Neutral Citation Number: [2009] EWCA Civ 292

Case Nos: C5/2008/2194 AND C5/2008/1789

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Asylum and Immigration Tribunal
Senior Immigration Judge Nichols and Immigration Judge Hanbury

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2009

Before :

LORD JUSTICE WALLER
LORD JUSTICE DYSON
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

KJ (Sri Lanka)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Shivani Jegarajah (instructed by **K Ravi**) for the **Appellant**
Jeremy Johnson (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 20 January 2009

- -

Judgment

Lord Justice Stanley Burnton:

Introduction

1. These proceedings raise questions as to the application of article 1F(c) of the Convention relating to the Status of Refugees of 1951 and of the principle established by the decision of this Court in *DK (Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1747 [2008] 1 WLR 1246.

2. KJ is a Tamil and a national of Sri Lanka. He claimed asylum and humanitarian protection on the grounds that, having served with the LTTE military, he had been suspected by them of defecting to the Sri Lankan army, and detained by them. He had managed to escape, but then had been detained by the government's security forces. He had managed to escape by payment of a bribe. He said that he feared persecution by government forces and risked retribution at the hands of the LTTE if he returned to Sri Lanka. In the decision under appeal, the Asylum and Immigration Tribunal held that he would not be at risk from government forces on his return, but that he would be at risk from the LTTE if he returned, and that he was not entitled to refugee status because there were serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations within the meaning of Article 1F(c) of the Asylum Convention.

3. KJ appeals against the finding under Article 1F(c) and the finding that he would not be at risk from government forces on his return. He contends that the Tribunal in making its determination under appeal was bound by the findings in his favour made in the determination of an adjudicator back in December 2004, and that in any event the finding that he was not at risk from government forces was flawed. The Home Secretary appeals against the finding that KJ would be at risk from the LTTE.

The procedural history

4. In order to understand the issues on this appeal, it is necessary to set out the history of the tribunal proceedings relating to KJ's asylum claim. It is yet another sad story of multiple decisions leading to expense and delay in determining an appellant's claims.

5. KJ arrived in the UK in 1999. He claimed asylum on the grounds that if returned to Sri Lanka he feared persecution both from the Sri Lankan army and from the LTTE, the Tamil Tigers. His claim was rejected by the Home Secretary by letter dated 5 July 2004. He appealed to the Immigration Appellate Authority.

6. His appeal came before an adjudicator on 2 December 2004. Shortly before that date, the Law Society had intervened in the practice of the solicitors who had been representing him. As a result, he was unrepresented. He sought an adjournment, which was refused. The adjudicator proceeded to hear the appeal, in the course of which KJ gave evidence. The adjudicator made some findings that were favourable to KJ and others that were not. He found that KJ was a Tamil who had joined the LTTE at a young age and seen military action. He was not a leader but had been involved in planning and surveying. He rejected KJ's claim that he had been suspected by the LTTE of defecting to the army. He rejected KJ's claim that he had a justified fear of persecution by government forces and rejected his claim that he feared ill treatment by the LTTE. He therefore rejected both his claim under the Asylum Convention and

that under Articles 2 and 3 of the Human Rights Convention. There was no claim under Article 8.

7. KJ appealed on procedural and substantive grounds. The procedural ground was that the adjudicator should have adjourned the hearing of the appeal for KJ to obtain legal representation: the fact that he had been unrepresented had not been due to any fault of his own.

8. On 14 March 2005, Vice President Latter granted permission to appeal on the ground that it was arguable that the adjudicator erred in law in refusing an adjournment. His order stated, "Permission to appeal is granted on all grounds."

9. KJ's substantive challenge to the decision of the adjudicator was heard on 30 January 2006. It was common ground that the adjudicator had erred in law in refusing an adjournment, and the Tribunal so decided. On 22 February 2006 directions for the reconsideration of KJ's claims were given, which stated the issues for reconsideration as: "All core issues including credibility."

10. The reconsideration hearing took place on 10 July 2006 and the decision of the Tribunal, consisting of Immigration Judges Vaudin d'Imecourt and Aujla, was promulgated on 24 July 2006. KJ was represented before them by Miss Jegarajah, who represented him before us. He relied on an expert country report of Dr Smith. *DK (Serbia)* had not been decided: the Court of Appeal's judgment was given on 20 December 2006. As a result, Miss Jegarajah did not submit that the Tribunal was bound by any of the favourable findings made by the adjudicator. The Tribunal considered his claim afresh. The Immigration Judges made adverse credibility findings and rejected both his Asylum Convention claim and his Human Rights claim, finding that he faced no real risk on return.

11. KJ sought reconsideration of the Tribunal's decision. He contended that the Tribunal had failed to treat the decision of the adjudicator as a starting point, and had failed to accept his findings in favour of KJ, including that as to his credibility, and that it had made other errors of law. On 25 September 2006, Senior Immigration Judge Spencer rejected the application as being out of time.

12. KJ then sought to appeal to the Court of Appeal. Following the grant of permission to appeal, the Home Secretary agreed that the appeal should be allowed. The agreed statement of reasons submitted on the application for a consent order stated:

> "6. The Appellant's grounds set out in a skeleton argument are as follows:
>
> i) the AIT reached a perverse conclusion that the Appellant left the LTTE in 1995 because there were no photographs of him in uniform after that date;
>
> ii) the AIT erred in law in rejecting the Claim's account of his escape from a LTTE prison without considering the expert evidence of Dr Smith;

> iii) the AIT erred in law in its consideration of Doctor Smith's evidence in so far as it relates to the Appellant's escape from Army custody.
>
> 7. It is arguable that the AIT erred in law in its consideration of the photographic evidence in relation to the Appellant's membership of the LTTE. Further, it is arguable that the AIT should have expressly addressed Doctor Smith's expert report in so far as it related to the Appellant's alleged escape from an LTTE prison. It is therefore expedient to remit the Appellant's appeal to the AIT for reconsideration."

13. A consent order was duly made on 2 March 2007 remitting the case back to the Tribunal for reconsideration.

14. On 20 November 2007, KJ's case came before a panel consisting of Senior Immigration Judge Nichols and Immigration Judge Hanbury. It is their determination that is the subject of the appeals by both KJ and the Home Secretary now before us.

The Tribunals' determination under appeal

15. Before Senior Immigration Judge Nichols and Immigration Judge Hanbury it was argued on KJ's behalf that they were bound by the positive findings as to KJ's credibility made by the adjudicator in 2004. Having reviewed the history of the proceedings, the Tribunal rejected that submission, and proceeded to consider KJ's appeal afresh. They said:

> "5. Having considered the submissions of both parties, we concluded that we should consider all issues afresh at the hearing before us. In relation to the first determination of the Adjudicator, we consider that the entire decision was vitiated by the refusal to adjourn and the consequent procedural unfairness. The matter was pursued on the basis that the appellant had not had an opportunity to properly put his case as he was represented and in our view it is clear from the AIT's decision on 22nd February 2006 that the hearing was adjourned for reconsideration on all issues and that the credibility of the appellant's account was to be re-determined. Given the basis of this application and the decision of the AIT, we do not consider the determination of the Adjudicator can stand. …"

16. KJ's case was that he had joined the LTTE in 1980. He trained with them and was taught surveying. He then joined a camp where members were involved in reconnaissance and surveying. They would enter locations of army camps and sentry points on to maps, to be used in attacks. They would also survey remote areas for maps to be produced. He had been involved in five battles and numerous clashes with the army, but the area where he had fought had been free of civilians. In support of his claim KJ produced two photographs of him in LTTE uniform. Whilst on a reconnaissance mission, two members had disappeared. It was suspected that they had defected to the army. KJ and a colleague were also suspected of assisting the army, and they were taken for questioning to a camp in dense jungle. KJ was held there for

three days, but escaped on 2 August 1999, by climbing over a barbed wire fence. He managed to reach a village where he was hidden by a friend. A wealthy uncle arranged for an agent to assist him to leave the country. He was guided into government-controlled territory where he stayed at a sub-agent's house for three days. However, there was an army round up and he was caught and taken to Joseph Camp. He denied membership of the LTTE, but was identified by a masked man as a member. He was then badly beaten and admitted his involvement as a member of the LTTE planning unit. He was detained for 13 days and transferred to another camp to act as an informant. He did not identify anyone as a LTTE member, but an informant reported that he had failed to identify a member who was known to him. As a result, KJ was beaten so heavily that he had to be transferred for treatment to a civilian hospital, from which he was subsequently discharged to an army medical camp. He was treated for a ruptured stomach. He was in the Army medical camp for some 5 to 6 days. The agent bribed someone at the camp, and one night a soldier escorted him from his room into the custody of two soldiers in civilian clothes. He left the camp in a van. He was handed over to the agent, and then travelled by lorry to Colombo, where he stayed in the house on the outskirts of the city. He claimed that the LTTE came to his parents' house looking for him in August 1999 and thereafter came regularly to their house. They threatened that if KJ did not surrender to them they would all be taken into custody. As result, his family fled the country.

17. On behalf of the Home Secretary, it was submitted that KJ had, by his own admission, brought himself within the exclusion in Article 1F(c) of the Asylum Convention. The LTTE was a proscribed organisation, it engaged in acts of terrorism, and KJ had been complicit in its activities. The Home Secretary also submitted that there should be a credibility finding against KJ: neither his account of his detention by and escape from the LTTE nor his account of his escape from army custody was credible. These contentions were all disputed on behalf of KJ.

18. The Tribunal's decision on the application of Article 1F(c) was set out in paragraphs 67 to 69 of the determination:

> "67. …Having considered this evidence, we have come to the conclusion that the LTTE, although it was not proscribed by the UK at that time, was engaged in activities that were contrary to the purposes and principles of the United Nations. However, we then have to consider whether this appellant's membership and role within the organisation was complicit in those activities, applying the principles to which we have referred above. We only have the appellant's evidence about the nature of his role; however it is reasonable to make some assumptions, on the basis of what he says that he was doing. 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. The appellant accepted that soldiers would have died as a result of his action. 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. We take into account the reasons why he said he joined: he was not forced it was voluntary because he wanted to fight for independence and avenge his relatives who had been killed. We note again from the CIPU that in 1991 the LTTE was proscribed in India following the assassination of Rajiv Gandhi. In the mid-1990s the organisation escalated its violence and carried out bomb attacks in Colombo, when many people were injured. In 1998 the bomb attack on the Temple of the Tooth in Kandy was carried out, and that was the same year that the Sri Lankan government banned the LTTE. We cannot accept that the appellant was not aware, even if he was not personally involved, that the LTTE was carrying out this type of activity that went far beyond an internal armed conflict against the government and was clearly designed to instil terror and fear in the population. Having regard to these facts, and noting what the Tribunal said in ***KK***, that it was not necessary that acts contrary to the principles and purpose of the United Nations should be terrorist in nature; we conclude that the LTTE was engaged in acts contrary to the purpose and principles of the United Nations, and that the appellant's membership and role was complicit in those acts such that he is excluded from the Geneva Convention under Article 1F(c). The appellant is not therefore entitled to refugee status.

68. The appellant is also excluded from humanitarian protection by virtue of paragraph 339C (iv) and 339D (ii). Again this is for the same reasons that he is excluded from the Geneva Convention i.e. that there are serious reasons for considering that he is guilty of the acts contrary to the purposes and principles of the United Nations by virtue of his complicity. Paragraph 339D states:

> "339D A person who is excluded from a grant of humanitarian protection under paragraph 339C (iv) where the Secretary of State is satisfied that:
>
> …
>
> (ii) There are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts of encouraged or induced others to commit, prepare or instigate such acts."

> 69. For the reasons we have given above, in out view the appellant is excluded from humanitarian protection."

19. The Tribunal then turned to consider KJ's account of his escape from LTTE detention. They rejected it as incredible. They said:

> "75. …We are unable to square the appellant's account of his detention with the LTTE, in which he clearly stated that he was under suspicion; he was detained; there was a sentry on duty at the front of the camp; and the camp was surrounded by barbed wire, with the background evidence and the expert evidence of Dr Smith. We reject the appellant's account that he was not formally detained, i.e., by being locked up and under guard, because the camp was in such a remote area that it was thought no-one would escape. The appellant, as it would have been known, knew the area well and the remoteness of the camp would not have stopped him. We do not believe it would have been possible for the appellant simply to climb over four or five lines of barbed wire in order to leave this camp without being stopped, and in our view the evidence of Dr Smith certainly does not support his account. We do not believe the appellant was detained by the LTTE."

It followed that the Tribunal rejected his claim that the LTTE had regularly visited his home in an effort to locate him.

20. The Tribunal rejected KJ's claim to have been detained and released by the army for not dissimilar reasons. They said that if, as he said, he had admitted to the army that he had been a member of the LTTE planning unit, he would not have been released on payment of a bribe. They also rejected his claim that a bribe had been paid on his behalf: he had not been able to explain how his uncle in Colombo could have known where he was detained, and had changed his story when pressed on this point. The Tribunal therefore rejected his claim that his scarring, and especially a surgical scar consistent with his having suffered a ruptured stomach and an ensuing operation, resulted from his detention.

21. Not surprisingly, having regard to these findings, and applying the country guidance in *LP* [2007] UKAIT 00076, the Tribunal found that KJ would not be at risk from government forces on his return to Colombo. However, KJ succeeded on his last claim, i.e. that he would be at risk from the LTTE. The Tribunal stated:

> "93. However, we must then consider the risk to the appellant in Colombo from members of the LTTE. What the Tribunal made clear in the case of *PS* was that it was not only high profile targets who are at risk from the LTTE in Colombo, they identified the two other categories that we have mentioned above. There is a real possibility in our view the appellant does fall into the category of a deserter. We have rejected his account that he was detained by the LTTE for any reason and therefore his profile is not as high as someone who had deserted from the LTTE detention. Nevertheless, taking

> account of what the Tribunal said in *LP* and *PS* and Dr Smith's opinion, we have reached the conclusion that there is a real risk that the appellant's background would be discovered by LTTE infiltrators in Colombo, particularly given the sophistication of their organisation and we cannot rule out a real risk of serious harm if he were to be discovered. We make this finding in the knowledge that it is now some years since he was a member of the LTTE. We also make it clear we do not believe there is any risk that the LTTE would come looking for the appellant in Colombo, for the very reasons spelt out by the Tribunal in *PS*, however, as we say, we cannot rule out real possibility of discovery. In that event the background evidence and cases we have referred to, support a conclusion that the appellant would not have a sufficiency or protection available from the Sri Lankan authorities."

The issues before the Court on this appeal

22. KJ appealed against the finding of the Tribunal that his accounts of his detention by the LTTE and the army were not credible, on the ground that SIJ Nichols and IJ Hanbury should have accepted the adjudicator's credibility findings, which were binding on any subsequent tribunal under the principle enunciated in *DK (Serbia)*. He appealed against their rejection of his account that he had been detained by the army and released on payment of a bribe, on the ground that it was insufficiently and defectively reasoned. In addition, he appealed against their finding that he was excluded from the benefit of the Asylum Convention under Article 1F(c) on the ground that it had not been shown that there were serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations. For her part, the Home Secretary appealed against the Tribunal's finding that he would be at real risk from the LTTE if returned to Colombo, on the ground that it had confused the attitude of the LTTE to deserters and its attitude to defectors, i.e., to those who had not merely left its armed forces but had also gone over to the other side. The objective evidence showed that deserters would not be at real risk, whereas defectors would be.

Discussion

The application of the principle in *DK (Serbia)*

23. On behalf of KJ, Miss Jegarajah reiterated the submission made to the Tribunal in November 2007 that they were bound, by virtue of the principle enunciated in *DK (Serbia)*, to accept the positive findings of the adjudicator as to the credibility of KJ's account. Since the Tribunal had not done so, and had rejected his account in important respects, they had erred in law and their determination, in so far as it was based on findings at variance with those of the adjudicator that were unfavourable to him, fell to be set aside.

24. In *DK (Serbia)* the Court of Appeal held that on a reconsideration pursuant to section 103A of the Nationality, Immigration and Asylum Act 2002 factual findings made by the original tribunal which were unaffected by the errors of law identified on reconsideration should stand when the appeal is reconsidered at the second stage.

Latham LJ gave the only substantive judgment, with which the other members of the Court of Appeal agreed. He said:

> 20. … The jurisdiction is one which is being exercised by the same tribunal, conceptually, both at the first hearing of the appeal, and then at any reconsideration. That seems to me to be the key to the way in which reconsiderations should be managed in procedural terms.
>
> 21. In the first instance, in relation to the identification of any error or errors of law, that should normally be restricted to those grounds upon which the immigration judge ordered reconsideration, and any point which properly falls within the category of obvious or manifest point of Convention jurisprudence, as described in *Robinson* [1998] QB 929. Therefore parties should expect a direction either from the immigration judge ordering reconsideration or the Tribunal on reconsideration restricting argument to the points of law identified by the immigration judge when ordering the reconsideration. Nothing in either the 2004 Act or the rules, however, expressly precludes an applicant from raising points of law in respect of which he was not successful at the application stage itself. And there is no appellate machinery which would enable an applicant who is successful in obtaining an order for reconsideration to challenge the grounds upon which the immigration judge ordered such reconsideration. It must however be very much the exception, rather than the rule, that a Tribunal will permit other grounds to be argued. But clearly the Tribunal needs to be alert to the possibility of an error of law other than that identified by the immigration judge, otherwise its own decision may be unlawful.
>
> 22. As far as what has been called the second stage of a reconsideration is concerned, the fact that it is, as I have said, conceptually a reconsideration by the same body which made the original decision, carries with it a number of consequences. *The most important is that any body asked to reconsider a decision on the grounds of an identified error of law will approach its reconsideration on the basis that any factual findings and conclusions or judgments arising from those findings which are unaffected by the error of law need not be revisited*. It is not a rehearing: Parliament chose not to use that concept, presumably for good reasons. And the fact that the reconsideration may be carried out by a differently constituted tribunal or a different Immigration Judge does not affect the general principle of the 2004 Act, which is that the process of reconsideration is carried out by the same body as made the original decision. The right approach, in my view, to the directions which should be considered by the immigration judge ordering reconsideration or the Tribunal carrying out the

> reconsideration is to assume, notionally, that the reconsideration will be, or is being, carried out by the original decision maker.
>
> 23. It follows that if there is to be any challenge to the factual findings, or the judgments or conclusions reached on the facts which are unaffected by the errors of law that have been identified, that will only be other than in the most exceptional cases on the basis of new evidence or new material as to which the usual principles as to the reception of such evidence will apply, as envisaged in rule 32(2) of the Rules. It is to be noted that this rule imposes the obligation on the parties to identify the new material well before the reconsideration hearing. This requirement is now underlined in the new Practice Direction 14A. This sets out in some detail what is required in such a notice.
>
> …
>
> 25. Accordingly, as far as the scope of reconsideration is concerned, the Tribunal is entitled to approach it, and to give directions accordingly, on the basis that the reconsideration will first determine whether or not there are any identifiable errors of law and will then consider the effect of any such error or errors on the original decision. That assessment should prima facie take place on the basis of the findings of fact and the conclusions of the original Tribunal, save and in so far as they have been infected by the identified error or errors of law. If they have not been infected by any error or errors of law, the Tribunal should only re-visit them if there is new evidence or material which should be received in the interest of justice and which could affect those findings and conclusions or if there are other exceptional circumstances which justify reopening them.

The italics are mine.

25. Latham LJ referred to the earlier judgment of Sedley LJ in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045:

> 43. I would add this on the procedural aspect of the case. Had the Tribunal been right in its critique of the determination in relation to Rule 31(7), it should have included in its order a direction that the immigration judge who was to continue the reconsideration should do so on the basis that the facts found by Mr Ince were to stand save in so far as the issue to be reconsidered required their significance to be re-evaluated.
>
> 44. The reason why it is important to be rigorous about this is that reopening a concluded decision by definition deprives a party of a favourable judgment and renders uncertain

> something that was certain. If a discrete element of the first determination is faulty, it is that alone which needs to be reconsidered. It seems to me wrong in principle for an entire edifice of reasoning to be dismantled if the defect in it can be remedied by a limited intervention, and corresponding right in principle for the AIT to be cautious and explicit about what it remits for redetermination."

26. The principle explained in *DK (Serbia)* was applied by the Court of Appeal in *HF (Algeria)* [2007] EWCA Civ 445. Again, there was only one substantive judgment, given by Carnwath LJ, with which the other members of the Court agreed. He approved and adopted the above statement of Sedley LJ in *Mukarkar*, stating:

> 18. As Latham LJ noted, those comments had not been the subject of argument in that case, nor were they in terms adopted by the other members of the court (of which I was one). I am happy now to adopt them. They remind us that there are two distinct aspects to the new approach, equally important. One is efficiency, the other fairness. On the one hand, the approach gives effect to the policy objective "to streamline the overall appellate process…" (*DK* para 4). On the other, the appellant should not be subjected without good reason to the stress and uncertainty of a new hearing on an issue on which he has succeeded. …

27. It is significant that when he cited paragraph 22 of the judgment of Latham LJ in *DK Serbia* Carnwath LJ added emphasis to the sentence that I have italicised in the above extract. With reference to the appeal before the Court, Carnwath LJ said:

> 23. On the second ground of appeal, it seems to me that the answer is equally clear the other way. In the light of *DK* it was in my view wrong for the Jordan panel to order reconsideration of the whole case, including credibility. The appellant's account of his treatment by the GIA, and of his role as an informer for the police had been accepted by Mrs Kempton. That finding had not been challenged on the request for reconsideration, nor had any new material or other exceptional circumstances been identified to justify reopening it. Had the guidance in *DK* been available to the Jordan panel, I would have expected them to have taken steps to limit the issues on the rehearing to exclude those not materially affected by the error of law. Although they cannot of course be blamed for the failure, it was nonetheless (as in *PE*) an error of law.

28. There are cases in which the principle in *DK (Serbia)* is easy to apply. If, for example, the Immigration Judge has applied an incorrect legal test to an issue of internal flight or relocation, his findings on other aspects of the case will be unaffected. But in the present case, in my judgment, there are three reasons why the principle is inapplicable.

29. The first, and fundamental, reason is that it is not possible to identify "factual findings which are unaffected by the error of law" made by the adjudicator. The effect of the decision of the Tribunal of 30 January 2006 was that the hearing before the adjudicator should not have taken place. All his findings and all his conclusions were affected by his error. Hence the direction, in my judgment correctly given, that all core issues, including credibility, should be reconsidered afresh. The Tribunal addressed this issue in paragraph 5 of the determination under appeal, cited above. I agree with the Tribunal's reasoning and their conclusion.

30. The second reason is that the adjudicator did not entirely accept KJ's credibility. He held that KJ had embellished his claim by contending that the LTTE had suspected him of defecting. He thought that the claim that he had suffered a rupture of his stomach as a result of mistreatment by the army "less reliable" than his other claims. The effect of Miss Jegarajah's submission is that KJ is entitled to choose which findings he adopts and which he rejects. But the effect of a tribunal decision must be objectively ascertainable. In addition, to hold that the favourable credibility findings made by the adjudicator were binding on a subsequent Immigration Judge would make the latter's task impossible. In order to assess the credibility of the disputed claims of KJ, he would sensibly have to hear his evidence in the round. Yet he would be bound to accept some of that evidence, even if he found it to be incredible.

31. The third reason is that the point was not taken before the Tribunal made its decision of 10 July 2006. As a result, the reconsideration direction was in general terms, and the reconsideration hearing was conducted on that basis. This objection is compounded by the fact that the contention that the Tribunal was bound by the favourable findings of the adjudicator was not mentioned in the agreed statement of reasons submitted to the Court of Appeal and the order for reconsideration made by the Court of Appeal was itself in general terms.

32. Accordingly, I would reject this ground of appeal.

The application of Article 1F(c)

33. Article 1F of the Refugee Convention is as follows:

> "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."

34. The first question that arises in the present case is: what are "acts contrary to the purposes and principles of the United Nations"? It is clear that acts of terrorism – in particular the deliberate killing or injuring of civilians in pursuit of political objects – are such acts. The Tribunal in their decision under appeal stated that acts contrary to the purposes and principles of the United Nations are not to be equated with acts of terrorism. It is unnecessary for me to debate this issue, because Mr Johnson did not suggest that acts of a military nature committed by an independence movement (such as the LTTE) against the military forces of the government are themselves acts contrary to the purposes and principles of the United Nations. I do not think that they are. Moreover, the Tribunal in its determination under appeal seems to have accepted that an armed campaign against the government would not constitute acts contrary to the purposes and principles of the United Nations. For present purposes it is necessary to distinguish between terrorism and such acts.

35. I turn, therefore, to consider what must be shown in relation to the person in relation to whom a question of the application of the exclusion clause arises. Certain points are, I think, clear. First, the Convention may be excluded even if the evidence available does not establish positively that the person in question committed a crime against peace or one of the other crimes or acts identified in paragraphs (a), (b) or (c): it is sufficient if there are "serious reasons for considering" that he did so. Nonetheless, the crimes and acts referred to are all serious, and the seriousness of the reasons must correspond with the seriousness of the crimes and acts in question. Secondly, each of the paragraphs requires the personal guilt of the person in question: paragraphs (a) and (b) refer to his having committed a crime of the nature described, and paragraph (c) refers to his having committed acts contrary to the purposes and principles of the United Nations. 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.

36. Lastly, so far as paragraph (c) is concerned, it is common ground that acts of terrorism, such as the deliberate killing of civilians, are contrary to the purposes and principles of the UN.

37. The application of Article 1F(c) will be straightforward in the case of an active member of organisation that promotes its objects only by acts of terrorism. There will almost certainly be serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.

38. However, the LTTE, during the period when KJ was a member, was not such an organisation. It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka. The application of Article 1F(c) is less straightforward in such a case. A person may join such an organisation, because he agrees with its political objectives, and be willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not

participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations.

39. It remains to apply these principles to the case of KJ. In my judgment, the Tribunal failed to focus on the crucial question: were there serious reasons for considering that he had personally been guilty of acts contrary to the purposes and principles of the United Nations? It found that KJ must have known of its terrorist activities, and so he must. But in the crucial sentence of paragraph 67 of the determination they elided knowledge and complicity. That sentence is:

> "Having regard to these facts, and noting what the Tribunal said in ***KK***, that it was not necessary that acts contrary to the principles and purpose of the United Nations should be terrorist in nature; we conclude that the LTTE was engaged in acts contrary to the purpose and principles of the United Nations, and that the appellant's membership and role was complicit in those acts such that he is excluded from the Geneva Convention under Article 1F(c)."

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

Risk from government forces

41. The Tribunal's rejection of KJ's account of his detention by the army is lightly reasoned. They gave essentially two reasons for rejecting his account. The first was that if, as he stated, he had admitted being a member of the LTTE's planning unit, it was not credible that the army would have agreed to release him on payment of a bribe. It is submitted that the Tribunal assumed, rather than found, that his release was approved by those in authority, whereas his description of it was consistent with his release having been unauthorised and illicit. This is, in my judgment, a valid criticism of the determination, as there is also of the reason given by the Tribunal for rejecting the relevance of KJ's surgical scar.

42. The other reason given by the Tribunal for rejecting KJ's account is more difficult to criticise. They rejected KJ's claim that a bribe had been paid for his release by his uncle. They said:

> "… we do not believe the circumstances in which the appellant claimed a bribe was paid on his behalf. Under cross-examination the appellant was asked how his uncle had been able to find him in the medical unit where he claimed he had been transferred. He said an offender told him and then

> changed his account and said people living in new where he was detained. He said his uncle would have been able to find out from the agent. Given that the appellant claimed to have been rounded up by the army in Vavuniya, we are unable to see how people living in Colombo could possibly have known any of the details of the appellant's claimed detention. We found the appellant's evidence as to how his uncle managed to find out where he was vague and totally unpersuasive. We do not believe the circumstances of this detention: we do not believe it ever happened."

43. This reasoning is unimpeachable. Since the alleged payment of a bribe was the precursor to and the prerequisite of KJ's release, it follows that the Tribunal's rejection of KJ's detention by the army is similarly supportable. It follows that the Tribunal's assessment of risk from government forces on return is not defective. I would reject this part of KJ's appeal.

Risk from the LTTE

44. I emphasise that the determination under appeal preceded the country guidance determination of the Tribunal *AN & SS (Tamils — risk?) Sri Lanka CG* [2008] UKAIT 00063. Hence the absence of any reference to it in the determination. I record that Mr Johnson abandoned the contention that if KJ would otherwise be at risk from the LTTE, there would be adequate government protection against that risk.

45. The contention of the Secretary of State is straightforward. The Tribunal found that KJ was a deserter, i.e., someone who had left the LTTE. As such, he was not in a category held to be at risk in the then current country guidance determination of *PS (Sri Lanka)* [2004] UKIAT 00297 relating to risk to returned Tamils from the LTTE. In that case, the Tribunal stated, at [59]:

> … What the careful analysis made by Miss Richards clearly demonstrates is that those who are reasonably likely to be targeted [by the LTTE] have a high profile which makes them particularly likely to be the object of LTTE reprisals. The analysis demonstrates that prominent present or past supporters of Tamil political parties which have aligned themselves with the government against the LTTE, LTTE defectors (particularly those who have then aligned themselves with the Sri Lankan army military intelligence units) and, more recently, those closely associated with the internal LTTE schism as supporters of Colonel Karuna, are at potential risk of being targeted.

This passage was cited by the Tribunal in paragraph 89 of its determination under appeal.

46. "Defectors", in this context, means former members of the LTTE who have, to use the words of the Tribunal in *PS*, "aligned themselves" with the opposition, rather than mere deserters. In paragraph 73 of the determination under appeal the Tribunal "noted" section 10 of the Country of Origin Guidance Report current at the date of the determination under appeal. Paragraph 10.29, cited by the Tribunal in paragraph 74 of

their determination refers to the LTTE's political *opponents* being classified by them as "traitors". The report of Human Rights Watch, cited in paragraph 10.32 of the COIR, refers to the LTTE being implicated in more than 200 targeted killings since the start of the ceasefire in 2002 "mostly of Tamils viewed as being political *opponents*".

47. As I have said, mere deserters, i.e., those who have left the LTTE but not joined the government or other opposition, are not within the categories held in *PS* to be at risk from the LTTE. In paragraph 80 of their determination under appeal, the Tribunal stated that it was possible that the LTTE thought that KJ was a deserter, and in paragraph 93 they stated that there was a real risk that KJ fell into the category of *a deserter*. As such, he would not be at risk as a *defector*. Similarly, in paragraph 87 they said that "there is a real risk that the LTTE would realise that he was someone who had fled the organisation all those years ago". Thus the Secretary of State contends that the Tribunal erred in law by misapplying the country guidance in that case: they confused deserters with defectors.

48. Miss Jegarajah submitted that the finding of the Tribunal was supportable. The evidence of Dr Smith, to which the Tribunal referred, was that KJ would be suspected of being a defector or a traitor, and it was this to which the Tribunal referred in paragraph 93 of its determination.

49. My difficulty with this submission is that Dr Smith based his opinion on his acceptance of KJ's account of his having been suspected by the LTTE as a defector and detained by them. He said, in paragraph 60 of his report of 26 June 2006:

> "It is highly likely that the Appellant is registered on [the LTTE's] electronic database as a defector or as a traitor because he escaped from detention. As such, his human rights and civil liberties would, at the very least, be vulnerable form the LTTE on return to Sri Lanka."

But KJ's account was rejected by the Tribunal. It follows, in my judgment, that the Tribunal had no basis for treating KJ as a suspected defector or traitor rather than as a deserter.

50. Indeed, as Mr Johnson pointed out, KJ's profile is not dissimilar from that of the appellant in *LP (Sri Lanka)* [2007] UKIAT 00076, of whom the Tribunal in that determination stated:

> "228. …. We find however, given his profile, as regards the LTTE, then if he were able to locate himself in Colombo there is nothing in that profile that would suggest a real risk to him of serious harm at the hands of the LTTE."

The Tribunal in the present case in paragraph 93 of their determination purported to take into account *LP*, but reached a different conclusion without explaining any distinction.

51. It follows that I accept Mr Johnson's submission that the Tribunal conflated the situation of a suspected deserter on return to Sri Lanka and that of a suspected or

actual defector. I would, therefore, allow the Secretary of State's appeal and remit the determination in relation to risk from the LTTE for consideration by a freshly constituted tribunal.

Lord Justice Dyson

52. I agree.

Lord Justice Waller.

53. I also agree.