal activities of the organisation.

101. The AIT took in effect a similar approach in *Pushparajah* (where the claimant had been a field commander and done some intelligence work) and in *Arokiyanathan* (where the claimant was one of the senior members of the LTTE militants and had commanded 40 soldiers). The Court of Appeal also took effectively a similar approach in the cases of *MH* and *KJ*. In those cases too there was no evidence to show that the applicants had taken part in activities intended to promote the criminal acts of the organisations to which they belonged.

102. In the present case Blair J took a different approach. He held that the claimant had been "a significant member of the LTTE, involved in some significant operations by that organisation", culminating in his position in the combat unit of the intelligence division.

103. However, the same was true, for example, in the case of *Arokiyanathan* who had been in charge of 40 soldiers. Both approaches cannot be right.

104. The principles of joint criminal enterprise liability identified by the ICTY support the former approach. According to that jurisprudence, in order for there to be joint enterprise liability, there first has to be a common design which amounts to or involves the commission of a crime provided for in the statute. The actus reus requirement for criminal liability is that the defendant must have participated in the furtherance of the joint criminal purpose in a way that made a significant contribution to the crime's commission. And that participation must have been with the intention of furthering the perpetration of one of the crimes provided for in the statute. (See paras 34-51 above).

105. The IAT in *Gurung* also adopted, at para 105, a formulation suggested by the UNHCR that where there is sufficient proof that an asylum seeker belongs to an extremist international terrorist group, such as those involved in the 11 September [2001] attacks, voluntary membership "could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question".

106. It is not clear whether in adopting that formulation the IAT intended to confine it to organisations devoted exclusively to the perpetration of terrorist acts or whether it was intended to apply to any member of an organisation which used terrorist methods as a, or the, main way of advancing its aims. The decision letter of the defendant in the present case shows that she did not interpret it as confined to organisations devoted exclusively to terrorist activities. She took *Gurung* to be authority for the proposition that "voluntary membership of an extremist group could be presumed to amount to personal and knowing participation, or at least acquiescence, amounting to complicity in the crimes in question" (see para 34 of the decision letter set out at para 18 above). The omission in the decision letter of the qualifying words "such as those involved in the 11 September attacks" is significant for the reasons given by Stanley Burnton LJ in *KJ* (see paras 90-91 above).

107. A person who becomes an active member of an organisation devoted exclusively to the perpetration of criminal acts may be regarded as a person who has conspired with others to commit such acts and will be criminally responsible for any acts performed in pursuance of the conspiracy. I use the words "active member" deliberately. As with any other conspiracy case, there may be questions about the scope of the conspiracy entered into by the person concerned and whether there was the requisite proximity between what he agreed and the crime or crimes in question. But the Secretary of State in considering an application for asylum and the effect of article 1F is concerned only with whether there are serious reasons for considering that the applicant has committed an international crime, and in the case of an active member of an organisation dedicated entirely to terrorist activities that is unlikely to present any problem. However, as Stanley Burnton LJ said, it is another matter if an organisation pursues its political ends in part by acts of terrorism and in part by other means. Joining such an organisation may not involve conspiring to commit criminal acts or in practice doing anything that contributes significantly to the commission of criminal acts.

108. I am troubled too by the phrase "or at least acquiescence amounting to complicity in the crimes in question" in the UNHCR formulation approved by the IAT in *Gurung*.

109. Acquiescence is a slippery word. It can amount to a mere omission and may provide a gateway to guilt by association rather than by anything done by the defendant. There is a qualitative difference between assisting or encouraging and mere acquiescence. If an international instrument defining international crimes is intended to create a form of criminal liability by omission, one would expect the circumstances to be defined. Article 28 of the ICC Statute provides an example. Under that article a commander may be criminally responsible for crimes committed by forces under his effective command as a result of his failure to exercise proper control over such forces in the circumstances specified in the article.

110. That is quite different from introducing some general form of individual liability through acquiescence. I can see no basis for that in the ICC Statute and I am unaware of any support for it in the case law of international criminal tribunals. In my judgment it would be objectionable as a matter of general principle. There may, of course, be cases in which non-accidental presence at the scene of a crime and non-intervention may provide evidence of encouragement or support, but that is a different matter.

111. I would agree with the IAT's comment at para 110 of its determination in *Gurung* about the need to consider the extent to which an organisation is fragmented. This will be relevant, for example, in deciding whether there are serious reasons for considering that a member of an organisation based in one location is criminally liable for the activities of another part of the organisation in a different place. However, I do not regard it as helpful to try to place an organisation on the continuum suggested in *Gurung* at paras 112-114, on which Mr Dhillon placed considerable reliance in the present case. The decision maker will obviously need to have regard to the nature of the organisation to which the applicant belonged and his or her role in it, but I do not see that it is helpful to try to place the organisation on the suggested continuum for three linked reasons.

112. First, I do not see that there is a simple continuum. The IAT has rolled up a number of factors which might cause somebody wedded to the ideals of western liberal democracy to take a more or less hostile view of the organisation and to use an assessment of where the organisation stands in relation to those values in deciding whether its armed acts were "proportionate". Those who see themselves as freedom fighters are often seen by others as terrorists, and this country's colonial history illustrates how such value judgments may change over the course of time. To my mind it provides a subjective and unsatisfactory basis for determining whether as a matter of law an individual is guilty of an international crime.

113. Secondly, I have difficulty in seeing how some of the individual factors identified are relevant to the question of guilt of an international crime, for example, whether the organisation's long term aims embrace a democratic mode of government. It is difficult to see the relevance of whether its long term aims are a multi-party form of government or a one party state.

114. Thirdly, and most fundamentally, its seems to me that the continuum approach takes the decision maker's eye off the really critical questions whether the evidence

provides serious reasons for considering the applicant to have committed the actus reus of an international crime with the requisite mens rea and invites a less clearly focused judgment.

115. The starting point for a decision maker addressing the question whether there are serious reasons for considering that an asylum seeker has committed an international crime, so as to fall within article 1F(a), should now be the ICC Statute. The decision maker will need to identify the relevant type or types of crime, as defined in articles 7 and 8; and then to address the question whether there are serious reasons for considering that the applicant has committed such a crime, applying the principles of criminal liability set out in articles 25, 28 and 30 and any other articles relevant in the particular case.

116. If there is potential ground for considering the applicant to have criminal responsibility as a commander for crimes committed by forces under his command, the decision maker will have to consider the provisions of article 28. Where that is not alleged, the decision maker will have to consider the provisions of articles 25 and 30 dealing with individual criminal responsibility and the required mental element.

117. Those provisions are reasonably clear. Article 25(3)(a) deals with those who would be regarded under English law as principals or co-principals. Article 25(3)(b) deals with those who solicit or procure the commission of a crime or attempted crime. Article 25(3)(c) deals with aiders and abettors. Article 25(3)(d) is directed at joint criminal enterprise liability. Article 25(3)(e) relates only to genocide. Article 25(3)(f) extends liability to attempts to commit international crimes.

118. The clause which may need the most unpacking is article 23(3)(d), dealing with joint criminal enterprise liability. In particular, the clause says nothing about the degree of contribution required or about the third category of joint criminal enterprise liability recognised in *Tadic*, that is, where a crime was committed as a foreseeable way of effecting a shared criminal intent and the defendant knowingly took the risk of this happening.

119. On the first point, a decision maker ought in my judgment to apply the principles summarised in para 104 above, that is, that in order for there to be joint enterprise liability:

> 1. there has to have been a common design which amounted to or involved the commission of a crime provided for in the statute;
>
> 2. the defendant must have participated in the furtherance of the joint criminal purpose in a way that made a significant contribution to the crime's commission; and
>
> 3. that the participation must have been with the intention of furthering the perpetration of one of the crimes provided for in the statute.

This approach is consistent with an obiter dictum in a judgment of a pre-trial chamber of the ICC, dated 29 January 2007, in the case of *Thomas Lubanga Dyilo*. The

tribunal observed at para 355 that the test of liability under article 25(3)(d) "is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY". (The tribunal was directly concerned with the liability of an alleged co-principal under article 25(3)(a), which it held was confined to a person who had been assigned a task essential for the crime and who consequently had the power to frustrate the commission of the crime by not carrying out that task.)

120. The question for the decision maker will be whether there are serious reasons to consider the asylum applicant to be guilty of an international crime or crimes applying those principles.

121. In practice, application of those principles would have led to the same result as that which was reached by the AIT in *Arokiyanathan, Pushparajah* and *Sivanantharajan* and by the Court of Appeal in *MH* and *KJ.*

122. If a question arises whether the relevant crime went beyond the scope of any joint criminal enterprise, the decision maker would in my view be reasonably entitled to approach that issue in the way that it has been approached by the ICTY. (See paras 41-42 above).

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123. Applying those principles to the present case, I conclude that the Secretary of State failed to address the critical questions. Given that it was the design of some members of the LTTE to carry out international crimes in pursuit of the organisation's political ends, she acted on a wrongful presumption in para 34 of the decision letter that the claimant, as a member of the LTTE, was therefore guilty of personal and knowing participation in such crimes, instead of considering whether there was evidence affording serious reason for considering that he was party to that design, that he had participated in a way that made a significant contribution to the commission of such crimes and that he had done so with the intention of furthering the perpetration of such crimes. The fact that he was a bodyguard of the head of the intelligence wing (referred to in para 32 of the decision letter as providing the evidence of how highly trusted he was within the LTTE) shows that he was trusted to perform that role, but not that he made a significant contribution to the commission of international crimes or that he acted as that person's bodyguard with the intention of furthering the perpetration of international crimes. Reference was made by the Secretary of State and by Blair J to his command responsibilities in a combat unit, but there was no evidence of international crimes committed by the men under his command for which he might incur liability under article 28. His own engagement in non-criminal military activity was not of itself a reason for suspecting him of being guilty of international crimes.

124. For similar reasons I consider that the judge was wrong to hold that the Secretary of State's decision was not reviewable on public law grounds. I would quash the Secretary of State's decision that the claimant was excluded from the protection of the Refugee Convention and humanitarian protection by reason of article of article 1F(a) and para 336 of the Immigration Rules.

Lord Justice Scott Baker:

125. I agree.

Lord Justice Waller, Vice President of the Court of Appeal Civil Division:

126. I also agree.